LN V.6

LEAGUE OF NATIONS

ACTS

OF THE

CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

Held at The Hague from March 13th to April 12th, 1930

MEETINGS OF THE COMMITTEES

Vol. IV

MINUTES OF THE THIRD COMMITTEE

Responsibility of States for Damage caused in Their Territory to the Person or Property of Foreigners.

GENEVA, 1930

PUBLICATIONS OF THE LEAGUE OF NATIONS

Conference for the Codification of International Law.

Appointment of the Preparatory Committee for the Codification Conference. Extracts from the Records of the Eighth Session of the Assembly. (Ser. L.o.N. P. 1927.V.28) 1/6 $0.40

First Codification Conference — Schedules of Points drawn up by the Preparatory Committee for submission to the Governments. (Ser. L.o.N. P. 1928.V.1) 3*d.* $0.10

Draft Rules of Procedure. (Ser. L.o.N. P. 1929.V.7)* 6*d.* $0.15

Bases of Discussion drawn up for the Conference by the Preparatory Committee. Volume I. Nationality. (Ser. L.o.N. P. 1929.V.1)* with Supplement *(a)* Replies made by the Governments to the Schedule of Points : Replies of Canada. (Ser. L.o.N. P. 1929.V.8)* and Supplement *(b)* Reply of the Union of Soviet Socialist Republics. (Ser. L.o.N. P. 1929.V.12)* 9/- $2.30

Bases of Discussion drawn up for the Conference by the Preparatory Committee. Supplement to Volume I. — Nationality. Replies made by the Governments to the Schedule of Points : Reply of Luxemburg. (Ser. L.o.N. P. 1930.V.1)* 6*d.* $0.15

Bases of Discussion drawn up for the Conference by the Preparatory Committee. Volume II. Territorial Waters. (C.74.M.39.1929.V.) (Ser. L.o.N. P. 1929.V.2)* with Supplement *(a)* Replies made by the Governments to the Schedule of Points : Replies of Canada. (Ser. L.o.N. P. 1929.V.9)* and Supplement *(b)* Replies made by Governments to the Schedule of Points : Reply of the Union of Soviet Socialist Republics. (Ser. L.o.N. P. 1929.V.13)* 9/- $2.30

Bases of Discussion drawn up for the Conference by the Preparatory Committee. Volume III. Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners. (Ser. L.o.N. P. 1929.V.3)* with Supplement *(a)* Replies made by the Governments to the Schedule of Points : Replies of Canada and the United States of America. (Ser. L.o.N. P. 1929.V.10)* 9/3 $2.30

Territorial Waters. Resolution adopted by the Advisory and Technical Committee for Communications and Transit. (Ser. L.o.N. P. 1929.V.11)* . 6*d.* $0.15

Convention on Certain Questions relating to the Conflict of Nationality Laws. (Ser. L.o.N. P. 1930.V.3) 6*d.* $0.15

Protocol relating to Military Obligations in Certain Cases of Double Nationality. (Ser. L.o.N. P. 1930.V.4) 6*d.* $0.15

Protocol relating to a Certain Case of Statelessness. (Ser. L.o.N. P. 1930.V.5) 6*d.* $0.15

Special Protocol concerning Statelessness. (Ser. L.o.N. P. 1930.V.6) 6*d.* $0.15

Final Act. (Ser. L.o.N. P. 1930. V.7) 1/3 $0.30

Report of the First Committee (Nationality). Rapporteur : His Excellency M. J. Gustavo Guerrero. (Ser. L.o.N. P. 1930.V.8)* 6*d.* $0.15

Report of the Second Commission (Territorial Sea). (Ser. L.o.N. P. 1930.V.9)* 1/- $0.25

* French and English texts.

[Distributed to the Council and the Members of the League.]

Official No.: **C. 351 (c). M. 145 (c).** 1930. V.

Geneva, December 31st, 1930.

LEAGUE OF NATIONS

ACTS

OF THE

CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

Held at The Hague from March 13th to April 12th, 1930

MEETINGS OF THE COMMITTEES

Vol. IV

MINUTES OF THE THIRD COMMITTEE

Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners.

Series of League of Nations Publications

V. LEGAL

1930. V. 17.

CONTENTS

	Page
LIST OF DELEGATES	11
FIRST MEETING, March 17th, 1930, at 3 p.m.:	
1. Opening Speech of the Chairman.	15
2. Telegram of Good Wishes from M. Zaleski, Acting President of the Council of the League of Nations	16
3. Election of the Vice-Chairman and the Rapporteur	16
4. Publicity of Meetings	17
5. Method of Work	17
6. Examination of the Bases of Discussion: General Principles: General Discussion	18
SECOND MEETING, March 18th, 1930, at 3 p.m.:	
7. Appointment of a Drafting Committee	26
8. General Principles: Proposal of the French Delegation	26
9. Consideration of Basis of Discussion No. 2	32
THIRD MEETING, March 19th, 1930, at 3.30 p.m.:	
10. Consideration of Basis of Discussion No. 2 *(continued)* ...	39
FOURTH MEETING, March 20th, 1930, at 3.30 p.m.:	
11. Definition of International Obligations: Text proposed by the Drafting Committee	49
FIFTH MEETING, March 21st, 1930, at 3 p.m.:	
12. Consideration of Basis of Discussion No. 7	59
SIXTH MEETING, March 22nd, 1930, at 3 p.m.:	
13. Consideration of Basis of Discussion No. 7 *(continued)*	69
SEVENTH MEETING, March 24th, 1930, at 4 p.m.:	
14. Consideration of Basis of Discussion No. 12	82
15. Consideration of Basis of Discussion No. 13	85
EIGHTH MEETING, March 25th, 1930, at 4 p.m.:	
16. Consideration of Basis of Discussion No. 13 *(continued)* ...	93
NINTH MEETING, March 26th, 1930, at 4 p.m.:	
17. Consideration of Bases of Discussion Nos. 5 and 6	103
18. Programme of Work and Appointment of Sub-Committees.	110
TENTH MEETING, March 27th, 1930, at 4 p.m.:	
19. International Obligations: Report of the First Sub-Committee .	112
20. Consideration of Bases of Discussion Nos. 5 and 6 *(continued)*	112
21. International Obligations: Report of the First Sub-Committee. Adjournment of the Vote	116
22. Consideration of Bases of Discussion Nos. 5 and 6 *(continued)*	116
23. Reference of Bases of Discussion Nos. 5 and 6 to the First Sub-Committee	119
ELEVENTH MEETING, March 28th, 1930, at 3 p.m.:	
24. Consideration of Basis of Discussion No. 1	120
TWELFTH MEETING, April 1st, 1930, at 3 p.m.:	
25. Bases of Discussion Nos. 19 and 29: Report of the Third Sub-Committee	129

S. d. N. 1.010 (F). 880 (A). 1/31. — Imp. de la T. de G.

Page

26. Programme of Work 142

27. Bases of Discussion Nos. 10, 17 and 18 : Text proposed by the Second Sub-Committee 143

THIRTEENTH MEETING, April 2nd, 1930, at 3.30 p.m. :

28. Bases of Discussion Nos. 10, 17 and 18 : Proposal of M. Giannini 146

29. Bases of Discussion Nos. 5 and 6 : New Text submitted by the First Sub-Committee 152

30. Definition of International Obligations : Text submitted by the First Sub-Committee 159

FOURTEENTH MEETING, April 3rd, 1930, at 3 p.m. :

31. Basis of Discussion No. 27 : Text submitted by the First Sub-Committee and revised by the Drafting Committee 162

32. Basis of Discussion No. 30 : Text prepared by the Drafting Committee of the Conference. 170

33. Point of Order. Proposal of the British Delegation to adjourn the Discussion of Basis No. 30 and to consider Bases Nos. 10, 17 and 18 175

FIFTEENTH MEETING, April 4th, 1930, at 3 p.m. :

34. Basis of Discussion No. 30 : Text proposed by the Drafting Committee of the Conference *(continued)* 177

35. Examination of Bases of Discussion Nos. 10, 17 and 18 *(continued)* 185

36. Question of Reservations 190

SIXTEENTH MEETING, April 11th, 1930, at 10.30 a.m. :

37. Questions of Procedure 191

38. Publication of the Minutes of the Committee 192

39. Close of the Proceedings of the Committee 194

LIST OF ANNEXES

1. BASES OF DISCUSSION DRAWN UP BY THE PREPARATORY COMMITTEE AND ARRANGED IN THE ORDER WHICH THAT COMMITTEE CONSIDERED WOULD BE MOST CONVENIENT FOR DISCUSSION AT THE CONFERENCE :

General Principles :

Bases 2, 7, 12, 13, 14, 15, 16, 23, 5, 6 198

Application to Special Questions :

A. Concessions or Contracts : Bases 3, 8 199

B. Debts : Bases 4, 9 199

C. Deprivation of Liberty : Basis 11 199

D. Insufficient Protection afforded to Foreigners : Bases 10, 17, 18, 19, 20. 200

E. Damages resulting from Insurrections, Riots or other Disturbances : Bases 21, 22, 22 *(a)*, 22 *(b)*, 22 *(c)*, 22 *(d)* 200

Circumstances under which States can decline their Responsibility :

Bases 1, 24, 25, 26, 27 201

National Character of Claims :

Basis 28 201

Compensation for Damages :

Basis 29 201

Character of the Agreement to be concluded :

Basis 31 202

Jurisdiction :

Basis 30 202

2. Observations and Proposals regarding the Bases of Discussion presented to the Plenary Committee by Various Delegations :

Austria :

Proposals circulated on March 17th, 1930 :
General Principles 202
New Basis 202
Basis 10 202
Basis 5 202
Bases 12 and 13 203
Basis 15 203
New basis 203
Proposal circulated on March 24th, 1930 :
Basis 22 *(b)* 203

Belgium :

Proposal circulated on March 18th, 1930 :
Bases 7 and 27 203

China :

Proposal circulated on April 4th, 1930 :
Bases 10, 17 and 18 203

Colombia :

Observations circulated on March 28th, 1930 :
Bases 5 and 6 204

Observations circulated on April 1st, 1930 :
Bases 30 and 31 205

Danzig (See Poland and Danzig)

Denmark :

Proposals circulated on March 25th, 1930 :
Basis 14 207
Basis 23 207
Basis 5 207
Basis 6 207
Basis 3 207
Basis 8 207
Basis 4 207
Basis 9 208
Basis 10 208

Bases 17 and 18 208
Basis 19 208
Basis 20 208
Basis 22 *(a)* 208
Basis 22 *(d)* 208
Basis 24 208
Basis 25 208
Basis 28 208
Basis 29 208
Basis 30 208
Basis 31 209

Egypt :

Proposal circulated on March 17th, 1930 :
Basis 1 209

Proposal circulated on March 21st, 1930 :
Amendment to the Belgian Proposal on Bases of Discussion Nos. 7 and 27 210

Proposal circulated on March 27th, 1930 :
Amendment to Paragraph 2 of the French Proposal regarding Basis of Discussion No. 5 210

Finland :

Observations circulated on March 17th, 1930 210

Proposal circulated on March 19th, 1930 :
Basis 23 212

France :

Proposal circulated on March 17th, 1930 :
General Principle of the Responsibility of States 212
Amended Text of above Proposal, circulated on March 18th, 1930 . . . 213

Proposal circulated on March 27th, 1930 :
Bases 5 and 6 213

Germany :

General Observations circulated on March 17th, 1930 213

Proposals circulated on March 29th, 1930 :
Bases 5 and 6 213

Great Britain and Northern Ireland :

Proposals circulated on March 17th, 1930 :
Basis 15 216
Bases 5 and 6 216
Bases 15 and 20 216
Basis 11 216
Bases 18 and 19 217
Bases 22, 22 *(a)*, 22 *(d)*, 22 *(b)* 217
Basis 22 *(c)* 217
Basis 26 218
Basis 28 218
Basis 29 219

Observations circulated on March 19th, 1930 :
Basis 27 and Proposals of the Belgian Delegation 220

Greece :

Proposal circulated on March 18th, 1930 :
Bases 2, 7, 12 and 13 220

Proposal circulated on March 29th, 1930 :
Basis 29 220

Hungary :

Observation circulated on March 17th, 1930 :

Bases 3 and 4 220

Proposal circulated on March 19th, 1930 :

Bases 7 to 9 and 11 to 14 221

India :

Proposals circulated on March 19th, 1930 :

Bases 2, 7, 12, 13 and 15 221
Basis 14 221
Basis 16 221
Basis 23 221
Bases 5 and 6 221

Proposal circulated on March 22nd, 1930 :

Basis 23 221

Italy :

Proposal circulated on March 22nd, 1930 :

Amendment to the Belgian Proposal on Bases of Discussion Nos. 7 and 27 222

Proposal circulated on April 1st, 1930 :

Bases 10, 17 and 18 222

Japan :

Proposals circulated on March 20th, 1930 :

Bases 13, 14 and 16 222

Proposals circulated on March 22nd, 1930 :

Basis 5 222
Bases 4 and 9. 222
Basis 11 222
Bases 24 and 25 223
Basis 26 223

Mexico :

Proposal circulated on March 19th, 1930 :

Basis 27 223

Mexico (contd.) :

Proposals circulated on March 19th, 1930 :

Basis 12 223
Bases 13 and 14 223
Observatiins regarding the Definition of the Sources of International Obligations, circulated on April 1st, 1930 223

Letter to the Chairman of the Committee, circulated on April 1st, 1930 :

Bases 10, 17 and 18 224

Norway :

Proposal circulated on March 17th, 1930 :

Basis 11 225

Poland :

Proposal circulated on April 1st, 1930 :

Bases 25 and 30 226

Poland and Danzig :

Joint Proposal circulated on March 27th, 1930 :

Bases 5 and 6 226

Portugal :

Observations and Proposals circulated on March 18th, 1930 :

Basis 2 226
Bases 7, 12, 13 and 14 226
Basis 23 227
Bases 5 and 6. 227
Bases 3 and 8. 227
Bases 4 and 9. 227
Bases 24 and 25. 227
Basis 28 227
Basis 30 227

Roumania :

Observations circulated on March 18th, 1930 :

Bases 2, 7 and 12 227

Salvador :

Proposal circulated on March 18th, 1930 :

Basis 2 228

South Africa :

Proposal for a New Basis of Discussion, circulated on March 17th, 1930 . 228

Proposals circulated on March 24th, 1930 :

Basis 13 228
Bases 17, 18 and 19 228
Basis 24 229

Spain :

Proposal circulated on March 19th, 1930 :

Bases 2, 7, 12 and 13 229

Switzerland :

Proposal circulated on March 18th, 1930 :

Bases 12, 13, 14 and 15 229

United States of America :

Proposals circulated on March 17th, 1930 :

Basis 29 230
Basis 1 230
Bases 2 and 7 230
Bases 12 and 13. 230
Basis 14 231
Bases 15 and 20. 231
Basis 16 231
Basis 23 231

Proposals circulated on March 19th, 1930 :

Basis 5 231
Bases 3 and 8. 231
Basis 10 231
Basis 17 232
Basis 18 232
Basis 19 232
Basis 20 232
Basis 21 232
Basis 22 232
Basis 1 232
Basis 24 232
Basis 25 233
Basis 26 233
Basis 28 233
Basis 29 233

Proposal circulated on March 22nd, 1930 :

Amendment to the Belgian Proposal on Bases of Discussion 7 and 27 . 233

3. Reports of Sub-Committees :

1. *Nature of the Obligations referred to in the Convention :*

(a) Proposal of the Drafting Committee, circulated on March 19th, 1930 234

(b) Proposal of the First Sub-Committee, circulated on March 27th, 1930 234

2. *Bases of Discussion Nos. 19 and 29 : Report of the Third Sub-Committee, circulated on March 29th, 1930* 234

3. *Bases of Discussion Nos. 10, 17 and 18 : Text proposed by the Second Sub-Committee, circulated on April 1st, 1930* 235

4. *Bases of Discussion Nos. 12 and 13 : Text proposed by the Drafting Committee, circulated on April 1st, 1930* 235

5. *Bases of Discussion Nos. 5 and 6 : Text proposed by the First Sub-Committee, circulated on April 22nd, 1930* 235

6. *Bases of Discussion No. 27 : Proposal by the First Sub-Committee as revised by the Drafting Committee and circulated on April 3rd, 1930* . . 236

4. Texts adopted by the Committee in First Reading as revised by the Drafting Committee[1] 236

5. Draft Report drawn up by the Rapporteur, M. De Visscher (Belgium) at the Request of the Chairman[1] 237

---

[1] These documents were not discussed by the Committee.

LIST OF DELEGATES.[1]

President : M. J. BASDEVANT (France).
Vice-President : His Excellency M. A. DIAZ DE VILLAR (Cuba).
Rapporteur : M. Charles DE VISSCHER (Belgium).

AUSTRALIA

Delegate :

Mr. W. E. Beckett, Legal Adviser in the Foreign Office.

AUSTRIA

Delegate :

M. Marc Leitmaier, Doctor of Law, Legal Adviser of the Federal Chancellery, Department for Foreign Affairs.

Substitute :

M. Charles Schönberger, Doctor of Law, Ministerial Adviser at the Federal Ministry of Finance.

BELGIUM

Delegate :

M. C. De Visscher, Professor at the University of Ghent, Legal Adviser of the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration.

BRAZIL

Delegate :

His Excellency M. G. de Vianna Kelsch, Envoy Extraordinary and Minister Plenipotentiary to the President of the Republic of Ecuador.

GREAT BRITAIN AND NORTHERN IRELAND

Delegate :

Mr. W. E. Beckett, Legal Adviser in the Foreign Office.

Substitute :

Mr. W. Strang, Assistant Adviser on League of Nations Affairs, Foreign Office.

CANADA

Delegate :

Mr. J. F. McNeill, Advisory Counsel, Department of Justice.

CHILE

Delegate :

His Excellency M. Miguel Cruchaga-Tocornal, former Prime Minister, former Ambassador to the President of the United States of America, former Professor of International Law, President of the Mixed Claims Commissions between Mexico and Germany and Mexico and Spain.

CHINA

Delegate :

His Excellency M. Chao-Chu Wu, Envoy Extraordinary and Minister Plenipotentiary to the United States of America.

Substitute :

M. Yuen-li Liang, Secretary of Legation.

COLOMBIA

Delegate :

His Excellency M. Francisco José Urrutia, former Minister for Foreign Affairs, Permanent Delegate accredited to the League of Nations, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council.

CUBA

Delegates :

His Excellency M. A. Diaz de Villar, Doctor of Law, Envoy Extraordinary and Minister Plenipotentiary to Her Majesty the Queen of the Netherlands.

His Excellency M. C. de Armenteros, Doctor of Law, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council.

---

1 This list contains only the names of members of delegations who were expressly notified to the Secretariat as having been appointed to attend the meetings of the Committee.

CZECHOSLOVAKIA

Delegates :

His Excellency M. Miroslav Plešinger-Božinov, Envoy Extraordinary and Minister Plenipotentiary to Her Majesty the Queen of the Netherlands.

Dr. Antonín Koukal, Chief Counsellor at the Ministry of Justice.

Experts :

Dr. Vladimir Matějka, First Secretary of the Legation to Her Majesty the Queen of the Netherlands.

Dr. Bohumil Kučera, Secretary of the Legation to Her Majesty the Queen of the Netherlands, Privat-docent of Private and Public International Law.

DANZIG

Delegates :

His Excellency M. Stéfan Sieczkowski, Under-Secretary of State at the Polish Ministry of Justice.

M. Georges Crusen, Doctor of Law, President of the Supreme Court of the Free City.

DENMARK

Delegate :

His Excellency M. Georg Cohn, Envoy Extraordinary and Minister Plenipotentiary.

EGYPT

Delegate :

His Excellency Abd el Hamid Badaoui Pacha, President of the Litigation Committee.

ESTONIA

Delegates :

His Excellency M. Ants Piip, Professor of International Law at the University of Tartu, former Chief of State, former Minister for Foreign Affairs.

M. Alexandre Varma, Mag. Jur., Director of Administrative Questions at the Ministry for Foreign Affairs.

FINLAND

Delegate :

His Excellency Dr. Rafaël Erich, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Sweden, former Prime Minister.

Substitute :

M. Bruno Kivikoski, Consul-General at The Hague.

FRANCE

Delegates :

M. P. Matter, Member of the Institute, Procurator-General at the Supreme Court.

M. J. Basdevant, Legal Adviser at the Ministry for Foreign Affairs, Professor at the Faculty of Law of the University of Paris.

Substitute :

M. Rouchon-Mazerat, " Maître des Requêtes " at the " Conseil d'Etat ".

GERMANY

Delegates :

M. R. Richter, Privy Counsellor, Head of Department at the Ministry of Justice of the Reich.

Dr. M. Fleischmann, Professor at the University of Halle.

Substitute :

Dr. Nöldeke, Counsellor of Legation.

GREECE

Delegates :

His Excellency M. N. Politis, former Minister for Foreign Affairs, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic.

M. Megalos A. Caloyanni, former Counsellor at the High Court of Appeal of Egypt, former Judge *ad hoc* of the Permanent Court of International Justice.

Substitute :

M. D. A. Carapanos, Private Secretary of the Head of the Delegation.

HUNGARY

Delegates :

His Excellency M. Eugène de Berczelly, Under-Secretary of State, Chief of the Department of International Law at the Ministry of Justice.

M. Béla de Szent-István y, Departmental Counsellor at the Ministry for Foreign Affairs.

INDIA

Delegate :

Mr. A. Latifi, M.A., LL.M. (Cambridge), LL.D. (Dublin), O.B.E., I.C.S., Barrister-at-Law (England), Commissioner of Division, Punjab; former District Judge; former Member of the Punjab Legislative Council and of the Indian Council of State.

IRISH FREE STATE

Delegate :

Mr. J. V. Fahy, Department of External Affairs.

ITALY

Delegates :

His Excellency Professor Amedeo Giannini, Minister Plenipotentiary, Counsellor of State.

Professor Arrigo Cavaglieri, of the Royal University of Naples.

Substitutes :

Professor Giulio Diena, of the Royal University of Pavia.

Professor Gabriele Salvioli, of the Royal University of Pisa.

Admiral of Division Giuseppe Cantú.

Staff-Colonel Camillo Rossi, Military Attaché at Berlin.

Don Carlo Cao, Barrister-at-Law, Colonial Director.

Marquis Dr. Luigi Mischi, Colonial Director.

Commendatore Dr. Michele Giuliano, Counsellor at the Court of Appeal.

Commendatore Manlio Molfese, Head of Department of the Civil Aviation and Air Traffic.

JAPAN

Delegates :

His Excellency Dr. Harukazu Nagaoka, Ambassador to the President of the German Reich.

His Excellency M. Nobutaro Kawashima, Envoy Extraordinary and Minister Plenipotentiary to the President of the Hellenic Republic. (Absent.)

Replaced by :

Substitute :

M. S. Sakuma, First Secretary of Embassy.

Experts :

M. S. Tachi, Professor at the Imperial University of Tokio, Member of the Imperial Academy, Associate of the Institute of International Law.

M. S. Ohtaka, Secretary of Legation.

LATVIA

Delegates :

His Excellency M. G. P. Albat, Minister Plenipotentiary, Secretary-General at the Ministry for Foreign Affairs, Professor in the Faculty of Law at the University of Riga.

His Excellency M. Ch. Duzmans, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Yugoslavia, Permanent Delegate accredited to the League of Nations.

LUXEMBURG

Delegate :

M. Albert Wehrer, Doctor of Law, Legal Adviser at the Ministry for Foreign Affairs.

Substitute :

M. A. Rueb, Doctor in Law, Consul at The Hague.

MEXICO

Delegate :

M. Eduardo Suarez, Head of the Legal Department at the Ministry for Foreign Affairs.

Substitute :

M. Fernández de la Regata, First Secretary of Legation to Her Majesty the Queen of the Netherlands.

MONACO

Delegate :

M. Hankès Drielsma, Barrister-at-Law, Rotterdam, and Consul at Rotterdam.

NETHERLANDS

Delegate :

M. J. Limburg, Doctor of Law, Member of the Council of State.

NICARAGUA

Delegate :

M. Tomás Francisco Medina, Permanent Delegate of Nicaragua accredited to the League of Nations.

NORWAY

Delegate :

M. Frede Castberg, Doctor of Law, Professor at the University of Oslo.

Substitute :

M. L. J. H. Jorstad, Chief of Division at the Ministry for Foreign Affairs.

PERSIA

Delegate :

M. A. Motamédy, First Secretary of Legation.

POLAND

Delegate :

His Excellency M. S. Sieczkowski, Under-Secretary of State at the Ministry of Justice.

PORTUGAL

Delegate :

Dr. José Lobo d'Avila Lima, Professor of Law at the Universities of Lisbon and Coimbra, Legal Adviser at the Ministry for Foreign Affairs.

PORTUGAL *(contd.)*

Dr. Antonio de Faria, Secretary of Legation at the Portuguese League of Nations Office in the Ministry for Foreign Affairs.

ROUMANIA

Delegate :

M. Constantin Sipsom, Professor of Civil Law at the University of Bucharest, Legal Adviser at the Ministry for Foreign Affairs.

Assistant Delegate :

M. N. Dascovici, Professor of International Public Law at the University of Jassy.

SALVADOR

Delegate :

His Excellency Dr. J. Gustavo Guerrero, Permanent Delegate accredited to the League of Nations, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic.

SOUTH AFRICA

Delegate :

Mr. C. W. H. Lansdown, K.C., B.A., LL.B., Senior Law Adviser to the Government of the Union of South Africa, ex-Attorney-General of the Province of the Cape of Good Hope.

SPAIN

Delegate :

M. Ginés Vidal, Minister Plenipotentiary Counsellor at the Embassy to the President of the German Reich.

SWEDEN

Delegate :

His Excellency M. A. J. P. de Adlercreutz, Envoy Extraordinary and Minister Plenipotentiary to Her Majesty the Queen of the Netherlands.

SWITZERLAND

Delegate :

His Excellency M. Paul Dinichert, Minister Plenipotentiary, Chief of the Division for Foreign Affairs in the Federal Political Department.

SWITZERLAND *(contd.)*

Substitute :

M. Camille Gorgé, First Chief of Section at the Federal Political Department.

TURKEY

Delegate :

Veli Bey, Legal Adviser of the Ministry for Foreign Affairs.

UNITED STATES OF AMERICA

Delegates :

Mr. Green H. Hackworth, Solicitor, Department of State.

Mr. Edwin M. Borchard, Professor of International Law, Yale University.

URUGUAY

Delegate :

His Excellency Dr. Enrique Buero, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of the Belgians and to Her Majesty the Queen of the Netherlands.

YUGOSLAVIA

Delegates :

Dr. Miléta Novakovitch, Professor at the University of Belgrade, former Judge *ad hoc* of the Permanent Court of International Justice.

Dr. Ivan V. Soubbotitch, Chief of Section in the Ministry for Foreign Affairs.

Substitute :

Dr. Slavko Stoikovitch, Attaché at the Reparations Commission.

And as Observers :

UNION OF SOVIET SOCIALIST REPUBLICS

His Excellency M. Dmitri Kourski, Ambassador to His Majesty the King of Italy.

M. George Lachkevitch, Legal Adviser at the Embassy to the President of the French Republic.

Third Committee :

RESPONSIBILITY OF STATES

FIRST MEETING

Monday, March 17th, 1930, at 3 p.m.

Chairman : M. BASDEVANT

1. OPENING SPEECH OF THE CHAIRMAN.

The Chairman :

Translation : Gentlemen,— In opening this meeting, I should like to thank you again for the honour you have done me in inviting me to preside over the work of the Third Committee. I shall endeavour to discharge my duties to the best of my ability, and I am sure that you will all assist me as far as possible in carrying out my task.

The Third Committee has to deal with the responsibility of States for damage caused in their territory to the person or property of foreigners. I need not remind you of the importance of this question. You are all aware of the place given to the theory of responsibility in any juridical system. You know that nowadays this question of responsibility is becoming increasingly important, both from the national and the international points of view.

The rules on responsibility are, so to speak, the key-rules of any juridical system and the practical value of any juridical system may be said to depend on the efficacy and scope of these rules. To-day, we have abandoned the idea formerly held by publicists that the responsibility of the State is incompatible with its sovereignty. The responsibility of the State in the international order is a principle which has often been recognised and proclaimed in treaties in international practice and in the rulings of international authorities.

It is highly desirable that the rules on this matter should be as definite as possible. In that way we may realise the aspiration for justice which is at the basis of the principles governing the responsibility of the State. The subject is also important because — and we must not forget this — in the course of time and in various circumstances, political ambitions have only too often been concealed under a pretext of responsibility.

Only by harmonising the rules on responsibility and by framing provisions of real technical value can we hope to satisfy the need for justice, which is at the basis of all solutions regarding responsibility, and that special need for order which tends to limit political ambitions.

It is characteristic of the work of this Committee that we have to look back to precedents, established practice and the solutions furnished by international case-law.

Some of you have had a share in establishing that practice and case-law. You have drawn up and signed decisions which have become authoritative in regard to questions of responsibility ; you have had a part in establishing principles of law in this connection ; you have also, by your writings, endeavoured to determine what exactly was the established law and what principles were recognised in the positive international order in this respect. Finally, you have criticised such principles. This work of a practical nature, this work in jurisprudence, this doctrinal work will serve as a basis for our deliberations.

On that basis we must together seek, with regard to the responsibility of States for damage caused in their territory to the person or property of foreigners, the rules which best meet the juridical needs of our time.

We must rely upon the past ; we must frame rules for the present ; but we must also keep our eyes fixed on the future. Such is our task.

I need not tell you how delicate and complex it is. Though the requirements of justice urge us to lay down rules regarding responsibility and to assert the responsibility of the State in certain cases, we must at the same time

recognise that the authority of decisions taken by the competent national organs should not be lightly called in question.

We must find and indicate a middle line between these two requirements and tendencies.

It is our duty here to frame rules of law. We shall try to state them with precision, but also, I imagine, with elasticity. We shall remember the spirit underlying provisions of municipal law as to the responsibility of individuals in their mutual relationships. Naturally, I think of the provisions of the French Civil Code, where a single article, a very short one, accompanied by a few supplementary provisions, has served and happily still serves as a basis for the solution of the most complicated and most recent problems in the matter of civil responsibility.

In the same way, we must bear in mind that in an international text we cannot enunciate everything and provide for everything. We must remember the extreme complexity of life. Thus we must try to reach a formula which, while being sufficiently definite, is also sufficiently elastic to meet the needs of life and to allow of the discovery and development of practical solutions. Moreover, all this must be based upon a few principles that are solid, clear and well established in the juridical conscience of the nations.

Such, on general lines, is the task before us. It is difficult and complex. We shall see how far we can proceed with it, but I am sure everyone is ready with goodwill to try to secure as complete a result as possible.

2. TELEGRAM OF GOOD WISHES FROM M. ZALESKI, ACTING PRESIDENT OF THE COUNCIL OF THE LEAGUE OF NATIONS.

The Chairman :

Translation : I have to communicate to you the text of two telegrams which have passed between the President of the Council of the League of Nations and the President of this Conference. The first telegram is as follows :

> " Warsaw, March 15th.
>
> " The President of the Conference for the Codification of International Law, The Hague.
>
> " I beg you to accept my best wishes for the success of the work of the Conference which I am sure, will help to strengthen in all nations a sense of the great value of the international ties created by law and the sentiment of human solidarity — Zaleski, President of the Council of the League of Nations."

To this telegram, the following answer was sent :

> " Zaleski, President of the Council of the League of Nations, Ministry of Foreign Affairs, Warsaw.
>
> " I am sure I am expressing the unanimous feeling of the Conference for the Codification of International Law when I thank Your Excellency for your good wishes for the success of the Conference — Heemskerk, President."

3. ELECTION OF THE VICE-CHAIRMAN AND THE RAPPORTEUR.

The Chairman :

Translation : We must now proceed to appoint a Vice-Chairman in order to complete the Bureau.

M. d'Avila Lima (Portugal) :

Translation : I have the honour to propose our distinguished colleague, His Excellency M. Diaz de Villar, as Vice-Chairman.

M. Matter (France) :

Translation : On behalf of the French delegation, I very warmly support the proposal just made. His Excellency M. Diaz de Villar's great reputation and his distinguished character will add greatly to the strength of our Bureau. I think, therefore, there can be no hesitation about supporting M. d'Avila Lima's proposal.

(Several delegations supported the proposal.)

The Chairman :

Translation : The proposal just made has, you will have noticed, been supported by a large number of delegations, but the Rules of Procedure compel me to take a vote, and I therefore put the proposal to the vote.

The proposal was adopted.

The Chairman :

Translation : We must now proceed to appoint a Rapporteur.

M. Dinichert (Switzerland) :

Translation : We need the corner-stone of our Committee, and I venture to suggest a name which, if I may say so, seems to be inevitable. I do not like proposals which cannot be avoided, but on this occasion we have before us a name which is indeed inevitable. We are all the faithful readers, and I might perhaps dare to say — at all events for my own part — the pupils, of Professor De Visscher. We always read the *Review of International Law*, which he directs and edits in so masterly a manner. Only a short time ago, and in this building, M. De Visscher delivered a course of lectures on the codification of international law. These we have all read with profit or, if we have not read them, we should do so now. Our task, as our Chairman has just reminded us, is so difficult and so complex that we must seek guidance in doctrine, science and practice. M. De Visscher is a scholar, a publicist, a jurist, and the legal adviser of a Government.

No one could be better qualified for the task of Rapporteur than M. De Visscher.

M. Politis (Greece) :

Translation : I should like to support very warmly the proposal just made by M. Dinichert. I think the Third Committee is exceptionally fortunate in having amongst its members a jurist with M. De Visscher's knowledge and experience. Just now we were reminded of the course that he gave on the codification of international law. I remember another on responsibility. All his writings are noteworthy ; they attract the attention of all scholars. I would add that for years he has made a special study of the question of responsibility. No one could be better fitted than M. De Visscher to discharge the delicate duties of Rapporteur. I cordially support the proposal.

(Several delegations supported the proposal.)

The Chairman :

Translation : The proposal has been supported by a large number of delegates. I put it to the vote.

The proposal was adopted.

M. De Visscher (Belgium) :

Translation : I am greatly honoured by the choice you have just made. It is too flattering and was expressed in terms which touch me profoundly. I fully realise the weight of the task so amiably imposed upon me, and I feel that the responsibility falling upon me in this Committee, though not an international responsibility, is none the less very heavy. I thank you, and I assure you I shall devote myself to our common work with the greatest zeal and assiduity.

4. PUBLICITY OF MEETINGS.

The Chairman :

Translation : As our Bureau is now complete we shall in a moment be able to start the actual work of the Committee, but I should like first of all to remind you of the provision in the Rules of Procedure regarding the nature of our meetings. In principle, meetings of Committees are private ; they may be public but only by the Committee's decision.

It seems that, as regards the work of the Committee on the Responsibility of States, there are very serious reasons for following the principle as a general rule, except in so far as it may be deemed necessary to depart from it.

Is there any objection to this procedure ?

The proposal was adopted.

5. METHOD OF WORK.

The Chairman :

Translation : I should now like you to consider the nature of the work we have to do and the best method of accomplishing it.

You have before you the Bases of Discussion, which constitute the starting-point of our work. They have, after consultation of the Governments, been arranged in an order different from that originally established. As stated in the Preparatory Committee's report, these Bases of Discussion are not in the nature of proposals ; they are not submitted as articles of a treaty which must be adopted, rejected or amended ; they are working bases by means of which each delegation will be able to explain its Government's attitude and say what is acceptable and what unacceptable.

We shall accordingly proceed to consider these Bases of Discussion and, when the views of the Committee have in that way been made clear, we shall have to frame texts for the drafting of which the Bureau will, at an early meeting, propose the appointment of a Drafting Committee. The duty of this Drafting Committee will be to embody in formulæ suitable for adoption as articles of a treaty the resolutions approved by the Committee.

The texts thus prepared by the Drafting Committee, in intimate co-operation with the Rapporteur, will, of course, be submitted to you, and the Committee will be entirely free to adopt, reject or amend them.

Is there any objection to this procedure ?

The proposal was adopted.

The Chairman :

Translation : We can now take up the consideration of the Bases of Discussion. On beginning our examination we may naturally ask whether it is desirable to embark on a general discussion of the whole of these Bases of Discussion.

In this connection, I venture to express my own view. You will have noticed that the Bases of Discussion are arranged as follows : first, there come general principles, next there are applications to special questions, and finally there are a certain number of points which I may provisionally describe as of secondary importance — circumstances under which States can decline their responsibility, etc. The whole is fairly comprehensive and somewhat complex. If we had a general discussion on the whole of the bases, the most diverse considerations might be raised and probably would need to be repeated when we came to discuss the particular bases.

It may, nevertheless, be helpful at the outset to submit general observations, if not on the whole of these bases, at least on the general principles governing the question.

We might thus begin at once to consider the first chapter, which is headed " General Principles ". Where we find the underlying idea that a State is responsible if any organ of the State performs an act or omits to perform an act, so that the State fails to observe its international obligations. That is the general idea underlying the whole of this first series of Bases of Discussion. It would be quite

possible to have a general exchange of views on these fundamental principles. I therefore propose the following method: we shall have no general discussion on the whole of the draft from Basis 1 to Basis 30, but a general discussion on the first chapter, which is headed "General Principles".

Is there any objection to this procedure?

The proposal was adopted.

6. EXAMINATION OF THE BASES OF DISCUSSION: GENERAL PRINCIPLES: GENERAL DISCUSSION.

The Chairman:

Translation: We shall proceed with the general discussion on General Principles, and, when that is completed, we shall in turn take up the consideration of each of the Bases of Discussion included under that head, together with any amendments that may be submitted.

M. d'Avila Lima (Portugal):

Translation: We have been invited to take part in a general discussion of the problem of codification. A preliminary observation seems inevitable. It is that the path has not always been easy to follow and has not led to any important results. We think it is advisable and necessary to recognise this fact. To do so is to pay a tribute to many praiseworthy efforts that have been accomplished with great difficulty. It would, moreover, be well to recall this fact when we come to consider solutions that are suggested for certain problems of great importance from an international standpoint.

The Minutes of various international gatherings and the statements made by many commentators are indeed sufficient to prove that unanimity can scarcely be said to exist in regard to the general trend or the technique of the work of codification. Such work may, in a more or less conventional manner, be classified in seven systems (according to our distinguished colleague M. Alvarez), or, more synthetically, in two technical systems — that of the Anglo-Saxon or Anglo-American school and that of the Continental school.

One system, developed particularly under the inspiration of the Pan-American Conferences on Codification, recognises the necessity of abandoning the absolutism of certain ideas, such as the universality of international rules. At the same time, it asserts the need for establishing clearly the great principles on which the new regime of co-operation is to rest. According to this view, codification ought not to be limited to the confirmation of existing rules, but ought to perfect them and bring them into harmony with new social conditions.

This opinion is, to some extent, opposed to that held by more conservative thinkers who, inductively, prefer a prudent delimitation of the work of codification. In their view, its object should at the outset be to choose simple ideas which are already ripe — *i.e.*, in regard to the regulation of which all States are agreed. This is apparently the method by which we have been invited to approach the discussion of this subject. Such an invitation (as might be expected from the courtesy and the liberal attitude of the Preparatory Committee and from the distinguished patronage of the League of Nations) does not impose on us any obligation to bring our views into complete harmony. We have therefore formed the definite opinion that the best guiding rule will be that of the *media sententia*. This is a philosophic formula supported by long experience; it was given definite international recognition when it was adopted for the work of the London Naval Conference in 1909.

The remarkable work of the Preparatory Committee seems to reflect the uncertainties and divergencies which have appeared in the matter of codification. This opinion should not be considered as a reproach, but rather as a well-deserved tribute which may justly be paid by those who modestly collaborated, as we did, in the difficult work of the Paris Conference on the Treatment of Foreigners. Remembering the difficulties in regard to doctrines that surround the problem of international responsibility, how can we be surprised by the hesitation shown concerning a proposal for a *jus scriptum*? We are again proceeding from the particular to the general, for we are not attempting to define the whole of the obligations devolving on States as regards the treatment of foreigners. We are endeavouring merely to determine the conditions under which States become responsible in the case of an infraction of particular rules of international law and the manner in which they must make good the damage caused to foreigners.

Will the position always be the same? It is somewhat difficult to reply. It has been said that only a small part of public international law is universal in character, the greater part of the rules of that law being of a special and regional nature. A breath of universalist, and almost romantic, idealism is also discernible. Inspired, perhaps, by the fact that ideas create feelings, which, in their turn, lead to action, this idealism gives rise to a desire to frame a code *inter populos*. The starting-point of such a code would be a solemn declaration of moral principles concerning, in particular, international obligations.

We must, however, think rather of the realities of the world and of international law. Close consideration shows at once that the subject of that law is not the individual foreigner, but the foreign State itself. This is a fresh difficulty in the way of the creation of a *civis internationalis*. Further, if we take account of national requirements, we must admit that, although the protection given to foreigners must correspond to that enjoyed by the nationals of a country, the foreigner

is not entitled to any greater protection than the national. Such, *mutatis mutandis*, in the widest and most general terms, is the controversial and complex problem of the international responsibility of States. Its content and its limits will form the subject of an analysis *in specie*, and we shall be glad to play our humble part in that analysis.

In this general preliminary consideration, however, two unpretentious observations seem permissible. The first relates to certain points which have been omitted or inadequately developed in the scheme proposed by the Preparatory Committee — *e.g.*, the non-inclusion of questions concerning war and neutrality, and the fact that the fundamental problem of the basis of responsibility has not been adequately treated in the Bases of Discussion.

The second group of observations arises, in our opinion, either from regionalist reasons or from considerations that are merely exegetic.

As the question of regional application is not dealt with in the draft, we are led by "particularist" reasons (which each country may, and quite legitimately, advance) to formulate certain reservations in view of the politico-legislative peculiarities of the Portuguese State. My colleagues of the Portuguese delegation will have to state such reservations concerning the problems connected with the extent of territorial waters and nationality. As regards the international responsibility of States, we desire to express the opinion that the application of the future convention to colonial or other territories must be subject to a special accession. This procedure was recognised as legitimate and advisable in the case of the draft on the treatment of foreigners submitted to the Paris Conference.

Finally, as regards our exegetic curiosity, we express the hope that the text submitted for our consideration will not be limited merely to *jus constitutum*, but, if it is thought desirable and necessary, we trust it may also satisfy our aspirations for a truly progressive *jus constituendum*.

M. Nagaoka (Japan):

Translation: Mr. Chairman and gentlemen, — It is a universally recognised truth that, just as within any civilised State each individual is responsible for his actions, so, in the great international community of States, each of its members must be held responsible when it infringes the rights of others. This principle of responsibility constitutes one of the strongest bonds uniting any collective organisation, whether it be the community of States or a group of individuals. This principle might even be said to be founded upon the highest moral virtues of humanity without which no solid juridical organisation would be possible.

It seems obvious, under these circumstances, that the rules determining the extent and nature of the international responsibility of States in their mutual relations constitute one of the most important problems of international law. I need hardly assure you that, when that problem comes before this Committee, the Japanese delegation will not consider the position of its own country or that of any other country, but will be guided solely by those impersonal ideals which are likely to lead to the best possible rules.

That is the fundamental idea in accordance with which the Japanese delegation will cooperate wholeheartedly in the work of this Committee. We are convinced that, with reciprocal goodwill, our work will result in conclusions acceptable to all, and we express the sincere hope that our deliberations may be crowned with success.

M. Sipsom (Roumania):

Translation: Gentlemen, — I should like briefly to explain the standpoint of the Roumanian delegation as regards the responsibility of States. We have to consider the principles governing this question; they were summarised by the Chairman.

A State is responsible, through its representative organs, if it infringes an international obligation undertaken towards foreign subjects and foreign nationals.

What are general international obligations?

In the first place, we must mention obligations accepted by treaty and, in the second place, those arising from conventions which create rights for foreigners through the agency of the signatory States. In the third place, there is what is generally known as international common law — *i.e.*, a State's obligations towards foreigners arising from the body of rules that has been called international common law.

The first two points give rise to no discussion; they are definite. This is not true of the third point, relating to those obligations of a State which arise from international common law.

It is desirable that these obligations should be defined. For that reason, I think it would have been preferable to invert the order of the factors and to start by determining the obligations towards foreigners imposed upon a State by international common law. When we have defined these ideas, we might then consider the responsibility arising from any violation of the principles in question.

On this matter there may be, there certainly will be, considerable discussion. No one can deny the existence of this common law, constituted by a body of rules that are generally admitted.

There are no certain and definite principles defining ordinary international common law as regards, for example, the question of the law affecting foreigners. That constitutes the whole problem. Apart from treaties and conventions, what are the foreigner's rights in any social or political organisation — *i.e.*, in a State?

Different opinions have been expressed on this question of the rights of foreigners. Some start from a point of view which is certainly legitimate — namely, that in any State no foreigner can claim more extensive rights than a national of that State. That represents the maximum limits of the rights that could be granted to any foreigner, unless there are special treaties or conventions to the contrary. That point of view may be very strongly defended.

The maximum of rights that might be granted does not, however, appear in all systems of positive law. In point of fact, the foreigner and the native inhabitant of the country are not yet given equivalent rights in all municipal systems of law. I might add that they are not put on the same footing in all respects in any municipal system of law.

Hence it is very important to know how and in what way foreigners may enjoy rights not possessed by nationals of the country. What are these rights ? How do they arise ?

Only when this question has been solved — and I think that is the chief task before this Committee — only when we have determined what constitutes the law of foreigners properly so-called, arising from what is termed international common law, shall we be able to determine clearly the responsibility of the State.

In all our discussions on the draft, a sharp distinction should be drawn between the municipal law of a country and international common law.

Responsibility under local law, the responsibility of the public authorities towards foreigners who are resident in the country and who have rights that have been infringed by acts committed by the public authorities in any of their forms — that is one question.

It is quite another question to say whether, in addition to the direct remedy open in any civilised country to the interested party himself — *i.e.*, the foreigner — against a State either through the administrative courts or any other channel, there is another right concurrent, or exclusive, which may be claimed by the State to which he belongs.

If on any occasion it is shown that the foreigner like the national of the country, has a complete remedy against the State, it is clear that, if satisfaction has been given to the foreigner, no action can be taken by the State which represents him and which takes up his claim.

Can such an action by the State representing the foreigner exist concurrently? Undoubtedly it cannot.

Consequently, a State is not responsible to the State, representing the injured foreigner unless the latter has not received satisfaction under the local law.

But if satisfaction has not been given, whose is the right ? The right belongs to the State and not to the foreigner. That must, however, be made clear. It is not the foreigner who may take action against a State : it is the State whose national he is which, taking up his claim, may invoke international jurisdiction.

I support the view of the Portuguese delegation that there is certainly an omission in the general drafting of the plan before us. The case of responsibility arising from a country's state of war, or neutrality in time of war, with regard to illegal acts committed against a foreigner during war, is neither considered nor even mentioned. Is it because these obligations are clearly defined ? I do not think so. There have been many cases where so-called exceptional war measures have led to long and serious discussions. It is not easy to reach agreement as to the extent of a country's right in time of war, either in its own territory or in occupied territory, to take measures which lead to the infringement of the rights of foreigners. There should certainly be an exchange of views, and perhaps some codification, in regard to this point. It is when ideas are most confused, when innumerable disputes have to be settled, that obligations need to be known. Some definite conclusions are thus needed in this respect.

M. Giannini (Italy):

Translation : The Hague Conference follows the Paris Conference on the Treatment of Foreigners. If the latter had yielded practical results, our task as regards responsibility in regard to foreigners would have been easier. Unhappily, the Paris Conference, has been suspended and we do not know when it will be able to resume its work. Consequently, you will perhaps be inclined to think that the whole problem of responsibility cannot be handled at a first Conference for the Codification of International Law.

In my opinion, if the Conference succeeds in framing a Convention which is not far removed from the Bases of Discussion submitted to us, it will have achieved a success. I would ask my colleagues to remember that in political matters there are possibilities and probabilities. We have to aim at what is practicable and for that purpose we should reach agreement on the Bases of Discussion now before us. On some questions we shall perhaps have to devise compromises. We may have to abandon some of the Bases of Discussion. Nevertheless, if we succeed in reaching agreement, it will be a great success. I should like to emphasise the fact that the Bases of Discussion submitted to this Committee have been so carefully drawn that agreement ought not to be difficult to reach. Let us therefore confine ourselves to what is practicable. Let us consider the Bases of Discussion and see how far it is possible to agree on points in regard to which differences are apparent.

In conclusion, I should like to make a recommendation and a practical proposal. The recommendation is one of prudence, and I would beg my colleagues to remember that prudence is the great virtue of the jurist. But, as we are also the delegates of our Governments, it is our duty to accomplish all that is

possible. Our discussions, particularly with regard to the responsibility of States towards foreigners, must be governed by the spirit of prudence. My practical proposal is that the Committee should not embark on a general discussion, but at once proceed to consider the Bases of Discussion.

The Chairman :

Translation : There are two points I should like to bring to the notice of the Committee. In the first place, it will be very difficult to reach any conclusion if we widen the field of our work to any great extent. If we are to attain results, we must not undertake too much. The widest limits would seem to have been traced in the Bases of Discussion. Further, amendments may most appropriately be submitted in connection with certain definite provisions rather than during the general discussion.

Secondly, I would remind you that, when the League of Nations considered the proposal to undertake the progressive codification of international law, it thought that, for the present, it was necessary to limit the question to the law in time of peace. Everyone is, of course, aware that this is not the whole, that it is only one part of the law and that there are other extremely important questions that might also be considered. But I would remind you of a French proverb which says : " Each day's task is sufficient ". Let us therefore perform our task to-day, though it be but modest. That will be better than undertaking too heavy a task which we could not hope to accomplish.

M. Erich (Finland) :

Translation : In his opening speech, the Chairman emphasised a very important point — namely, that the general principles consistently presuppose, as the essential feature of international responsibility, an act or an omission which is contrary to the international obligations of a State. This is indeed the case if we refer to the terms of the general principles. Basis of Discussion No. 2 mentions legislation incompatible with the international obligations of the State ; so does Basis No. 7. Basis of Discussion No. 12 refers to acts or omissions which contravene the international obligations of the State ; so does Basis No. 13. Acts incompatible with the international obligations of the State and acts which contravene the international obligations of the State mean the same thing. Basis of Discussion No. 14 refers to acts performed by officials of a State which are deemed to be acts of the State and, of course, are deemed to be acts incompatible with the international obligations of the State. The general principles are thus fully in agreement on this point.

The general principles may therefore be said to presuppose, as an essential condition of international responsibility, an attitude or an act which is incompatible with the obligations of the State. In other words, they presuppose a wrong, a fault or culpability on the part of the State. In this connection, we might say that the Bases of Discussion before us are more restrictive than the questionnaire which was submitted to the Governments and which referred *inter alia* to the question of the protection that is due to the acquired rights of foreigners.

The Finnish delegation thinks it would be advisable to reconsider the question whether the idea of international responsibility should be thus limited to acts or omissions which are incompatible with the international obligations of the State.

Such consideration is all the more necessary because the Bases of Discussion themselves are not absolutely consistent with their starting-point. That is clear from a consideration of Basis No. 21, which says that a State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance. Then we find the following provision : " The State must, however, make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities ".

Such acts are entirely legitimate, provided the authorities have not exceeded their powers. But if we limit responsibility to acts contrary to the international obligations of a State, that principle does not apply to this provision. Thus we may say that the Bases of Discussion themselves provide for a case of responsibility which is not based upon the culpability of the State.

One special point in this connection is of great importance — namely, the question of the protection of acquired rights.

In the original questionnaire, there was a question as to the responsibility of a State if it enacts legislation which infringes the acquired rights of foreigners. The question of the protection of acquired rights (of which certain aspects only are covered by the draft Bases of Dicussion) would be solved in quite a different manner according as we adopt culpability or fault as the essential element in international responsibility or according as we adopt the point of view that there is also an independent responsibility for any act or omission contrary to the obligations of the State.

The Finnish delegation has drawn up certain observations concerning these various points, including the problem of the protection of a foreigner's acquired rights. These observations have not yet been distributed to members of the Committee, but I would ask you to be good enough to consider the remarks I have just made.

M. Cohn (Denmark) :

Translation : Mr. Chairman, — I should like to make a few remarks of a somewhat general nature concerning the general principles of our Bases of Discussion.

You may have noticed that, in its replies to the Committee's questionnaire, the Danish Government made a certain distinction between the standpoint of civil law and the standpoint of international law. The same idea might be expressed as follows: in Denmark the public would not understand that a question of external policy was involved whenever the person or property of a foreigner suffered injury. The conviction that the State treats foreigners quite impartially in this respect is so widely held in Denmark that the problem would not readily be considered from the standpoint of the State's international responsibility.

The Bases of Discussion say, for instance, that a State is responsible as the result of failure to show certain diligence in the protection of foreigners and that the public status of a foreigner imposes upon the State a special duty of vigilance.

Take the case of a foreigner — even a foreign public official — who is insulted by a private person. Public opinion in Denmark would not understand the contention that this implied a lack of vigilance or diligence on the part of the State. That would be quite natural, because we do not employ any special diligence with regard to foreigners who cross the frontier of our country. That would be an enormous task, and no one would think it possible of accomplishment. In other words, we think there is not, in principle, any relationship under international law between the State and individual foreigners. Such a relationship arises only in cases which are very rare and wholly exceptional in Denmark — cases in which the State adopts an unfriendly attitude towards a foreigner because he is a foreigner, or because he belongs to a certain country. But that is of very rare occurrence and could not be made the subject of a general rule concerning the diligence that should, in all cases, be shown by the State towards foreigners.

Such are the ideas underlying the Danish Government's first reply to the Committee's questionnaire. We wished rather to affirm the rule of the State's non-responsibility if its law and its administration treat nationals and foreigners impartially and if it employs the means at its disposal for the discovery and punishment of guilty parties.

Where the rules in force are the same for nationals and for foreigners, we are prepared to recognise responsibility only in exceptional cases, in which these rules conflict with the general principles governing the protection of the person and property of private individuals as recognised by most modern constitutions. In such a case, the State in question cannot plead that foreigners are treated in the same way as nationals.

The Committee thought it would be possible to draw up a detailed plan for the codification of the rules on the responsibility of the State. We are in no way opposed to this interesting and perhaps desirable effort. We understand the ideas underlying such a codification, and we admit that there are cases and countries in which a settlement of these problems might be desirable and even necessary. We should, however, emphasise the exceptional character of the rules we intend to codify.

In our opinion, only a very small part of the great problem of the State's is responsibility towards private individuals, whether nationals or foreigners, may be considered and dealt with from the standpoint of public international law. In most cases the questions that arise should be solved according to the rules of the civil or administrative law in force in the country.

My object in venturing respectfully to submit these remarks is not merely theoretical. We are all aware of the disastrous and even catastrophic consequences of exaggerated claims in this connection. There is no need to recall historical examples that are in everyone's memory. It is important to emphasise that, in general, the State is in no way responsible because a foreigner has suffered injury. Even if his Government supports his claim for reparation or compensation, and even if the matter is submitted, for instance, to the decision of an international court, the claim still retains its original character under civil or administrative law. It can only involve the consequences resulting from an infraction of international law in exceptional circumstances — in the case of discrimination against foreigners. Such a situation ought not to be presumed; the good faith of Governments should be taken for granted. Apart from these exceptional cases, a whole population, a whole State, cannot be held responsible because of mistakes made even by State officials.

During our deliberations, I shall have the honour to submit a few small amendments in this sense to the Bases of Discussion. But, even without those amendments, I venture to think that the State does not incur responsibility until all national remedies, whether judicial or administrative, have been exhausted, and that even then the claim in most cases retains its original character under the civil or administrative law of the country.

M. Leitmaier (Austria):

Translation: Mr. Chairman, — Following your wise advice, I shall refrain from developing during the present discussion the considerations underlying the Austrian proposal, the text of which has just been circulated. I shall return to that proposal when we come to discuss the various Bases.

I wish, however, to make one remark of a general nature. It is undeniable — I am sure we are all agreed on this point — that, in dealing with the responsibility of States for

damage caused to foreigners in their territory, we are in no way undertaking the regulation of all those questions of international law which may arise in connection with a particular case involving that responsibility. It is obvious that the many international rules existing outside the limits of our work will, should occasion arise, exercise their effects, on the application of the rules we may accept. I think it is clear, however, that such rules — for example, the rule concerning the succession of States — will be in no way affected by our work.

M. Limburg (Netherlands) :

Translation : I gladly accept M. Giannini's invitation to make this general discussion as short as possible. Nevertheless, I hope he will allow me to set out very briefly the Netherlands delegation's point of view with regard to the Bases of Discussion. I hope that, after hearing me, M. Giannini will not think me an imprudent jurist.

Mr. Chairman, I understood, even before you explained the matter with that admirable lucidity which is characteristic of your remarks, that the Committee of Experts intended to exclude from our discussions the law of war and the law of neutrality. With these we are not concerned. The Committee of Experts thought that the Hague Convention concerning the laws and customs of war and that relating to the obligations and rights of neutrals should not be included in our discussions. On studying the volume of observations submitted to us, moreover, I understood that we were not expected to enumerate all the rights of foreigners or to compile a code relating thereto, for, if we did that, we should be led to deal amongst other subjects, with the whole of private international law.

That being so, I would ask what is the nature of these bases. The Netherlands delegation thinks the bases all rest upon one general principle. At the head of the first basis, we do indeed find the words " general principles ", but these bases contain general principles which are derived from a still more general principle. It is on that principle that we must try to agree. It is that principle which we must endeavour to formulate.

I was much encouraged, Mr. Chairman, by your opening speech. I always hear you with pleasure, but this afternoon I did so with special satisfaction. You referred to that master work, the French Civil Code : you recalled, without mentioning its number, Article 1382, which lays down the principle governing wrongs done by one individual to another. The Netherlands delegation thinks that our present duty is to draft, as far as that is possible, the principle contained in Article 1382 of the French Civil Code, so that it may be adapted to international law. This principle of Article 1382 corresponds to Article 1401 of the Netherlands Civil Code, and we have to transplant it into international law.

If that is so, we must consider all these Bases of Discussion as resting upon one great principle. If we accept a basis, that will be a case of application and nothing more than application. If we reject a basis, we shall merely be making an exception to the principle we have laid down. I hope that during these discussions it will be possible to formulate this principle of Article 1382 for the purposes of international law. For my part, I shall endeavour to find a suitable formula for that purpose.

M. Guerrero (Salvador) :

Translation : I have asked to be allowed to speak since M. Giannini made his observations, but I do not intend to take part in a general discussion. I consider that each of the bases mentioned in the document before us contains a principle which may be accepted or contested and which we shall have an opportunity of discussing when we take them up individually. At present I wish merely to support M. Giannini's prudent and wise advice. We cannot hope to solve all the problems raised in this document. Still less ought we to extend its scope. The question of responsibility in time of war has been mentioned, particularly by our Roumanian and Portuguese colleagues. The Chairman has already given an explanation on that point. I should like to supplement it.

The work before us is based on the study made by the Committee of Experts for the Codification of International Law. When we considered what questions were suitable for codification, we were of opinion that we ought not to take up the question of war, for the Committee thought it would be anomalous to speak of war in a new international institution designed to prevent war. We were, as you are aware, the mandatories of the League of Nations. We could not extend the plan outlined for us. The Committee on Codification recognised that, if a rule is to be codified, the assent of all States is required and not merely the approval of certain States.

Acting upon the instructions of the League of Nations, the Committee on Codification consulted the Governments on several occasions. In accordance with their replies, the Preparatory Committee drew up the Bases of Discussion now before us. Consequently, if any new questions which are not included in this plan are raised during the discussions of the Committee or the Conference, we should be bound to refer these new questions to the Governments and to await their replies. We must confine ourselves to the work that has been prepared.

I should like to make the following suggestion and I do so because I realise that we are all anxious to succeed as rapidly as possible. We have certain bases. On some of them, agreement between all delegations is possible, for, on several of the principles in these bases,

there is no great diversity of opinion. On the other hand, we may be quite sure that on certain other bases there will be no agreement. That is obvious from the replies of some Governments. They show fundamental divergencies. This is the case, for instance, with Basis No. 13 where the attitude taken up by the Governments cannot be modified. Although replies have not been received from all States, the replies that have been sent give the impression that agreement will be reached on certain points.

I suggest that where agreement is possible, as is the case with several provisions — for instance, the first — there should be immediate discussion of such provisions together with any amendments that may be submitted. The other Bases of Discussion, those which it is clear even now will not lead to agreement, should be left until the last moment, when they could be examined in a practical spirit without our entering into discussions that, having regard to the differences already revealed, would prove to be interminable.

I do not expect my suggestion to be adopted immediately, but I think it might be examined and that it would probably prove helpful to our work.

M. Matter (France) :

Translation : Gentlemen, — I was wondering whether I ought to speak, as just now I found myself in complete agreement with M. Giannini and my Netherlands colleague, M. Limburg, who both said that we must proceed by stages. We must first find a starting-point, a solid basis, and, as a great statesman said, we must proceed like the hunter in the marshes and advance only after finding a sure footing. We have, in fact, to find in the mass of juridical principles some point on which we can all agree and from which we may proceed.

M. Limburg sought this starting-point in the provisions of Article 1382 of our time-honoured Civil Code. This article refers to the responsibility of individual men, and it has been reproduced in the codes of all civilised nations.

We find such a starting-point in the Conference's preparatory work, which is so important and so interesting and contains such an abundant wealth of public international law. The discussion that has just taken place, moreover, would seem to show that the principle on which we shall all agree is that international obligations do exist.

In the present state of our civilisation, our conventions, our manners, our customs, there is now indeed such a thing as international law. This law must now, like all laws, be provided with a sanction.

We have, therefore, a first principle on which we can all agree and which I shall attempt to formulate in one simple rule with a conception as wide as possible and referring solely to what I shall term international obligations.

At the present stage of our discussion, I think we might accept the following : " The French delegation considers that the following principle underlies the bases proposed : any failure on the part of the organs (legislative, executive or judicial) of a State to carry out the international obligations of that State involves its responsibility ".

When we come to examine this formula, to revise it, to improve it, the Committee will certainly remember the apposite observations submitted just now to the effect that there are cases of responsibility quite apart from any fault.

The formula I submit has, I think, the advantage that everyone will be able to accept it. In this year of grace 1930, every State has certain international obligations, is bound by conventions and by custom ; any failure to fulfil these obligations, of whatever nature and through whatever organ, necessarily involves the responsibility of that State, since both logic and the science of law teach us that any failure to fulfil an obligation necessarily entails a sanction.

We find this rule in all codes. It appears in Article 1134 in these words : " Contracts lawfully entered into take the place of the law for those who have made them . . . They must be performed in good faith ".

More recent codes, in particular those two fine monuments of jurisprudence, the Swiss Federal Code of Obligations and the great German Code of January 1st, 1900, reproduce this formula in practically the same terms.

You may object that that goes without saying. I reply with Talleyrand : " It goes still better with saying ".

The formula is at once definite enough and elastic enough to be accepted by everybody. As a basic formula it would seem to be capable of securing the unanimous support of the thirty-five or forty nations represented here.

Consider the effect throughout the world — I am thinking not only of the legal world, but the whole world — of this statement that, in the unanimous opinion of this Committee, the League of Nations, represented by this Conference on Codification, is unanimously agreed on the principle that every State is responsible for failure to comply with its international obligations.

If it is true that States like individuals must progress slowly, not by sudden leaps but by stages, your unanimous decision on this point would indeed be a singularly fortunate event in the history of our law and our civilisation. We should not merely have spoken, to use a celebrated phrase, as Europeans ; since

we represent all nations, we might claim that we were speaking for mankind.

Veli Bey (Turkey) :

Translation : Gentlemen, — Whilst the Turkish delegation fully appreciates what is being done, it thinks two observations might usefully be submitted.

The international responsibility of States has been considered from a narrow standpoint. The infraction of international law gives rise to injuries that are not merely individual. Cases can easily be imagined in which a State may suffer moral or material damage, directly and as a community through an act or acts committed by another State in violation of international law, and that quite apart from damage individually suffered by the nationals of the injured State.

A State which suffers from the more or less concealed attacks of another State, attacks on its independence, its territorial integrity its system of government, its credit or its prestige, ought also to be able to invoke a juridical rule to summon, its aggressor before an international court and to secure an adequate and effective decision.

The legal means of protection which, according to the Bases of Discussion, may be employed on behalf of the person and property of individual nationals ought, therefore, to be extended when necessary to the whole community of the State. The Turkish delegation accordingly requests the Committee to consider the question of extending the Bases of Discussion, so that they may include formulæ corresponding to the point of view I have just explained.

In the second place, as the object of this Conference is the codification of international law, the Bases of Discussion should be much more precise and definite.

The Turkish delegation hopes that the formulæ finally drawn up will be as precise and definite as is necessary.

M. Richter (Germany) :

Translation : The German delegation has just lodged with the Bureau a Note concerning the delimitation of the objects of our Convention. On this matter we agree with the ideas expressed by M. Giannini. As our Note is very short and as other speakers have dealt with the same problem, I should like very briefly to explain the German delegation's point of view.

The Preparatory Committee pointed out on page 25 of the Brown Book (document C.75.M. 69.1929.V) that, in defining the conditions under which a State becomes responsible for damage caused by it to foreigners, it is important to determine ; (1) which are the persons, authorities and organs whose acts are to be regarded as acts for which the State is responsible ; (2) what elements of wrongfulness must attach to these acts in order to render the State responsible. To this second question the Bases of Discussion give a general answer which seems to cover all cases : the act causing injury must be contrary to the obligations imposed on the State by international law. This principle is asserted in Bases Nos. 2, 5 (2), 7, 12, 13 and 16. It is separately laid down in regard to the acts of the legislative, executive and judicial power and the acts of officials. We might have stopped there. The responsibility of the State can, in fact, arise only through an act contrary to the international obligations of the State.

After asserting the general principle, however, the bases deal with certain special situations : acts affecting the rights of persons to whom concessions have been granted ; repudiation of debts or suspension of their service ; deprivation of liberty ; requisitions, destruction and other damage suffered as the result of riots, disturbances, etc.

These provisions deal, not with the international results of the non-fulfilment of obligations incumbent upon the State with regard to the treatment of foreigners, but with the actual content of those obligations. Here it is not sufficient to say that the State is responsible if it violates its international obligations, but those obligations are defined for certain special cases. We think this method is open to serious objection. It should first be remembered that the international rules applicable to the treatment of foreigners are the subject of a draft convention which was submitted to the Paris Conference and is still before that Conference. It seems inadvisable to encroach on the domain of that Conference.

Further, if a codification convention lays down only certain rules concerning the treatment of foreigners to the exclusion of other rules, the existence of which cannot be denied and the codification of which is quite as important, that fact alone would be likely to weaken the binding force of the rules to which the convention does not refer.

We therefore think that, if our work is to be successful, its object must be limited. It must, at all events in principle, be restricted to those obligations which arise through the non-fulfilment of obligations concerning the treatment of foreigners and which call for reparation and satisfaction. In other words, it would be advisable, in principle, not to define in the present Convention the attitude that should be adopted by the State as regards respect for, and protection of, the person and property of foreigners.

Moreover, the adoption of this principle does not preclude the possibility of inserting in the Convention some of the special rules to which I have referred. We think, however, that this should be done only for very weighty reasons of a special nature.

M. Politis (Greece) :

Translation : My remarks will be vey brief. I should like, before this general discussion closes, to express shortly my entire agreement with my distinguished friends M. Limburg and M. Matter. The formula submitted to the

Committee by M. Matter seems to me to be wisdom itself. I support it without any reservation and I am fully in accord with all he said.

I think that the success we desire will be achieved only if we limit our activities and are content with a few general formulæ in addition to the one just submitted. We must be careful to exclude some of the rules indicated in the bases which relate to questions of substance. In addition to the general rule which has just been suggested we must, I repeat, confine ourselves to rules which are also very general and very elastic, on four or five points: on the question of what acts may be deemed to be acts for which the State is responsible, on the causes for which responsibility may be declined, on the conditions under which responsibility may be invoked, on the consequences of responsibility.

I think it is most important that these rules should be very wide and very elastic, and for the reason that international law is in course of formation. We are not called upon to deal here with rules of substance or those obligations the infraction of which constitutes responsibility, but we must content ourselves with general rules which will allow legal practice, which is continually shaping the law to pursue its work unhindered.

I therefore agree wholeheartedly and unreservedly with the proposal made by M. Matter and I hope the Committee will adopt it unanimously.

The Chairman :

Translation : The list of speakers in the general discussion is exhausted, and I declare the general discussion closed. We come now to the consideration of the Bases of Discussion and the amendments or proposals that have been submitted.

The Committee rose at 6.30 p.m.

SECOND MEETING

Tuesday, March 18th, 1930, at 3 p.m.

Chairman : M. BASDEVANT

7. APPOINTMENT OF A DRAFTING COMMITTEE.

The Chairman :

Translation : The Bureau has considered the advisability of constituting the Drafting Committee immediately. The Drafting Committee will embody in articles to be submitted to this Committee the principles previously adopted by the Committee.

I propose that the Drafting Committee should be composed as follows :

Professor BORCHARD (United States of America),
M. DE VIANNA KELSCH (Brazil),
Professor CAVAGLIERI (Italy).

Is there any objection?

The proposal was adopted.

The Drafting Committee will, of course, co-operate closely with the Rapporteur.

8. GENERAL PRINCIPLES : PROPOSAL OF THE FRENCH DELEGATION (Annex II-France).

The Chairman :

Translation : Gentlemen — I would remind you very briefly of the point we reached yesterday. We had completed the general discussion on the general principles stated in some of the Bases of Discussion. The French delegation submitted a proposal, suppported by other delegations and stating in a formula as simple as possible the idea underlying a whole series of the Bases of Discussion included in the general principles. The formula was read at yesterday's meeting and has since then been further considered. After certain conversations, and in view of the ideas expressed at yesterday's meeting, this formula was simplified and at the same time made more definite by an indication that it applied to the matters included in our work — *i.e.*, damage caused to the person or property of a foreigner in the territory of a State.

Accordingly, the proposal, which has just been circulated, now reads as follows :

"A State is responsible for any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner in the territory of the State."

This is a general formula ; and, if you accept it, you will leave open all questions regarding the exact determination of its scope. If this text is adopted, we shall subsequently consider, in connection with each of the Bases of Discussion before you, the State's responsibility by reason of acts or omissions on the part of the legislative power, the executive power, officials, etc. We shall also have to consider the question of officials who exceed the limits of their authority and other similar matters. I may at once add that, if you agree with suggestions that are to be made, we shall have to consider the very important question of the preliminary exhaustion of local judicial remedies. I have before me a proposal that the question of the exhaustion of local judicial remedies should be considered in relation to Basis No. 7, which deals with responsibility by reason of the acts or omissions of the executive power.

That is the position at present. I must add that the South African delegation yesterday submitted the following proposal :

" A State must conform to the standards and rules which the accepted principles of international law regard as incumbent upon States, and must make reparation for damage suffered by a foreigner in his person or property in consequence of its failure to comply with this obligation."

It agrees in substance with the French proposal. I do not think we need vote separately on the two proposals. If the French proposal is adopted, I think the Committee will agree to refer the South African proposal to the Drafting Committee, which will consider whether it is possible to combine it with the other proposal.

I take this opportunity of explaining that votes now given in the course of the discussion and with regard to the various bases are votes of principle. The preparation of texts will be the duty of the Drafting Committee.

Finally, the Roumanian delegation has just handed me a short declaration concerning the French proposal :

" The Roumanian delegation is in complete agreement with the French delegation's proposal which indicates clearly the reason for which the Conference was convened and recognises the undoubted international responsibility of any State which, by the act or omission of any of its representative organs contravenes an international obligation properly established, assumed or recognised in regard to a foreign national."

That is the point we reached in our deliberations.

Mr. W.-E. Beckett (Great Britain) :

I am in entire accordance with the French proposal, but would like to clear up one or two points. In the original draft of the French proposal yesterday there were three words in brackets. They are omitted in the text which is submitted to us to-day, but I take it there is no change of substance and that the meaning is the same.

My second point is the following : reference has been made to the South African proposal, and I take it that, if we vote in favour of the French proposal, the Drafting Committee, when putting it into its final form, will take into account both proposals together as having been accepted by this Committee.

M. Politis (Greece) :

Translation : I should also like to say a few words on the same subject and, if necessary, make a reservation. I also noticed the deletion of those three words which appeared in the original text of the French delegation's proposal. I realise that this deletion is due to the fact that the acts of the various organs of the State are covered by a number of bases before us. I wish to make a reservation forthwith to the effect that, if these bases are not ultimately accepted, I shall ask that the three words " legislative, executive, or judicial " should be introduced in the text finally adopted.

M. Guerrero (Salvador) :

Translation : I have always maintained that the international responsibility of a State arises from a failure to comply with its international obligations. I should, however, like to submit a few observations at the very outset of our work of codification. The relations between States require to be made clearer and more definite and, as we are undertaking the work of codification, each State should know what is to be codified just as it should know both its rights and its duties and their respective limits.

If we consider the French proposal alone, we shall find that it is so concise that it remains vague and might give rise to misunderstandings between States.

As the Chairman has explained that international obligations are to be defined subsequently, I do not think it necessary to object to the French delegation's proposal.

In any case, before voting on the question, I think it would be well for us to agree to adopt the proposal in principle, but to await the result of our work before giving a final decision. Everthing will, in fact, depend on our definition of international obligations with regard to each of the three organs.

I am not making a definite proposal but merely a suggestion. To sum up, I support, in principle, the declaration made by the French

delegation — provided, of course, that the international obligations of each of the three organs of public authority are clearly defined.

M. de Adlercreutz (Sweden) :

Translation : I agree with M. Guerrero's remarks. The Swedish delegation will support the French delegation's proposal, subject to a clear statement of the exact scope of that very general declaration of principle.

M. Cohn (Denmark) :

Translation : I venture to ask whether the words " in the territory of the State " serve any useful purpose in the text. This rule is very general ; it is somewhat vague and these words are the only qualification of a special nature. They might perhaps justify the deduction that the rule does not apply outside the territory of the State. I do not think that is our intention. I believe, therefore, it might be better, as the rule is of so general a nature, not to include these words.

The Chairman :

Translation : The Danish delegate proposes to strike out the words " in the territory of the State ". If he wishes to press his proposal, he may request that the text should be divided and voted upon in parts and he can then vote against the words in question.

I venture to point out that the object of these words was to bring the French proposal exactly within the limits of the task assigned to this Committee and the Conference by the decisions of the Council and Assembly of the League of Nations. We are not expected to settle the responsibility of the State in general, but merely the responsibility of the State for damage caused in its territory to the person or property of foreigners.

M. Suarez (Mexico) :

The Mexican delegation associates itself with the proposal of the French delegation. It believes, however, that, if that proposal contains the truth, it does not contain the whole truth. The Mexican delegation wishes to suggest that the principles proposed by the French delegation should be combined with another principle.

We do not think that any failure on the part of the organ of the State to comply with the international obligation of the State always entails the international responsibility of the State. We think it is necessary that all legal remedies should be given. I wish therefore to suggest, in order that these principles may be realised, the addition of the following words : " if direct legal remedies have not been given to obtain adequate redress ".

Mr. Hackworth (United States of America):

The United States delegation cordially agrees with the proposal of the French delegation, but feels that it hardly goes far enough. We would therefore like to suggest that it be amended by adding the following words : " This imports a duty to make reparation to the State of the foreigner for the damage thus caused ". We think that this addition would complete the definition in the manner in which we would like it to appear in the code or in our Convention.

The Chairman :

Translation : I would ask delegations which intend to submit amendments to the French proposal to be good enough to send them to the Bureau in writing.

M. Nagaoka (Japan) :

Translation : The Japanese delegation does not object to the French proposal but would like to know whether this proposal is to be inserted in the actual text of the Convention or in the preamble.

M. Cruchaga-Tocornal (Chile) :

Translaion : The purpose of this Conference is to codify the rules of the law of nations regarding international responsibilities, that is between State and State. In no case is it possible to bring within its competence what concerns the domestic or municipal responsibility of the State — that is, between the State and individuals.

The Bases of Discussion included under the heading " General Principles " are not drafted with sufficient precision to establish a line of demarcation between the two types of responsibility outlined above ; neither does the French proposal for a definition of the fundamental postulate on which those general principles rest fulfil that *sine qua non* condition.

In our opinion, the domestic or municipal responsibility of a State is governed by its internal legislation, and its existence is a prerequisite to that of an international responsibility, domestic or municipal responsibility becomes international only when :

1. The laws and institutions of the State do not extend to the alien the means of obtaining redress against the official entities or functionaries which may have caused him a wrong susceptible of pecuniary reparation ;

2. The judicial and administrative courts and authorities of the State, whatever may be the standards of their organisation and operation, discriminate against the alien resorting to them under the domestic laws which recognise his equality with the national ;

3. The resources placed by domestic legislation at the disposal of the alien have been exhausted without his having secured adequate redress; and

4. The damage resented by the alien is a consequence of the breach of an international compact between the two respective States, that is, between the State against which a claim is pressed and the State of which the claimant is a national.

The foregoing broad principles presuppose the existence, which I believe to be necessary, and should be required in the legal system of every civilised State, of the aforementioned municipal sources of redress and the correct application thereof, in such a manner as to preclude the possibility of a denial of justice. The only exception to the general rule already stated is the one regarding an international responsibility accepted in a treaty when no appropriate legislative measures are taken duly to fulfil it.

We believe that, upon the foundation of the general principles outlined above, and with the clear understanding that the alien is in no wise acknowledged to have a preferential position as compared with the national in the matter of his relations with the State, it would be possible to formulate the broad lines of a Convention endowed with the elasticity to which M. Politis referred yesterday. Once this foundation is solidly established, we may proceed to erect upon it the structure of subsidiary provisions directed to regulate the application of the broad rule of international responsibility to particular cases.

I have no objection to make to the proposal of the French delegation because I think we can combine it with the proposal of the Belgian delegation already before us.

The Chairman :

Translation : I fear there is some danger of reopening the general discussion which we thought was concluded yesterday. The amendments which have just been submitted relate to very important points. These points are dealt with in Bases of Discussion that we shall consider later. It is impossible to discuss everything at the same time. The French proposal gives us a starting-point for our work. If we accept the formula, that starting-point will not, of course, cover all our discussion. Other questions will come later and will define exactly the scope of that principle ; they may perhaps fix its limits. The question of the preliminary exhaustion of legal remedies, for instance, will come later ; so will certain other questions that have just been mentioned. I would therefore ask speakers to be good enough to confine themselves to the point now under discussion and to reserve for the future any explanations bearing on other matters.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : I do not wish to deal with questions that will have to be raised later. I merely desire to make an observation regarding the absolute form given to the French proposal.

I thought, and still think, that, when the French delegation formulated its proposal, it did not intend to lay down an absolute principle. The rules and provisions of the Convention we are now discussing are really limitations and restrctions. The French delegation intended merely to lay down a principle as to the basis of responsibility. It did this in an absolute form which has given rise to certain fears and reservations. The Chairman has already pointed out that there is a danger of encroaching on other questions.

I think this proposal might well be preceded by a simple phrase : " subject to the provisions of the present Convention . . . " These few words would prepare the way for the restrictions and limitations that follow. There are bound to be limitations concerning the claimant, the national character of the claim, etc. There are also restrictions with regard to the right of self-defence. Thus, there is a whole series of limitations to the application of the general principle.

To sum up, delegates must be reassured by some indication that the whole question is not finally solved. We are merely stating the basis of responsibility.

M. Giannini (Italy) :

Translation : The Chairman suggested just now that we might refer both the French formula and the South African formula to the Drafting Committee. I should like the Committee to realise the disadvantage of referring to a small Drafting Committee a question of substance on which we are evidently divided.

The French formula relates to a problem on which agreement is fairly easy, whilst the South African formula lays down the principle that the State must conform to certain rules and must make reparation for damage suffered in consequence of its failure to comply with its obligations. I think it will be very difficult to agree on the South African proposal, for the notion of fault might involve us in very lengthy discussions owing to our differences of opinion.

Accordingly, I think the Drafting Committee should be asked merely to improve, if possible, the formula proposed by the French delegation.

I come to a second point. Several of our colleagues have said that this formula contains too much. Others, however, have stated that there is something lacking.

Some speakers have, in fact, suggested that the words " in the territory of the State " should be struck out. I think, however, that we must retain these words, for they actually occur in the question as submitted to the Conference : " Responsibility for damage caused in their territory ".

I have other reasons, too, for opposing the deletion of these words.

If a State incurs responsibility in the territory of a State not a party to the Convention, what would happen? It is very difficult to solve such a problem, for the State not party to the Convention could *not* consider itself bound.

It has been said, too, that something is wanting. I think several things are wanting. The whole Convention is wanting.

The question as to the form to be given to the proposal is still undecided. I fully agree with my Japanese colleague. I should like our French colleagues to consider this point. Really, we have here not an article or a rule of a Convention, but rather a declaration of principle. As the whole Convention is to be based upon this declaration, it would be better to insert it in the Preamble. I think that would meet the wishes of many delegates.

M. Plesinger-Bozinov (Czechoslovakia):

Translation: The Czechoslovak delegation might accept the French proposal, but considers that it is too general and that it might consequently go beyond the Bases of Discussion drawn up for this Conference by the Preparatory Committee. The Czechoslovak delegation will therefore postpone its decision on this proposal until, as arranged, there has been a consideration of the series of the points submitted to us as Bases of Discussion.

M. Matter (France):

Translation: The French delegation is highly gratified by the way in which its proposal has been received. It tried to sum up in as simple a formula as possible the general view of the Committee on this subject.

It may doubtless be thought that certain things are wanting. You were quite right to point this out. Some speakers think the proposal contains too much. I should be sorry if it were found to be too comprehensive, for it seems to me to be in harmony with the duties of nations in this year 1930. I shall be very willing to accept amendments, but I think this article has one very great advntage: it actually exists. It would, even now, indicate a step forward. That is the first remark I have to make.

The second is that I agree entirely with the Italian delegation. As I was early trained in the same system of law and as I studied at Rome, this agreement does not surprise me, I must, however, make one observation. This is not a declaration of retrospective law affecting the past, as though the law already existed. It is the first article of a Convention, the dominating article of course, and to some extent it influences the whole Convention. It is what is called in universal law a fundamental article. But, like all other articles in laws or Conventions, it affects only the future. That is the only reply I wish to make to M. Giannini. For the rest, I am in complete agreement with him.

I have but little more to say, but in that little I should like to express all my feeling, all that love of right and justice developed in me during a long legal career. I should like to make an energetic, friendly and vigorous appeal on behalf of this proposal. We, who are of the generation that is passing away, attach great importance to such work. At the moment when, sooner or later — as late as possible — we have to pass on to others the torch of justice, we have so keen a desire to see that torch raised high that we should like to have absolute and complete unanimity in this matter. I do not think I am wrong in holding that the simple sentence before me will be adopted by a majority. Is that enough? I do not think so. I should like it to be said in this Committee, and repeated outside, that some forty States have met and declared that all nations are unanimous in asserting that, whenever a wrong is committed in a country, and all the regular remedies have been exhausted, the State is ultimately responsible, and have proclaimed that there is a sacred duty to protect foreigners. I should like it to be said that there was unanimity in the adoption of the essential principle of the bases submitted to us — namely, the ultimate responsibility of States that have not taken all the precautionary measures and all the legislative executive and jurisdictional measures that are necessary. I should like such a decision to be taken unanimously.

Am I too ambitious? I think not. I really believe that, by asking you to adopt this attitude, which is entirely in harmony with the lofty aims of the League of Nations and in accord with the progressive march of humanity, I am asking you to perform a simple act of right and justice.

The Chairman:

Translation: That completes the discussion. I think we can now vote on the text of the French proposal. Afterwards, we will proceed to consider the amendments and, if necessary, vote upon the whole.

M. Giannini has pointed out that this text might be inserted in the preamble. Any decision on that point might perhaps be premature, as we are not yet concerned with questions of drafting.

He further reminds me of the South African amendment. That proposal contains, in the first place, a formula which expresses the idea underlying the international responsibility of the State in a different way from the French proposal.

I suggest, after conversation with the South African delegate, that this formula might be referred to the Drafting Committee for a decision as to how far it could be taken into account.

In the second place, that proposal contains a formula relating to reparation for damage suffered by a foreigner in his person or property. That is a point we shall consider later, as it appears in one of our Bases of Discussion.

When I spoke of consideration by the Drafting Committee, I was thinking of the first point. The second is reserved for future consideration by the whole Committee.

What I have just said leads me to turn to the delegation of the United States of America.

That delegation wished to add to the French proposal a phrase saying that the responsibility of the State implies the duty to make reparation to the State whose national has suffered damage.

What I have just said with regard to the second part of the South African proposal applies also to the United States proposal. I must say that, in my opinion, this assertion of the obligation to make reparation for damage might be introduced when we consider the Basis of Discussion relating to the problem of reparation for damage. Accordingly, with a view to the progress of our work, I would ask the United States delegation whether it will agree to postpone consideration of its suggestion.

Mr. Hackworth (United States of America) :

The United States delegation withdraws its proposal.

The Chairman :

Translation : I turn now to the Mexican delegation ; here my hands are somewhat freer since no formal amendment has been submitted, but merely a verbal amendment. I do not know how far it is maintained or whether I may hope for its withdrawal.

This verbal amendment consisted in adding to the French proposal the idea that responsibility should be subject to the preliminary exhaustion of the local legal remedies. This condition as to local remedies is, however, covered by another Basis of Discussion. That basis does not, indeed, appear among the general principles, but we have before us a proposal by the Belgian delegation that the rule concerning the preliminary exhaustion of local remedies should be included in the general principles.

We shall therefore have to discuss that point very soon. Accordingly, I hope that, in the interests of our work, our Mexican colleague will be good enough to withdraw for the moment his request that his suggestion should be considered.

M. Suarez (Mexico) :

The Mexican delegation withdraws its proposal.

The Chairman :

Translation : I now turn to the Egyptian delegation.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : I shall not insist. I did not intend to suggest that the French proposal should be voted upon only with the phrase I proposed as an amendment. I desired simply to indicate the relative character of the declaration. This relative character will be obvious from the whole Convention.

M. Urrutia (Colombia) :

Translation : In order to avoid any explanations when the vote is taken, I should like to say now that I shall vote for the French proposal if we add " in the cases and under the conditions stated in this Convention ".

In the absence of such a qualification I should very regretfully feel bound to abstain. The formula is too general to be acceptable without qualification.

M. Nagaoka (Japan) :

Translation : The decision whether the French delegation's proposal should appear in the body of the Convention or in the preamble has been postponed. There is one small matter I should like to point out to the Drafting Committee which will consider the text. The Chairman stated just now that the words " in the territory of the State " were agreed upon in Geneva. I notice that Basis of Discussion No. 14 refers to acts performed in a foreign country. If we decide to insert this formula, the phrase in question will need careful attention.

The Chairman :

Translation : I think that all the amendments have now been abandoned, or rather postponed. But now His Excellency M. Urrutia asks us to supplement the French proposal by the phrase " in the cases and under the conditions stated in this Convention ".

I would ask M. Urrutia whether this formula, which may be very appropriate later, is not at present premature. We are merely framing a provision which will serve as our starting-point. It will be limited and defined by the provisions we adopt in the course of our work. As we do not know exactly what shape our work will take, I would ask M. Urrutia whether he thinks it is really essential to introduce this qualification in a text which is not yet the text of a convention, especially as we do not know whether it will appear in the preamble or in an article. Could not M. Urrutia give us his vote and reserve for later the supplementary suggestion he had in mind?

M. Urrutia (Colombia) :

Translation : Mr. Chairman, I frankly hesitate to vote for this formula but, as I do not wish to adopt an attitude of stubborn opposition, I shall vote subject to reservation.

The Chairman :

Translation : We are left now with only the text of the French proposal. You have it before you. Thus there is no need for me to read it. I shall ask delegations to vote.

(A vote was taken by a show of hands.)

The French delegation's proposal was unanimously adopted by the thirty-five delegations present.

The Chairman :

Translation : Gentlemen, I am glad to note the uanimous vote of thirty-five delegations in favour of this proposal.

Thanks to the spirit of conciliation shown, particularly by delegations who felt some hesitation and wished for certain qualifications, thanks to their goodwill in agreeing to postpone consideration of various points which they thought important, we have achieved a first result which is of good augury for the remainder of our work.

M. Matter (France) :

Translation : I think we have done good work.

9. CONSIDERATION OF BASIS OF DISCUSSION No. 2.

The Chairman :

Translation : We shall now proceed to consider, one by one, the Bases of Discussion before us (Annex I).

With that consideration we shall combine, in the order that seems most logical, the various supplementary proposals and amendments that have been submitted.

In this connection, I should first mention the general observations submitted by the German delegation which are before you and which, in effect, summarise the very interesting speech we heard yesterday. These general observations are stated as follows :

> " The German delegation desires to refer to the general observation submitted by the German Government in regard to the scope of the problem relating to the responsibility of States. In accordance with that general observation the German delegation would suggest that the problem should be defined and delimited.
>
> " In its opinion, the present discussions should relate to the question of the general conditions of responsibility — that is to say, should lay down the general conditions under which a State incurs responsibility for damage suffered by a foreigner in its territory. The authors of the questionnaire and the Bases of Discussion also seeem to have considered this aspect of the problem as being the most important. In point of fact, only a few Bases of Discussion go beyond the limits thus marked out and aim at imposing certain special obligations with regard to the treatment of foreigners."

As you see, the Bases of Discussion come, in general, within the limits approved by the German delegation. Only a few Bases of Discussion go beyond these limits. We shall deal with them later and it is then that the German delegation should advance its objections. For the moment, we shall merely take note of these general observations, with regard to which no discussion is necessary.

M. Richter (Germany) :

Translation : That is exactly our point of view, Mr. Chairman. We shall submit our observations later.

The Chairman :

Translation : We can therefore consider Basis of Discussion No. 2, which reads as follows :

> " A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations."

This text deals with the State's responsibility for acts or omissions of the legislative power. A corresponding text in Basis No. 7 relates to the State's responsibility as a result of acts or omissions on the part of the executive power. We shall consider that later.

The delegation of the United States of America has proposed that a single text should be substituted for Bases Nos. 2 and 7 :

> " A State is responsible for damage suffered by a foreigner as the result of a wrongful act or omission of its legislative or executive authorities incompatible with its international obligations."

For the moment, we might discuss Basis No. 2 and reserve for subsequent consideration the suggestion made by the delegation of the United States of America.

M. Cavaglieri (Italy) :

Translation : Gentlemen — The Italian delegation entirely approves Basis No. 2. In our opinion, it clearly and definitely marks the distinction between responsibility under international law and responsibility under municipal law.

This basis lays down the principle that the State may infringe its international obligations either by action or by omission — that is to say, either by legislation incompatible with its international obligations or by failure to enact the necessary legislation.

I should like to refer to the drafting of this basis. It is important to frame provisions which, as far as possible, give rise to no disagreement.

I should, in the first place, like to strike out the words " resulting from treaty or otherwise ". I would simply say that the State is responsible if it has enacted legislation incompatible with its international obligations.

I should stop there. There can be no doubt that the State is responsible if it has enacted legislation incompatible with treaties.

The words " or otherwise " seem too vague and might, I think, give rise to disputes. If we wish to retain this idea, I propose that we

should say "resulting from treaties or from recognised principles of international law". In point of fact, I do not think international obligations can arise otherwise than from treaties or the recognised principles of international law. In order to facilitate the approval of this basis, however, I propose that we should strike out the whole of this phrase and say merely "incompatible with its international obligations, or of failure . . ."

My second remark, although concerning the drafting, relates also to a question of substance. The text of Basis of Discussion No. 2 is as follows: ". . . or of failure to enact the legislation necessary for carrying out those obligations". I propose to substitute the word "omission" for the word "failure". It is hardly necessary to give my reasons for this change. The expression "failure to enact" implies the idea of fault and, accordingly, raises a very serious question which we should do well to avoid, at all events for the moment. When we say "omission to enact" we are merely stating a fact, an abstention, without taking any decision on the question of fault.

M. Guerrero (Salvador):

Translation: In substance, I approve of the basis under consideration; that is to say, I agree that a State incurs international responsibility either as a result of enacting, or omitting to enact, legislation. But I agree with our Italian colleague that the words "or otherwise" are too vague. The texts we are drawing up must be very definite. But I do not think we should replace the words "or otherwise" by "or from recognised principles of international law". What, in fact, are the principles of international law which are recognised at present? We are now engaged in determining those principles. Accordingly, I propose that we should say "resulting from treaties and from the provisions of the present Convention". There can, indeed, be no doubt that treaties constitute an international obligation and the same will be true of the provisions we are now framing.

M. d'Avila Lima (Portugal):

Translation: If the statement proposed for our examination in Basis No. 2 is regarded as a whole — that is to say, apart from the judicious distinction drawn by the Preparatory Committee, we may consider it from two standpoints differing substantially both in nature and origin.

The former, the more obvious, corresponds to the acknowledged politico-sociological fact that as the State, which is both actively and passively responsible from an international point of view, is merely a legal abstraction, its concrete expression must be sought in the organs and representatives exercising the sovereign power, or *Herrschaft* as our colleagues from beyond the Rhine describe it.

Now, as it is also certain that the designation of the organs empowered to represent the authority of the State is a matter which comes within the sovereign jurisdiction of each State, the whole problem under consideration would seem to be an example of what the old metaphysicians called *petitio principii*. On the one hand, the international responsibility of the State is asserted; on the other, the State is left free to define that responsibility both objectively and subjectively.

We must remove this paralysing uncertainty. For that purpose, it is not enough to frame a generic and purely academic formula asserting the existence of international responsibility and saying that a State incurs international responsibility. The problem must be analysed. It was doubtless this need for analysis that led the Preparatory Committee to adopt the traditional division for the organs constituting the general mechanism of the State. We should like, however, to introduce two changes — to which we shall now refer — in this famous tripartite division. First, as a tribute to what we deem to be the most progressive technique of public law, we would replace the word "executive" by "governmental". Next, we would provide for the possibility of the powers of the State being concentrated in the hands of a dictator. This seems necessary if we consider the present political situation.

We pass now, according to the recommendations and the proposals of the Preparatory Committee, to the first of these divisions — *i.e.*, the legislature. If we argue from the legal effect — namely, the international responsibility of the State, we must admit, as a result of the binding character of international principles, that the infringement of international obligations arises as a result of the violation of any of those principles or undertakings, and they should indeed be considered as examples of a *lex specialis*.

Such an infringement may occur either positively or negatively — *facto suo aut omissione* — as was taught some five centuries ago by the great Grotius, who may be considered as the founder of international law, and whom, I hope, our colleague M. Giannini will not describe as an imprudent jurist.

Having stated this consequence, its application leads us directly, in the first place, to the organ or organs which, according to the mechanism accepted and recognised by most States, are responsible for framing legislative principles.

Such an application seems, in principle, both justifiable and indisputable. It admits of no restriction or reservation such as would amount to a total or partial denial of the old precept, "*error juris semper nocet*".

Ignorance of the law is no excuse. That maxim should also apply to States.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : After the adoption of the French proposal, the only part of the first four Bases of Discussion that needs to be retained is the indication of the organ. In the French formula itself, the Committee has, in fact, already expressed its opinion with regard to acts or omissions incompatible with international obligations.

The Bases of Discussion now before us were evidently drawn up before the French proposal was submitted, and they merely repeat the notion of an act or omission incompatible with international obligations. This principle may therefore be considered as adopted by the Committee, as the circumstances under which a State becomes responsible are indicated in the French proposal.

That proposal very briefly introduces the idea of the organ in the words, " on the part of its organs ". The four Bases of Discussion were intended to define exactly the organ through which the State becomes responsible. The first is concerned with the legislature, the second with the executive power in its highest form, the third with officials acting within the limits of their authority, and the fourth with officials who exceed their powers but purport to act within the scope of their authority. Personally, I think the only part of the bases we need retain is the indication of these organs. As I said just now, we may consider the principle as adopted and, apart from questions of drafting, the whole matter has therefore been exhausted.

Mr. W. E. Beckett (Great Britain) :

I think that the remarks of the delegate for Egypt are quite sound. I only want to say one word about the observations of M. Guerrero.

I should be perfectly ready to agree with either of the alternative Italian proposals — namely, to say expressly that the international obligations concerned are those which result from treaties or international law, or not to define these words at all.

I do not think, however, that I could agree with M. Guerrero's proposal which is, in fact, to limit these obligations to those resulting from international conventions, because it is quite certain that in this Conference and in the work which results from it we shall not cover the whole grounds ; there will still remain a considerable amount of customary law which will impose obligations upon States and to which this principle must apply. I do not think M. Guerrero means to deny any obligations under customary law — I do not take his proposal to mean that — but it is clear, I think, that we cannot limit the obligations to those resulting from international conventions.

M. Sipsom (Roumania) :

Translation : I desire to support very definitely M. Guerrero's point of view. The principle of responsibility in general has been admitted. I cannot agree with the Egyptian delegate that, once this general principle is admitted, we cannot discuss conditions and that these conditions are entirely covered by the recognition of the general principle. On the contrary, the next step should be to consider distinctions and methods of expression.

Basis of Discussion No. 2 relates to one of the ways in which the State becomes responsible — namely, act of the legislature. This basis says that the State may be responsible in two ways — either by a definite action or by an omission. The State is responsible through action if, having undertaken certain international obligations through treaties or conventions, it does not fulfil such international obligations ; through omission, if it fails to include them in its municipal law, and consequently does not perform what it had undertaken to do.

So much is certain, and everyone will agree on that point. If, by a treaty or convention, a State undertakes to enact legislation or to do a certain thing on behalf of a foreigner and fails to do so, or if it acts in the opposite sense, it definitely infringes the treaty and incurs responsibility. The words " or otherwise " have, however, been added. Thus, what was very clear and definite in the first part becomes vague and indefinite in the second part. If obligations are vaguely asserted by the words " or otherwise " whereas the whole object of codification is to define cases of responsibility, that would be contrary to the very purpose of codification.

I cannot accept the Italian delegation's suggestion — namely, that we should strike out these words, for their deletion would not give the result we desire. It would merely leave the matter indefinite and vague, whereas the great need is for precision. I support M. Guerrero's suggestion — namely, that we should define the words " or otherwise " with regard to the way in which a State becomes responsible.

Is ordinary international law or custom clear? Is it definite? There are certainly cases which are clear and definite. They should be stated. Accordingly, we must now frame rules and state cases which by legal practice or custom are recognised as cases of responsibility of an extra-contractual nature for the former cases (treaties and conventions) relate to contractual responsibility.

Hence M. Guerrero's proposal — " resulting from treaties and from the provisions of the present Convention " — should be added to the formula. The very object of this Convention and this codification is to define the cases in which a State may be responsible otherwise than through the violation of a treaty or convention.

M. Dinichert (Switzerland) :

Translation : We might obviously have asserted in one formula the principle that the State is responsible for acts incompatible with international law, irrespective of the State authority by which such acts are committed — whether it be the constituent authority, the legislature, the executive or the judiciary. Possibly we shall return later to the proposal to combine in a single provision two or three of the bases we have considered. For the moment, however, I shall follow the programme before us.

I wish to say, in particular, that I entirely support the Italian proposal concerning Basis No. 2. If we adopt that proposal we shall refer solely to the international obligations that should be respected by the State. As the Italian delegation has stated, there is no need to define or comment on what we mean by "international obligations".

I wish, however, to emphasise that, in my opinion, we cannot employ any other expression. Obviously, we are referring to treaties, custom and the generally recognised principles of international law. All these bind the State concerned in the same way and to the same extent. I am sorry to differ in this respect from two weighty opinions that have been expressed. I regret it because we differ on a question which is evidently fundamental and far-reaching. I wish everyone here could have agreed, at the very outset of our work, that the international obligations of a State are bound to include written law and also unwritten law, which has become custom, and generally accepted principles. I think that, if we adopted any other formula — for instance, conventions together with the Convention with which we are now concerned — we should be taking a very regrettable retrograde step.

We are almost all of us parties to the Statute of the Permanent Court of International Justice. Therein we have all agreed that, in international matters, justice shall be rendered on the basis of written law and the generally recognised principles of law. Accordingly, not only am I unable to change my opinion, but I would have greatly liked to be able to convert those of our colleagues who entertain some doubt on this matter. On the other hand, I agree with them when they say it is desirable to some extent to convert customary law and generally recognised principles into written law, and that we should seize this opportunity for doing so.

That is obviously desirable, and I shall be glad to discuss the matter with them when, in a few days' time, we take up the consideration of those Bases of Discussion in which we define some at least of the acts that must be considered as incompatible with international obligations. It is absolutely impossible to complete the work in this direction. But I should like my colleagues to join me in an endeavour to reach a certain measure of agreement at this first Conference. Slowly and progressively, and with all the necessary prudence, we shall attempt here and in the other conferences that may follow, to transform the general principles of law into written law.

M. Giannini (Italy) :

Translation : I am somewhat relieved to think that this same question will arise in connection with the other Bases of Discussion. I thought the observations made by my colleague, M. Cavaglieri, were almost "innocent". His first proposal was to strike out the words "resulting from treaty or otherwise". I think that is the point to which we should first devote our attention.

M. Cavaglieri next said : "If the deletion of these words does not seem advisable, I would point out that the expression 'or otherwise' is rather vague". Our colleagues, M. Guerrero and M. Sipsom, said we must allude to the provisions of the present Convention. Now, the present Convention will itself constitute a treaty. If we decide to define the words "resulting from treaty", we can but accept M. Guerrero's proposal for the simple reason that the constitution of some States provides that international law is a source of municipal law. In view of this fundamental undertaking of a constitutional nature, such States could never agree to strike out the words in question. I think you must tacitly admit them by striking out the words "resulting from treaty or otherwise" or, if you think it better, you must add "principles expressly recognised in international law". Of these two solutions I, like my colleague M. Cavaglieri, prefer the former — namely, the deletion of the words which are inaccurate.

I said I was somewhat relieved because the question recurs in the other articles but, for the moment, I would emphasise the difficulty of dealing with questions of drafting at present. Only when the Drafting Committee has prepared a text, can we decide whether the final form is acceptable. For the moment, our work is merely provisional. We have to lay down principles ; their formulation will come later. Let us therefore leave aside purely drafting questions and attempt to solve the problems on which agreement in principle is necessary.

As to M. Cavaglieri's other proposal — namely, to substitute the word "omission" for the word "failure" for the reasons he explained, I interpret the silence on that point as implying unanimous agreement.

M. De Visscher (Belgium), Rapporteur :

Translation : My sole object in speaking is to support very strongly the proposals made by our Italian colleagues. As has just been explained, these proposals have a double purpose : on the one hand, the deletion of the words "resulting from treaty or otherwise" and, on the other hand, the substitution of the word "omission" for the word "failure".

These two proposals are really based on the same idea — namely, that we ought not to introduce into this discussion questions which should not be included in our consideration. We are not required, for the moment, to take up the consideration of the sources of international obligations. Accordingly, I agree that we should delete the words "resulting from treaty or otherwise" for, if we did not strike out these words, we should be entering upon a very difficult path without knowing whither it would lead us. Moreover, we should be embarking upon a difficult doctrinal discussion if, particularly after the commentaries that have been made, we retained the word "failure". That would certainly be understood as a very clear and definite reference to the theory of fault. If we started to discuss from a doctrinal standpoint the basis of responsibility in cases of fault or risk, we should once more be entering upon a path without knowing where it might lead to.

Accordingly, I strongly support the Italian delegation's proposals.

M. Leitmaier (Austria) :

Translation : I should like an explanation as to the scope of the text before us. In our future discussions we shall certainly agree to recognise, in some measure, the responsibility of States for damage caused by private individuals. We shall easily agree that in such cases the responsibility arises through failure on the part of the State to comply with its international obligations to prevent and punish. In a particular case, this failure may be attributable to the legislature, quite as much as to the executive power. It may perhaps be urged that Basis No. 2 does not refer to acts causing damage committed by private individuals and that this basis relates only to damage which is the direct consequence of legislation.

In this connection, I was much struck by a remark made by one of the Governments (I think it was the Swiss Government) to the effect that, in general, it is not to laws as such that we should direct our attention in seeking to determine the international responsibility for facts arising from laws which affect the rights of other States.

In certain special cases, indeed, the law itself may be the direct cause of damage involving responsibility. We can imagine a law authorising a Government to expropriate the landed property of foreigners alone, in return for compensation fixed by the Government itself at much less than the true value. Such a law would doubtless considerably diminish the value of such property belonging to foreigners.

In general, however, the act causing damage will be attributable to some other organ of the State or to a private person. If Basis No. 2 refers only to direct damage, its sphere of application will be somewhat restricted.

What is the position if the act directly causing the damage is the act of a private individual? States are unquestionably under an international obligation to ensure foreigners a certain measure of protection and, for that purpose, to maintain the appropriate governmental organisation. Thus, if their organisation is defective, and if they have in consequence failed to comply with their obligation to protect or punish, they are responsible even in the case of damage caused by a private individual. The absence of an organisation such as a civilised State should possess is certainly a failure attributable to the legislative power.

Is such a case covered by Basis No. 2? Yes, according to its terms, for this would certainly be a case of damage resulting from the fact that the State had omitted to enact the legislation necessary to the fulfilment of its obligations. If, however, Basis No. 2 refers also to damage caused through failure on the part of the State to protect foreigners adequately, I think it would be well to say so explicitly. Personally, I think a remark in the report would be sufficient.

M. Limburg (Netherlands) :

Translation : I should like, in the first place, to ask the Chairman a question. There is a proposal to replace the word "failure" *(négligé)* by the word "omission" *(omis)* because, it is said, if we retain the word "failure" we shall be embarking upon a consideration of the question of fault.

I ask myself, or rather I ask those of my colleagues who know French better than I — and there are many such — whether the difficulty will be entirely removed by this substitution. We ought to find such an expression as, in linguistics, is described by the Latin words "vox media". I do not know any satisfactory word, but we might say : "or of non-enactment of the legislation necessary". I think that phrase might satisfy everybody.

I should like to ask a second question arising out of the first Italian amendment. I should like to ask the Chairman, who was Chairman of the Committee of Experts, the reason why that Committee added the words "resulting from treaty or otherwise". Did they fear that, in the absence of those words, certain people might think that only international treaties were involved? That question should be considered by the Drafting Committee. If we accept the Italian amendment, the question does not arise.

I would like the Committee to note that, in any case, the wording of Basis No. 2 should be brought into line with that of Basis No. 5. Basis No. 5 says "2. A judicial decision which is final and without appeal is incompatible with the treaty obligations *or other international obligations of the State*".

The Chairman :

Translation : I gladly answer the questions of the Netherlands delegate. In the first place, I think the text would be improved by the adoption of the wording he proposes.

In the second place, he asked me a question concerning the expression "resulting from treaty or otherwise". The Committee of Experts added "or otherwise" because they thought it certain that the international obligations of the State are not merely the obligations resulting from treaties. There are obligations which are imposed upon the State in virtue of established international custom. Should the State fail to comply with such obligations, its international responsibility would be involved, for, if I may say so, this responsibility is only a supplementary rule acting as a sanction for failure to observe obligations of any nature, whether they arise from treaty or from international custom.

In conclusion, I would add that the text would be much more satisfactory if, leaving aside these problems as to the source of international obligations, we struck out the words "resulting from treaty or otherwise".

M. Matter (France) :

Translation : I am quite satisfied with the Chairman's explanation. I was afraid the Italian delegation's proposal would result in ignoring international custom, that mass of rules, principles and moral and juridical laws admitted by all civilised nations in their mutual relations. It has been very clearly explained that, far from ignoring such custom, it is confirmed. I am therefore fully satisfied.

As for speaking French better than M. Limburg, that would be impossible, and he proved it by finding a very simple and very elastic wording which makes it possible to avoid both the word "failure" *(négligé)* and the word "omission" *(omis)*.

The Chairman :

Translation : There are no further speakers on Basis No. 2, but the Hellenic delegation has submitted a proposal which I shall read. The proposal is to replace Bases Nos. 2, 7, 12 and 13 by the following basis :

"A State is responsible for damage suffered by a foreigner as the result :

"1. Of an unjustifiable act or omission of the executive or legislative power which is incompatible with the State's international obligations ;

"2. Of unjustifiable acts or omissions of officials of the State acting within the limits of their authority when such acts or omissions are incompatible with the State's international obligations ;

"3. Of acts of officials of the State, even if they were not authorised to perform them, if the officials purported to act within the scope of their authority and their acts were incompatible with the international obligations of the State."

I would point out that paragraphs 2 and 3 relate to points we have not yet considered. Only paragraph 1 is of direct interest to us at present. It says that the State is responsible for damage suffered as the result of an unjustifiable act or omission of the executive or legislative power which is incompatible with the State's international obligations. Failure on the part of the executive power and failure on the part of the legislative power are thus grouped together in one provision. The advantage is that we thus have a simplified formula. It is perhaps rather late to open a discussion on this point.

This provision, moreover, does not seem to be in opposition to Basis No. 2 which we have considered together. In these circumstances, and as we are not concerned with the adoption of texts but merely of ideas which will be formulated by the Drafting Committee, I wonder whether we could not now take a decision in regard to Basis of Discussion No. 2, amended as suggested by M. Cavaglieri and M. Limburg — that is to say, striking out the words "resulting from treaty or otherwise" and substituting the phrase "or of non-enactment of the legislation necessary . . ." for the phrase "or of failure to enact . . .".

If we could now take a decision on this Basis of Discussion, it would mark the first stage in our work.

If there is no objection we shall proceed as follows : the formulæ submitted by M. Politis are reserved, particularly as, with regard to the executive power, we shall have to consider them to-morrow.

Further, in order to clear the ground and make some progress, I shall put Basis of Discussion No. 12 to the vote.

M. Guerrero (Salvador) :

Translation : Mr. Chairman — I think we are proceeding rather too quickly. Although I am one of those who think that we should try to reach a conclusion as soon as possible, I consider that we ought not to proceed by way of majority votes. If we are really to do anything worthy of being called codification of international law, we must take account of the opinion of all delegations.

I submitted a proposal which has been set aside, and now other proposals are being referred to the Drafting Committee.

When I accepted the French delegation's proposal, I did so because it was understood that we should subsequently frame an exact definition of international obligations. I certainly could not accept clauses that are too vague. That would be the case if we retained the words "or otherwise" or, again, if we struck out the words "resulting from treaty or otherwise".

We must define what we mean by international obligations. Unless we do that, our work will not be such as is desired by the League of Nations and by the whole world. Instead of having definite rules governing the relations between States, we shall find ourselves faced with a text which will be a source of grave differences and of constantly recurring disputes. We shall be in a worse position than we are at present, when we have no codification.

Mr. Chairman, I again request you to be good enough to consider the proposal I made. That proposal was, moreover, supported by other delegations. Otherwise, we shall start all over again to-morrow and shall not succeed in reaching agreement.

The Chairman :

Translation : Gentlemen — M. Guerrero's remarks imply that we have not sufficiently examined Basis of Discussion No. 2. He has submitted a suggestion which I cannot entirely follow ; consequently, I cannot give him that full and immediate satisfaction I would wish.

His remarks show, however, that more work is needed on this question. Thus it will be necessary to adjourn until to-morrow the consideration of Basis No. 2, together with such amendments as may be framed meanwhile, including the Hellenic delegation's proposal, which can be circulated.

M. Giannini (Italy) :

Translation : I venture to point out to M. Guerrero that we discussed his proposal when, unfortunately, he was not present.

For my part, I ventured to point out that some States had included in their fundamental constitutional laws a provision to the effect that the principles of international law are part of the municipal law. You will agree that we cannot compel such States to accept international conventions in contradiction with their Constitutions. We must either omit the phrase " resulting from treaty or otherwise " or adopt the wording submitted by my colleague, M. Cavaglieri. There is no other expression capable of satisfying requirements we are bound to recognise.

To my mind, this is a question which it is very difficult to settle incidentally. I should like to add that other delegates have replied to M. Guerrero, and I do so because I should not like him to think that his observations were lightly passed over. On the contrary, we considered them ; but, unfortunately, he was not present.

Need we start the discussion again to-morrow and devote another day to a question which seems quite ripe? Can we not see whether we are in agreement on one or other of these formulæ, take a decision and leave the matter to the Drafting Committee? I repeat that we have had a lengthy discussion of Basis No. 2 ; we ought not to start again to-morrow.

M. Guerrero (Salvador) :

Translation : Mr. Chairman — I think the question is so important that we ought to consider it somewhat more thoroughly. We must define what we mean by international obligations. Do you not think it would be advisable to appoint a small sub-committee to assist us in this work? After considering the matter, the sub-committee could submit to us a text giving a definition of these international obligations. Some delegations think that in addition to international treaties and the provisions of the convention we are now framing, there is also such a thing as well-established international custom. I should be prepared to accept that point of view ; that would give added definiteness. I propose that we should add : " . . . and well-defined international custom ".

At all events, I request that the matter should be considered by a sub-committee, which would define what we mean by international obligations. In any case, I would ask you to be good enough to note the modification or amendment I am making in my proposal — namely, the addition of the words " international custom ".

M. De Visscher (Belgium), Rapporteur :

Translation : I wish merely to throw a little light on the discussion and to discover the exact scope of M. Guerrero's proposal. Does our colleague intend to define — in an incidental provision, of course — the sources of international obligations?

M. Guerrero (Salvador) :

Translation : That is so.

M. De Visscher (Belgium), Rapporteur :

Translation : There is therefore no question of the content of international obligations? You do not intend to determine here the total rights that should be accorded to foreigners? If that is the case, I think agreement should not be difficult. We might, with M. Guerrero's approval, succeed to-morrow in finding a formula that would be entirely satisfactory.

M. Giannini (Italy) :

Translation : I am sorry that I cannot agree with my colleagues. We cannot settle incidentally questions of a general nature. We are concerned with progressive codification. Obviously we must make a start somewhere, and we are bound to set aside certain questions which can be settled only at a subsequent conference. Can we now, in a few words, solve the problem that has been raised? I doubt it. I would ask M. Guerrero, who is a member of the Preparatory Committee, whether he thinks it possible to solve immediately any incidental questions that may arise in the discussion of each article. I think

it would be difficult to adopt such a method. I do not think it is possible at this point to indicate, in a parenthesis, the sources of international obligations.

The Chairman :

Translation : Several delegates who had abandoned their intention to speak have now sent in their names again. The discussion must therefore be adjourned until the next meeting.

The Committee rose at 6.20 p.m.

THIRD MEETING

Wednesday, March 19th, 1930, at 3.30 p.m.

Chairman : M. BASDEVANT

10. CONSIDERATION OF BASIS OF DISCUSSION No. 2 (continued).

The Chairman :

Translation : I would remind you of the point we reached yesterday in our discussion of Basis No. 2. A proposal was made to strike out from this basis the words " resulting from treaty or otherwise ". At the end of the meeting, we were informed that M. Guerrero would submit an amendment to that effect. That amendment has been circulated in the following terms :

" A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, *resulting from the law as established by treaty or from a custom accepted as law*, or of failure to enact the legislation necessary for carrying out those obligations."

Before discussing it or putting it to the vote, I have to call upon the Spanish delegate, in accordance with his request of yesterday.

M. Ginès Vidal (Spain) :

Translation : The Spanish delegation attaches the greatest importance to a definition of those " international obligations " which involve the responsibility of a State at any particular time. The Spanish delegation proposes the following amendment :

" The Spanish delegation proposes that Bases Nos. 2, 7, 12 and 13 should be replaced by the following Basis :

" A State is responsible for damage suffered by a foreigner as a result of :

" 1. An unjustified act or omission on the part of the executive or legislative power incompatible with its international obligations.

" 2. Any act or omission of its officials acting within the limits of their authority, and even outside those limits if claiming to act in an official capacity, when such acts or omissions are incompatible with its international obligations.

" It is understood that the international obligations which involve the responsibility of States as specified above, are those which derive :

" *(a)* From the provisions of codified international law.

" *(b)* From obligations under conventions or treaties.

" *(c)* From the principles of international customary law, whether incorporated or not in the internal law of each country, regarding the legal guarantees afforded to the lives, freedom and property of foreigners.

" Such responsibility, however, may not be pleaded until the interested persons have exhausted all remedies open to them under the internal legislation of the State."

The Chairman :

Translation : Before continuing the discussion, I desire to make certain remarks as to our method of work. I think we should now concentrate our attention on Basis of Discussion No. 2 as submitted, and on the amendment proposed by M. Guerrero. We should not, for the moment, introduce any new elements into the discussion. The question of the preliminary exhaustion of legal remedies is extremely important, but it will come up for discussion later. I would therefore ask the Committee to be good enough to reserve that question and not to introduce it into the present discussion. I have just received another important amendment, submitted by the Indian delegation, according to which the basis we are now

discussing should include the idea that the State cannot escape its responsibility through its municipal legislation. That is another matter we shall deal with later and, accordingly, that point, too, should be regarded as reserved.

In this connection, I should like to remind you of the example of the United States and Greek delegations. They did not insist upon a discussion of their particular suggestions in the plenary meeting of the Committee, although they had submitted a proposal to group together Bases Nos. 2 and 7. It is understood that these suggestions will be examined by the Drafting Committee, which will consider whether or not it is advisable to combine those bases. We shall discuss the question afterwards. To avoid confusion in our discussions, therefore, I beg you to confine yourselves for the present to the consideration of Basis No. 2, together with M. Guerrero's amendment.

As I have attempted to bring the discussion back to Basis No. 2 and M. Guerrero's amendment, I venture to make two remarks on that subject. These remarks do not affect the substance of the question, but relate merely to points of drafting which should be cleared up immediately.

First, I think the phrase " custom accepted as law " should be replaced by the phrase used in the Statute of the Court — namely, " international custom as evidence of a general practice accepted as law ". I need not emphasise the advisability of avoiding the use of a different wording here from that which appears in the Statute. This modification, moreover, in no way changes the sense of M. Guerrero's proposal : otherwise I should not have ventured to make the suggestion.

My second remark concerns a slight material error. The text proposed by M. Guerrero says " . . . or of failure to enact . . . ". I think that, in accordance with the observation made yesterday by the Netherlands delegation, we should say " . . . or of non-enactment . . . ". I do not think there will be any objection to that change.

M. Sipsom (Roumania) :

Translation : With regard to the serious and important question raised by Basis of Discussion No. 2, some of us would like an opportunity for further reflection together by means of an exchange of views giving both sides of the question. Therefore, although we all share the Chairman's natural desire to expedite our work, I hope I may be allowed to state the chief reasons for our doubts and hesitation on this question. I apologise to those whose minds are already made up on this point for wasting their time to the extent necessary for our tardy conviction. They may be consoled by the thought that their patience will give us time to make up our own minds if not to influence the opinion they themselves have finally reached. Moreover, the same considerations apply to two other Bases of Discussion, Nos. 7 and 12.

We are considering the conditions under which a State becomes responsible through a legislative act contrary to its obligation towards foreigners resident in its territory. According to Basis of Discussion No. 2, such an obligation devolves upon a State : (1) from a treaty, (2) or otherwise.

This second source of obligation is, indeed, very vague and very uncertain. Now, we cannot base any responsibility on failure to fulfil an obligation if its source is not determined, or, even supposing the source be indicated — and in this case it is what is generally accepted as ordinary international law — if the person who is bound is at all events unaware of the content and extent, as these have not been clearly stated.

Any such obligation is both abnormal and dangerous. It is abnormal because an obligation must first be clearly stated and must be known before any failure to fulfil it can be asserted. It is dangerous, because a State would be liable to be held responsible for an obligation asserted at the same time as its infringement is declared and by the same judicial organ as declares the obligation. Such a state of affairs is inadmissible.

To avoid this serious objection, M. Guerrero and I requested that the obligation or obligations under common international law incumbent upon a State with regard to foreigners residing in its territory should be defined and clearly stated. Thus, there would be no danger of the State failing to fulfil its obligations because it did not know what they were. What objections are raised to this request, which I think a very reasonable one? The Italian delegation and the Rapporteur have stated that it is not the duty of this Conference to determine the law of foreigners, as that question has been dealt with by another Conference, which appears to have failed. They say, too, that our sole duty at present is to lay down sanctions for the responsibility arising through non-compliance with an obligation, and that we are not concerned with the source or content of such obligation.

In the second place, the same speakers, supported by M. Politis and, to some extent only, by M. Dinichert, say that any such definition and determination of obligations is difficult, if not impossible and that, if we undertook such a task — although it is included in the real, if not in the theoretical, aims of codification — the action of this Conference would be paralysed. For that reason, too, the Italian delegation proposed to strike out the statement of the sources of international obligations of States, and to retain in the text, in addition to an affirmation *in abstracto* of the international obligation devolving upon States, only the sanction of

responsibility for failure to fulfil that obligation.

In our opinion, however, the two objections raised cannot prevail against the legitimate request for a definition of these obligations. We have, indeed, come here to frame a draft international code. What is the purpose of a code if not to enunciate and define the law as clearly and indisputably as possible? But how is the law formed? From legislation, from certain and undisputed custom, from the results of judicial decisions and from the evolutionary work of doctrine. The law coming from all these sources must be stated, defined and announced. It is, moreover, the legislator's first duty to state and formulate pre-existing rules of law. That is the normal legislative act; it is the essential function of the legislator. He may, further, do constructive legislative work by framing and enacting new laws. In that way, he makes additions to pre-existing law.

Far from being excluded from our work, this duty of stating the law is imperative. Shall we hesitate, terrified, uneasy, overcome by caution, before this essential and fundamental task? It is indeed our duty to frame provisions concerning obligations, their source and extent, and we have to show how the international responsibility of States arises. Are States responsible nationally and internationally? Subject to certain reservations concerning the municipal acts of Governments and the reserved domain of national sovereignty, they are undoubtedly responsible from an international point of view. This responsibility is not incompatible with sovereignty. It is in no way excluded by sovereignty.

That is the great meaning of the principle we recognised yesterday on the proposal of the French delegation, after the eloquent appeal by M. Matter.

But, if States are responsible in principle, when, why and how are they responsible? Responsibility can arise only through failure to fulfil an obligation. Hence, such obligations must, in the first place, be defined and determined. Logic and justice require the source and extent of an obligation to be clearly established before failure to fulfil it can be asserted.

No responsibility can be asserted, no sources of obligations can even be stated, without a definition of those obligations.

A State cannot be declared responsible for transgressing an obligation imposed by an international code unless that code defines it and states it.

Is it so difficult to define these obligations? Can we even go so far as to say it is impossible? Not at all. Common international law and the obligations arising therefrom have been made clear through the work of the League of Nations, through the judicial decisions of the Permanent Court at The Hague and even through other judicial decisions. Moreover, we are fortunate in having with us all the experts who are capable of tracing these obligations. We might ask them to form a sub-committee for that purpose.

If this is thought to be impossible, if there is any objection to this suggestion, I can see only one subsidiary means of reaching agreement. We might define this international obligation, which is viewed *in abstracto* in Basis of Discussion No. 2, in two ways: first, we might say expressly that these obligations may arise not only from treaties but from customary law which is indisputably established and recognised by all the contracting States: secondly, we might declare — in conformity with the decisions of the League of Nations — that a State's obligation towards a foreigner cannot exceed the same State's obligation towards its own nationals. A foreigner cannot be better treated from the legal standpoint than the nationals of a State themselves.

M. Cavaglieri (Italy):

Translation: At yesterday's meeting, the Italian delegation proposed the deletion of the disputed wording in order to avoid, as far as possible, a difficult discussion concerning the sources of international obligations. We readily acknowledge, of course, that international obligations arise not only from treaties but also from customary law. Consequently, the Italian delegation supports the amendment proposed by M. Guerrero, according to which international obligations may arise either from treaties or from custom accepted as law. The choice of the exact wording is not of great importance.

I was very interested in the important and very interesting speech of our Roumanian colleague in regard to the determination of a State's obligations towards foreigners. Logically, he is quite right. Obviously, the State's obligations towards foreigners must be known before we can establish the consequences of failure to comply with those obligations.

But, as our colleague also recognises, this question is not ripe for codification, and we should do better to confine ourselves to the Bases of Discussion proposed by our Preparatory Committee.

Accordingly, the Italian delegation fully supports the text of the amendment proposed by M. Guerrero. It thinks that, if our work is to have any real practical value, we must limit ourselves to the Bases of Discussion drawn up by the Preparatory Committee.

M. Castberg (Norway):

Translation: I desire to make only a short remark on the amendment proposed by M. Guerrero.

I think we ought not, in this Convention on the Responsibility of States, to lay down any rule concerning sources of international law other than those mentioned in Article 38

of the Statute of the Permanent Court of International Justice.

Now, according to Article 38 of the Statute of the Court, international rules, and consequently international obligations, may arise not only from treaties and from custom but from " the general principles of law recognised by civilised nations ", from judicial practice and from doctrine.

The wording of this provision of the Statute may perhaps be open to criticism, but I think we ought not to adopt any provision which is markedly different.

Consequently, we ought either to accept the Italian proposal — and that would be the better solution — or we ought to reproduce in their entirety the provisions of Article 38 of the Statute of the Permanent Court.

The Chairman :

Translation : We have now reached the point when we ought to take a decision with regard to the wording submitted by M. Guerrero. I do not think there is any objection to the twofold modification I suggested, according to which we should adopt the wording " international custom, as evidence of a general practice accepted as law ".

Accordingly, I shall ask you to vote on this provision. I think I may say, in accordance with the opinions that have been expressed, that certain delegations accepted this formula as a compromise, although they would really have preferred a more radical change in the basis through the deletion of the words in question. As, however, the compromise has been accepted by certain delegations, I will ask you to vote on the wording proposed by M. Guerrero.

M. d'Avila Lima (Portugal) :

Translation : You are aware, gentlemen, of the desirability of avoiding vagueness in legal matters. I think that is M. Guerrero's object. I do not think there is any contradiction in M. Sipsom's amendment. It would improve the text. Customary law exists, indeed, but I think it would be more exact to say " custom indisputably recognised by the contracting States ". In this way, the text would certainly be more definite.

M. de Berezelly (Hungary) :

Translation : If the proposal of the delegate for Salvador is not supported by a majority, what will be the new text on which we shall have to vote?

The Chairman :

Translation : This is the only text before me at present. It is the only one I can put to the vote.

M. de Berezelly (Hungary) :

Translation : Then Basis No. 2 no longer exists?

The Chairman :

Translation : That is so, unless a new proposal is made later.

M. Buero (Uruguay) :

Translation : I am strongly in favour of the proposal of our Portuguese colleague, who supported that of the Roumanian delegate. The proposal to give a precise definition of customary international law is more in accord with the actual spirit of M. Guerrero's proposal. I think the proposal, as amended by the Roumanian delegate, faithfully interprets what M. Guerrero said yesterday.

From our point of view, customary law in general is inacceptable, particularly as regards international law. For that reason, I desire a perfectly clear definition. As regards international law, we know that customs are established through the domination of certain States, and we cannot now recognise those customs that we have not definitely accepted. As I do not desire to prolong the discussion, I confine myself to supporting strongly the Roumanian delegation's proposal.

M. Limburg (Netherlands) :

Translation : I do not think the position is quite clear, and I should like some explanation. We have before us M. Guerrero's amendment to Basis No. 2. Are we to understand that, if this amendment is accepted, the basis itself is accepted, whereas if it is rejected Basis No. 2 is still open for discussion?

The Chairman :

Translation : I thought this long discussion might be taken to mean that the original text of the Basis of Discussion was no longer supported and that we had before us only the new wording submitted by M. Guerrero. Hence, I thought a vote might be taken upon the whole and nothing more.

Nevertheless, I fully understand the view expressed by the Netherlands delegate. In order to secure a clear expression of opinion, we might vote upon M. Guerrero's proposal in two parts. First, down to the words " resulting from the law as established by treaty " and afterwards on what follows those words, that is to say, on the new formula proposed by M. Guerrero.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : M. Guerrero's proposal includes the words " or from a custom accepted as law ".

Just now, the Roumanian delegate submitted a sort of commentary on that part, and I do not know whether, if we vote for that part, we shall be considered as voting for the commentary or explanation given by the Roumanian delegate when he adopted M. Guerrero's proposal as his own.

The Chairman :

Translation : We are voting on a text and not on a commentary.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : In any case, M. Guerrero did not contradict that interpretation, and it is noteworthy that the author of the proposal neither interpreted that part himself nor contradicted the meaning given to it by the Roumanian delegate.

The outstanding feature of the Roumanian delegate's commentary is that the obligatory nature of an international custom is made to depend upon its acceptance by States which become contracting parties to the Convention that is being framed. In view of this new legal construction, I wonder what will happen in the case of a conflict or difference as to the existence of any custom. Will the contracting States have to be convened to a meeting in order to be questioned upon such a point? Or must the works of publicists of all countries be referred to, to ascertain whether the custom is accepted or not? That would confer upon such works an authority they do not possess, for it would be tantamount to recognising them as the final expression of international law. Moreover, what would happen in the case of any State which had not participated in the formation of a custom?

In these circumstances, and until the exact meaning of M. Guerrero's proposal is made clear, I find it difficult to understand how the part giving rise to such doubt can be either accepted or refused.

M. Politis (Greece) :

Translation : I should like, in the first place, to refer briefly to the question of the meaning of custom. In a technical committee such as the present, it is rather disappointing that the question should be raised. The Chairman very wisely said just now that a few words should be added to M. Guerrero's formula in order to bring it exactly into line with the formula given in Article 38 of the Statute of the Court. Let there be no hesitation in that respect : the need is obvious. The States represented here have acceded to the Statute of the Court. They therefore come within the jurisdiction of the Court or may come within that jurisdiction. The Court may apply to them any custom within the meaning of Article 38, paragraph 2 of the Statute. Hence, by repeating the same phrase, by accepting as a basis of obligation custom as defined in the Statute of the Court, we add nothing to our present undertakings.

This remark should in itself suffice to remove any misunderstanding. There can be no question of explaining or commenting on custom.

Just now the Roumanian delegate said : "provided that a custom is accepted by all the contracting States".

I venture to point out that, if a custom were not accepted by all the contracting States, it would not be a custom. No practice which is claimed to be a custom could, within the meaning of Article 38 of the Statute of the Court, be a rule of law unless it were accepted by all the States. By its very definition, custom is a rule accepted by all the States.

I submit this preliminary remark in view of what was said by our Egyptian colleague.

With regard to the question itself, I think that, if the Committee does not accept this wording, it will be still less likely to accept the original wording of Basis No. 2, as all the discussion that has taken place since yesterday has centred round that original wording.

We have arrived at a compromise wording ; if it were not accepted, we should have nothing at all before us. I cannot contemplate such a prospect, and I cannot believe this Committee will refuse to accept this general rule to the effect, that a State is responsible for failure to comply with an international obligation resulting from treaties and custom. By accepting this wording you assume no new undertaking ; with or without the text the situation is exactly the same.

Suppose that to-morrow any one of the Governments represented here violated one of its international obligations, whether resulting from treaties or from custom, and suppose it were bound by an obligation to accept the jurisdiction of the Court and that its adversary brought it before the Court ; there can be no doubt that, if the Court found that the Government in question had failed to comply with an obligation arising either from treaty or from custom as defined in Article 38 of the Statute, it would be bound to conclude that the Government was responsible and was liable to make reparation for the damage illegally caused to the national of the State suing it before the Court.

I urge you to reflect carefully upon this question. This wording imposes no new undertaking. Hence, I cannot for one moment imagine that it will not be accepted unanimously. I assure you with all the strength of my conviction that if on such a text, as on the text submitted two days ago by M. Matter, we could not reach unanimity, it would be poor encouragement in the important work which we have undertaken and which we must bring to a successful conclusion. Since we are speaking of responsibility, let us not forget that we have all assumed a responsibility towards public opinion. We must not leave The Hague without having accomplished some useful work.

M. Matter (France) :

Translation : The French delegation has nothing to add to the Greek delegate's eloquent appeal, which is founded both on good sense and on good law. We agree entirely with all that M. Politis has said.

What is the point at issue? Is it an amendment of an earlier text? Not exactly ; the proposal is merely to find a substitute for a word which was thought to be too comprehensive and insufficiently precise.

Moreover, are we faced with anything new? Is any fresh effort demanded? As M. Politis has shown, the principle in question is recognised in Article 38 of the Statute of

the Court, so that all we are now asked to do is to confirm and, as it were, consolidate the earlier text. That is a definite point from which we may safely start.

The French delegation is deeply grateful for the way in which you have already supported it. That delegation now warmly associates itself with the appeal for unanimity which has just been made, and hopes that we may here once more proclaim, with single heart and will, a principle of law.

M. Guerrero (Salvador) :

Translation : We feel bound to allay the apprehensions of all those who think the phrase " custom accepted as law " is not sufficiently clear.

I have just heard M. Politis' commentary on international custom. I agree with it, and I think it is clear enough to remove all apprehension. I do not accept the parallel he drew between Article 38 of the Statute of the Court and the question we are now discussing, since, when the Statute of the Court was framed, its object was to supply indications and guidance for the Court in reaching its decisions.

Here we are in no way concerned with giving guidance, but with laying down the law. The two things are quite different. But, as I said that I agree entirely with M. Politis' commentary on the meaning of "international custom ", I would ask the Rapporteur, if he agrees with this commentary, to include it in the report. Thus, that part of the amendment which has been criticised by certain delegates will be made clear by M. Politis' commentary.

The Chairman :

Translation : I think we could now take the vote.

M. Dinichert (Switzerland) :

Translation : I am sorry to detain the Committee at the end of a discussion, but I am bound to say that I am somewhat disturbed by the proposal which has just been made and according to which the official report of this Committee would give an interpretation of custom which may seem accurate to some people but which I think is not unquestionable.

Personally, I cannot accept this formal statement that custom has the force of law, only when the principle in question is recognised by all countries without exception. I do not intend to thrust my view on any one, but I do not think that is the exact interpretation that should be given to this formula.

We feel anxious about the following matter. As regards the new Convention, we are free to do as we think best, subject to ratification by our Governments. But I cannot agree that this official interpretation included in a document of the Conference should be taken as the authentic interpretation of the Statute of the Court. The majority of us have acceded to the Statute of the Court. We are bound by a Convention. We know Article 38 of that Convention. We must leave it just as it is. I wish to make this formal reservation : no interpretation of any texts we may take from the Statute of the Court should be regarded as an interpretation of that Statute.

I entirely agree with M. Politis that we ought not to depart from the text given in the Statute of the Court. We are told that the formula proposed is the result of efforts at conciliation which were made after yesterday's meeting. I am one of those who always appreciate the value of conciliation, and I am delighted that such conciliation was possible, but I must point out that I have already shown a great spirit of conciliation, inasmuch as I am not asking for the reproduction of the whole of Article 38 of the Statute. I quite follow M. Politis' reasoning but I must add that he stopped half-way. M. Politis mentioned paragraphs 1 and 2 of Article 38, but he did not mention paragraphs 3 and 4. I am not raising the question. I am merely making a reservation as to the interpretation that has been given.

I should like to add that we shall be showing a very great spirit of conciliation if we accept unanimously the formula proposed by M. Guerrero. But I can add nothing to it, particularly as regards the commentary that has been given.

M. Giannini (Italy) :

Translation : The original Italian proposal to strike out the words in question was made in order to avoid a storm. The storm has broken out. We explained why we were anxious to avoid this storm. We are beginning the progressive codification of international law ; the difficulty is to know where to stop. Obviously, it is not very satisfactory to begin to codify without knowing how the various problems will be connected together, as no subject in any legal system can be completely isolated from the others. It would be very helpful to know what are the international obligations in question.

I wish, however, to make some observations of a preliminary nature and some of a technical character. As regards the former, I would point out that it is very difficult for us to engage in a discussion on a problem which was not placed before our Governments and which we were not expressly asked to consider.

As the storm has broken out, let us try to see its consequences. If we cannot agree to strike out the words under consideration, I would point out that the alternative to striking them out is to define the words. We proposed " resulting from treaties or from the recognised principles of international law ". M. Guerrero has devised another formula which is as good, if not better ; we accepted it. We shall, for the moment, put aside the fundamental reason for which we wished to define international obligations, but we shall not entirely ignore it.

We are asked for the meaning of the words: "customary law". Perhaps on some other occasion we shall, if necessary, frame a convention on customary law, but, if we begin to ask for definitions on every subject, I fear we shall never codify anything. The most we can do is to allay any apprehensions that are expressed with regard to certain points. If M. Guerrero's amendment succeeds in doing that, we shall be satisfied with it. It is the best compromise possible at the present time.

I should like to make a further remark and to refer to my late master, the orientalist Kerbaker, who described the records of learned societies as "illustrious cemeteries". I do not say that the reports of conferences resemble the proceeding of learned societies, but I do think they are not of very great importance.

When once a treaty has been concluded, no one reads the report, for treaties live of themselves and, if they are clear enough to meet the needs of life, hardly any reference is made to the reports. The reports are of great importance at the outset because they influence Governments. They explain how and why certain agreements were reached; but that is all, and we ought not to exaggerate their value. M. Politis tried to find grounds for a compromise; the Swiss delegation announced that it must make reservations, that it could not accept any interpretation of the Statute of the Court.

Personally, I propose that we should adopt M. Guerrero's compomise formula and that, in the report, we should merely give our reasons for adopting that formula, without opening the door to interpretations of other problems in regard to which differences may arise.

M. Urrutia (Colombia):

Translation: I wish to say, in the first place, that in a spirit of conciliation I shall vote for M. Guerrero's proposal, for in a legal question as complicated as that we are now discussing, no result is ever possible without such a spirit of conciliation.

I venture, however, to recall two facts. When this question was discussed at the Institute of International Law, as several members of the Institute who took part in the Lausanne meetings and who are now present will remember, it was decided not to define international obligations. The texts adopted by the Institute say merely "international obligations". In spite of the presence of great authorities on international law, it was then thought too difficult to give a definition.

It is indeed, hard to say whether international obligations arise solely from treaties or from customary law, or from those general principles of international law which constitute the juridical conscience of the civilised world. Personally, I should prefer to adopt the Institute's texts. The Convention might contain an article providing, as do the Institute's texts, for a procedure of conciliation or arbitration in case of doubt with, in the last resort, recourse to the Permanent Court of International Justice. The signatory States would thus be given security.

I should like us, too, to refrain from defining customary law. States, like individuals, have good and bad customs, and it would be better not to define customary law. Thus, we should avoid greater complications.

In conclusion, I repeat that I shall vote for M. Guerrero's proposal, although I should prefer the texts of the Institute of International Law.

M. Limburg (Netherlands):

Translation: I do not wish to prolong the discussion, but I find it somewhat difficult to vote on M. Guerrero's text. I have followed very closely all that my eminent colleagues have said. I still find difficulties, however. Already there are, so to speak, antinomies.

Yesterday we accepted a French proposal which said without any definition, without entering into any details: "A State is responsible for any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State." Did we define the sources of those international obligations? No, we said in a general way: "Any failure . . . to carry out . . . international obligations". We accepted that unanimously. To-day, we are talking of giving details, of restricting, of specifying those international obligations. That is an attitude which I do not understand very well, and that is why I ask whether it would not be better to accept the idea underlying Basis No. 2 and refer to the Drafting Committee the question whether the expression "international obligations" should be defined or not.

Our Swiss colleague has already reminded us of paragraphs 3 and 4 of Article 38 of the Statute of the Court. We have the right and the power to say: "We are here creating, or at least we are trying to create, material law, not formal law, not law of proof". We might therefore say: "We shall confine ourselves to paragraphs 1 and 2 of Article 38 of the Statute." But what would be the position of States which have adopted the Statute of the Court and which are now bound by all four paragraphs of Article 38? What will happen if a State which has already acceded to the optional clause of the Statute of the Court and which has therefore adopted Article 38 as a whole, asks that it should be applied as a whole? You will agree that this is certainly an awkward question, to which no immediate answer is possible.

For these reasons — namely, the fact that we accepted the French proposal yesterday and, secondly, the relations hip between the optional clause of the Statute of the Court and this text, which limits Article 38, I suggest the question should be referred to the Drafting Committee.

M. De Visscher (Belgium), Rapporteur :

Translation : I was much struck by M. Limburg's remarks. It is clear that the question we have been considering for so long arises not only with regard to No. 1 of the Bases of Discussion ; it is a question of quite a general nature which will arise and which has already arisen with regard to the proposal adopted at M. Matter's suggestion.

I think we should adopt M. Limburg's suggestion. I propose the following. As the question now before the Committee is of a quite general nature, and as we shall speak of international obligations in connection with practically every article of this Convention, we should, at the end of the Convention, draft an article of a general nature in the following terms : " The obligations referred to in the articles of the present Convention are those which have their source in . . . ", and we should then give a list of the sources of law which we have started to enumerate in M. Guerrero's amendment. That would be a general article covering the whole of the Convention. I think we should thus satisfy some delegates and allay the apprehensions of others. That would be a logical piece of work, entirely in harmony with M. Limburg's suggestion.

M. Matter (France) :

Translation : I shall make only one observation in reply to M. Limburg's question.

There are still many backward systems of law which do not allow any enquiry as to paternity. I shall not, however, shelter behind such out-of-date provisions or refuse to recognise the paternity of yesterday's text. As its father, I have good reasons for recognising it.

I do not see that it is in any way opposed to to-day's text. Yesterday, we stated a general principle — what I called a fundamental article. I was, of course, the first to say that later we should see what consequences were entailed by such a provision and should give definitions. To-day, we are giving definitions. Whether we adopt M. Guerrero's suggestion or follow the Rapporteur's advice matters little ; but I do not see how the general nature of the terms of the fundamental article is in any way opposed to a subsequent definition. Indeed, when we gave a general basis to our first article, we reserved to ourselves the right to define later the principles on which it rests.

Accordingly, far from opposing either the Rapporteur's suggestion or M. Guerrero's proposal, I think they are both entirely in harmony with the general principle adopted yesterday.

M. Giannini (Italy) :

Translation : I think we should agree on the principle. Later, we can consider the form in which it can be best expressed.

For these reasons, and as we have already devoted much time to the consideration of arguments for and against, I urge the Committee to proceed to the vote.

The Chairman :

Translation : I think it is indeed time to take the vote. The Rapporteur has just made a suggestion as to procedure. It is that we should vote on Basis No. 2 whilst reserving for the moment what, properly speaking, constitutes M. Guerrero's amendment. It is understood that this amendment will be considered later as a possible final article.

I shall ask the Committee to say whether it agrees to adopt this procedure or whether it prefers to vote at once on M. Guerrero's amendment itself as submitted.

I ask the Committee to decide whether the procedure suggested by the Rapporteur should be adopted.

The procedure; was adopted.

The Chairman :

Translation : In consequence of this decision I shall put to the vote Basis of Discussion No. 2, reserving M. Guerrero's suggestion, that is to say, reserving the words " resulting from the law as established by treaty or from a custom accepted as law ". It is clearly understood that these words will be discussed later from the standpoint of a final article covering the whole of the Convention.

M. Guerrero (Salvador) :

Translation : I desire to explain my vote, for I shall be compelled to vote against all the articles, until I know how international obligations are to be defined. I am prepared to accept the Rapporteur's suggestion, provided the definition of international obligations comes immediately after the general declaration we adopted yesterday. It is the very foundation of all the other articles. If the article in question is not to be discussed until the end of our session, I shall naturally be unable to vote for the other articles. On the other hand, to define international obligations and to insert the definition in the Convention immediately after the declaration we adopted yesterday would seem to be the most logical procedure, as delegates will know exactly what is meant by international obligations.

M. Koukal (Czechoslovakia) :

Translation : The Czechoslovak delegation agrees entirely with the delegate of Salvador.

M. Politis (Greece) :

Translation : To make agreement possible, I think it should be understood that those who still hesitate to accept, in the text to be voted on, the expression " incompatible with its international obligations " and who could accept that text only if there is an explanation as to the meaning of " international obligations ", might vote for the text, provided

their vote were not finally binding. It would be a vote for the principle, not a final vote. The final vote would be given when a satisfactory text has been devised and such a text might equally well be inserted either at the end of the Convention or immediately after the text adopted on the proposal of the French delegation.

It should be clearly understood that those who vote for the text without M. Guerrero's amendment reserve to themselves the right to reconsider this provision with a view to giving their final approval when they have before them the terms of the supplementary text that is to be drawn up.

M. Sieczkowski (Poland) :

Translation : In view of the French delegate's statement that M. Guerrero's proposal is not incompatible with the French proposal adopted yesterday, there would, I think, be no objection to a definite statement of the sources of international obligations as an addition to the French proposal. Thus, the apprehensions felt by M. Guerrero and by the Czechoslovak delegate would be allayed. The only matter left to decide would be the place where the addition should be made.

M. Sipsom (Roumania) :

Translation : The Rapporteur's proposal could be brought into line with M. Guerrero's reservation if we voted for the principle of the article without any definition of international obligations, and the general principle would come immediately after the fundamental article approved yesterday.

The Chairman :

Translation : I think there is some misunderstanding. A certain method was approved, and now doubts are felt as to its advisability. The various principles must, however, be adopted in succession and not all at one time. We must observe a certain order. The adoption of Basis No. 2, reserving the provision proposed by M. Guerrero, which is by no means set aside, is only one stage in our work. It would be very regrettable if many members of the Conference refrained from accomplishing this stage, as their negative attitude on this matter, would make our work more difficult.

M. Sipsom's suggestion seems a very wise one. The adoption of Basis No. 2 would mark a definite stage in our procedure, but would not be final until we had adopted the other provisions, which will be included either in the body of the text or at the end. We are now concerned with voting for ideas. If you accept the idea that a State is responsible for damage suffered as the result of a legislative act, even if it is understood that definitions are to be given subsequently, you might vote for the principle. Definitions will come later. You are not finally bound by your vote for the first part of the provision, since the second part is to be considered later.

Finally, a vote will be taken on the whole.

I fear agreement may be more difficult to reach than appeared to be the case just now, and I regret it very much. But we have started to follow a procedure adopted by the Committee, and I cannot now ask you to abandon it.

M. De Visscher (Belgium), Rapporteur :

Translation : I should like to reply very briefly to one question that has been raised. When, a short time ago, I made the proposal that the Committee has been good enough to adopt, I intended merely to secure the inclusion in a general text of the definitions requested by certain of our colleagues. I had formed no opinion as to the place where this text should come. If the Committee wishes it to come immediately after the text adopted yesterday, I should have no objection at all and should propose that we set to work at once, so that there could be no doubt as to our intention.

I proposed that the text should come at the end, because in international documents it is usual to give at the end definitions of the terms used, but there is no objection to a different procedure.

M. de Armenteros (Cuba) :

Translation : I venture to make the following suggestion. The proposal made by the delegate for Salvador amounts to a restriction of the rules in force. Obviously, a spirit of conciliation must be shown if we are to accomplish any useful work on this complex question.

We might adopt the proposal of the delegate for Salvador, but at the same time appoint a drafting committee to frame a declaration which should be inserted in the Preamble of the Convention and which should deal with the interpretation to be given to the rules codified. If that is not done, it will not be possible to interpret the rules strictly.

M. Urrutia (Colombia) :

Translation : Yesterday we adopted the French proposal which will become Article 1 of the Convention. We now have to draw up Article 2 defining the sources of international obligations. We are not voting on that article to-day, but we might appoint a committee for the purpose of submitting a proposal. When we have adopted Basis No 2, that will become Article 3. We might thus adopt Basis No. 2 and M. Guerrero's proposal. I ask him whether he approves of this suggestion.

M. Sipsom (Roumania) :

Translation : Delegates who voted for the Rapporteur's proposal did not intend to express an opinion that it would be better to put at the end of the text the definition that is to be framed regarding international obligations. That is a question of drafting which can be considered later, and which belongs rather to the final stage of our Conference. I think most delegates intended to express the opinion that this question is both very

delicate and of fundamental importance and that, therefore, time is needed for reflection.

If that was the opinion of the majority, there is no need to return to our vote on procedure.

M. Giannini (Italy) :

Translation : I wish to explain why I voted against the Rapporteur's proposal. It is because I prefer M. Guerrero's incidental formula to a separate article.

M. Politis (Greece) :

Translation : The Committee had adopted a form of procedure.

The Chairman :

Translation : We are bound to follow it.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : The Rapporteur proposed a procedure which related to the drafting of a text. I think the Committee may still vote at once on M. Guerrero's proposal.

The Chairman :

Translation : That is impossible, as the Committee has decided otherwise.

M. Guerrero (Salvador) :

Translation : I think we are in a difficulty because we have changed our procedure. At the opening of the meeting the Chairman announced that my amendment would be discussed and that a vote would then be taken. I am bound to point out that this procedure has been changed.

Having made that remark, for which I apologise, I am able to accept M. Urrutia's proposal that an article should be drafted, and, if there is no objection, it might come after the declaration adopted yesterday. That article would read : "The expression 'international obligations' means, etc.", and then the idea included in my amendment would be reproduced. We might then continue the discussion of the other articles. If such a procedure is not adopted, the votes cast will not be of much value, as everything will be subject to reservation until we know what is meant by international obligations.

The Chairman :

Translation : We must follow the procedure adopted by the Committee. According to that procedure, you must take a decision in regard to Basis of Discussion No. 2.

It is clear from various statements that the substance of M. Guerrero's amendment must be considered very soon, and I expect its immediate consideration will be proposed.

I think those members of the Committee who are prepared to adopt Basis of Discussion No. 2 should be fully satisfied by the explanations to which M. Guerrero's amendment has given rise. Accordingly, they might either vote for this Basis of Discussion or, at all events, abstain from voting, in order not to prevent its adoption, since very soon — in fact, at once — they will have an opportunity to vote upon the text which will give them all the satisfaction they deem necessary.

Consequently, I shall put Basis of Discussion No. 2 to the vote, reserving those points which are covered by M. Guerrero's amendment.

M. Giannini (Italy) :

Translation : In order both to satisfy my conscience and to reach unanimity if possible, I propose that we should add to the Basis of Discussion on which the vote is to be taken the following paragraph :

> "The expression 'international obligations' in the present Convention means obligations resulting from treaties or from international custom as evidence of a general practice accepted as law."

The Chairman :

Translation : You must first vote on Basis No. 2 as drafted. The addition proposed by M. Giannini can be considered afterwards. Do not forget that you are voting on ideas and that the drafting will be the work of the Drafting Committee in accordance with your decisions.

The Chairman :

Translation : I put to the vote Basis of Discussion No. 2, reserving M. Guerrero's amendment.

The Basis of Discussion was adopted by 29 votes, the remainder of the members of the Committee present abstaining from voting.

The Chairman :

Translation : We now have before us the paragraph proposed by M. Giannini, which reads as follows :

> "The expression 'international obligations' in the present Convention means obligations resulting from treaties or from international custom as evidence of a general practice accepted as law."

You must decide whether you wish to vote at once on this formula or whether you prefer to open a discussion. If, after discussion, this formula is adopted, a vote must be taken on the whole.

M. Politis (Greece) :

Translation : I do not think it would be very logical to take a vote on this text, not because the text cannot be considered immediately, but because the objection to which it is open can be seen at once. We were about to reach agreement on M. Guerrero's amendment. M. Limburg then pointed out that there might be serious grounds for hesitation before accepting it. He developed a point of view which was previously indicated

in different words by M. de Visscher. The latter stated that he was much impressed by M. Limburg's argument and proposed that further consideration should be devoted to the question whether the definition of international obligations should be given in a special text. The Committee adopted the Rapporteur's suggestion. We must therefore request the Drafting Committee to prepare a text giving a definition of "international obligations" which will satisfy everyone. There is only one thing to be done — namely, to refer this question to the consideration of the Drafting Committee.

M. Limburg (Netherlands) :

Translation : As M. Politis has just stated the point of view I intended to develop, and has done it much better than I could have done it, I shall refrain from speaking.

The Chairman :

Translation : We have before us a proposal to refer this text to the Drafting Committee, which should report as soon as possible and submit to the Committee a formula which might be inserted after the bases and, if a Convention is drawn up, after the articles of the Convention.

M. Urrutia (Colombia) :

Translation: Certain delegates have expressed the opinion that they could not continue to vote until this question is settled. It is therefore desirable that we should return to this question to-morrow, and that the Drafting Committee should submit a proposal at the next meeting. Accordingly, I would ask the Chairman to be good enough to state that the question is adjourned until the next meeting.

The Chairman :

Translation : It is understood that the Drafting Committee's proposals will be considered at to-morrow's meeting.

I put to the vote the proposal to refer the question to the Drafting Committee for report to-morrow.

The proposal was adopted.

The Committee rose at 6 p.m.

FOURTH MEETING

Thursday, March 20th, 1930, at 3.30 p.m.

Chairman : M. BASDEVANT

11. DEFINITION OF "INTERNATIONAL OBLIGATIONS": TEXT PROPOSED BY THE DRAFTING COMMITTEE (Annex III, No. 1 (a)).

The Chairman :

Translation : I need hardly remind you of the point we reached yesterday. After adopting the basis under discussion, it was decided that the Drafting Committee should prepare a text which, in the Convention to be framed, should probably (I say "probably" by way of reserving the needs of the general structure) come after the provision adopted the other day on the proposal of the French delegation. This text would therefore probably become Article 2 of the Convention to be drawn up.

The Rapporteur will read the proposal and will give certain explanations.

M. De Visscher (Belgium), Rapporteur :

Translation : This is the text of the Drafting Committee's proposal : "The international obligations referred to in the present Convention are those resulting from treaty or customary law which have for their object to ensure for the persons and property of foreigners treatment in conformity with the principles recognised to be essential by the community of nations."

This is the first point to be noted. In referring to the sources of international law, the text before you mentions merely treaty and customary law. For the very weighty reasons put forward yesterday, we avoided reproducing the terminology of the Statute of the Court. It would indeed have been necessary (and the remarks made in that sense were very sound) either to reproduce the whole of the provisions of Article 38 — the four sources enumerated therein — or, on the other hand, to mention only treaty and customary law in general terms without employing any such expression as "accepted as law", which would obviously be a reference to the Statute of the Court. To have borrowed that part would undoubtedly have given rise to subsequent discussions which it would be better to avoid. Hence, the text submitted to you mentions merely treaty and customary law.

In the second place, you will notice that the second part of the Drafting Committee's text is intended to indicate the object of the international obligations referred to in the Convention. I say "the object of the international obligations" because we are not contemplating, and cannot contemplate, determining the extent of those obligations. Otherwise we should inevitably embark upon a definition of the conditions for the treatment of foreigners. In this connection we have very largely followed the proposal made yesterday by the Spanish delegate. The proposal submitted by the Spanish delegation was thought to be very sound and was adopted by the Drafting Committeee. The obligations in question are those which are designed to ensure for the persons and property of foreigners a certain treatment.

Now comes the third point: What is that treatment? The text submitted to you says: "treatment in conformity with the principles recognised to be essential by the community of nations". Here, the Drafting Committee has to apologise and to recognise that its text needs modification. The Committee in fact mentions two sources of law; treaties and custom. It may be said in the case of custom that the obligations arising therefrom have for their object to ensure a certain minimum. That is true; but the same cannot be said of a treaty. A treaty grants foreigners just what its provisions grant, what they contain, and not a certain minimum.

The wording before you needs to be modified, but the modification is easily made. This is the text which the Drafting Committee proposes in view of the observations submitted by the American delegate:

> "The international obligations referred to in the present Convention are obligations resulting from treaties and those obligations based upon custom which have for their object to ensure, etc."

The effect of this modification is seen at once. Treaties and obligations resulting from conventions are considered quite separately. On the other hand, custom, which constitutes the second source of obligations, is indicated as granting foreigners a certain treatment in conformity with the principles recognised to be essential by the community of nations.

The Chairman:

Translation: An amendment has been submitted by the delegations of Czechoslovakia, Yugoslavia, Roumania and Uruguay. This amendment would substitute for the words "by the community of nations" the words "by the respective States".

M. Castberg (Norway):

Translation: The Norwegian delegation thinks the best procedure would be to give this article a form absolutely in harmony with the idea of Article 38 of the Statute of the Permanent Court of International Justice.

Nevertheless, the Norwegian delegation is prepared to abstain from voting against the Drafting Committee's proposal.

I think, however, it should be pointed out that, with the text proposed by the Drafting Committee, the Convention will establish responsibility solely for the non-fulfilment of obligations resulting from treaty or customary law. The Norwegian delegation think that it should also be recognised that a State's international responsibility may be involved by acts or omissions contrary to the general principles of law recognised by civilised nations.

If the text now proposed is accepted, it must be understood that its adoption in no way constitutes a decision as to whether international responsibility may not also be involved by acts and omissions which, though certainly not contrary to any given treaty or custom, are nevertheless contrary to the generally recognised principles of law. It must be understood that this question as to the existence of a large number of international obligations resulting from the general principles of law is not affected and that, after the conclusion of our Convention, it will remain in the same position as before.

Moreover, it would certainly be wise to insert in the Preamble of the Convention, as the Danish delegation suggests, a clause reserving the question of responsibility in cases not settled by the Convention.

Our work will, we hope, result in establishing responsibility in certain cases and, perhaps, in denying it in certain others. But whatever happens, even after the conclusion of our Convention, a vast field will inevitably remain uncovered by any convention.

M. Nagaoka (Japan):

Translation: For the sake of clearness, I propose to add to the text of the Drafting Committee the third paragraph of Article 38 of the Statute of the Court, which refers to the general principles of law recognised by civilised nations. We must avoid any erroneous interpretation which might arise from a mistaken idea that international obligations relate only to treaties and customs.

M. Limburg (Netherlands):

Translation: Mr. Chairman — I am somewhat embarrassed by the Drafting Committee's proposal. That would not be the case if I had heard only the explanations given by the Rapporteur, but we have just heard our Norwegian colleague.

The Rapporteur explained that the text submitted to us took account of the observations put forward yesterday. The object of those observations was to demonstrate the antithesis between M. Guerrero's text and the four paragraphs of Article 38 of the Statute of the Hague Court.

I was very glad to hear that the wording submitted was devised to avoid any repetition of yesterday's observations. It was found

possible to avoid employing the same terms as are contained in Article 38. Mention was made only of obligations, treaties and customs. Since international law consists of treaties and customary law, one might hope, in consequence of what the Rapporteur has just said, to avoid including in the enumeration two of the paragraphs of Article 38.

Thus this Convention, which we intend to conclude in a few weeks, will still leave the Court free, as it was yesterday, and as it still is to-day, to apply the four paragraphs of Article 38.

I was about to ask that this result should be recorded and to say that, with such an interpretation, the Netherlands delegation supports the proposed wording.

But our Norwegian colleague has just said that paragraph 3 of Article 38 is excluded by this wording.

This point must be cleared up. Personally, I think that the wording submitted by the Drafting Committee should be interpreted as it was by the Rapporteur. The Court will in future be free to apply the four paragraphs of Article 38, just as it is free to apply them now.

But what will be the consequence if this interpretation is not admitted?

We should have the somewhat absurd consequence that, as a result of the Convention we are drawing up here, the Court would be able to apply to that Convention only the first two paragraphs of Articles 38. What would that mean? If we adopt the interpretation given by our distinguished Norwegian colleague, it would mean that in the case of States which had not acceded to the Convention but had nevertheless a certain international responsibility, the Court might apply the third paragraph of Article 38.

Whereas we who, with all our zeal and effort, are preparing a Convention on responsibility would find that the Court could not apply to us the third paragraph of Article 38.

Hence, I think the only possible and reasonable interpretation both for the present and for the future is the one given by the Rapporteur.

The Rapporteur says, in fact: "We have before us the whole of international law, and the responsibility of States rests upon essential principles, etc., but we are not in any way prejudicing Article 38 of the Statute of the Court and the Court remains free for the future to apply the four paragraphs of Article 38".

That is how I understand the text before us.

M. Sipsom (Roumania):

Translation: We thought it our duty to propose a certain addition to the wording submitted by the Drafting Committee, not in order to give prominence to our own views or to add anything incompatible with the formula, but for the following reasons:

The wording says that, apart from those international obligations of a State which result from treaties, there are also international obligations arising from custom, from what has been recognised or established by international custom — the text says "international custom recognised to be essential by the community of nations".

The first question which arises is whether there is any international custom recognised as such, any common international custom, any common international law in the sense that it is indisputably recognised by the whole world.

I think there is not, and that, as the late publicist Kinley said, there are national international laws but there is no general international law. It is, I agree, in course of formation. There are things which are generally recognised, and it is true that custom is the fundamental source of international law. It is true that certain customs are recognised and even codified. Yesterday, I proposed that we, too, should codify and that we should deduce certain formulas from generally established custom, but that was thought unnecessary.

We are back where we were before — there is no international custom recognised by the whole world. Each State reserves to itself the right to recognise or not to recognise the whole or part of international custom. There is nothing which can be indisputably imposed upon a State and of which we can say: "That is unquestionably international custom."

If that is so — and I do not think it can be denied — we have two systems. The first says that what States in general (the community of nations, as the text says) recognise as common international law or custom is binding even on those that have not recognised it. That is one system. I do not say that it cannot be defended. It is supported by many publicists particularly by those who, like our distinguished colleague, M. Politis, favour the idea that State sovereignty is definitely diminishing.

But there are others who say: "I quite understand that this custom is generally recognised, but I must satisfy myself whether it really is a custom; mere affirmation is not enough to constitute a custom. It must be enunciated by someone and confirmed by general assent".

This is the second system. No international custom can be recognised as generally accepted unless it is accepted by the State against whom it is invoked. I do not deny that, when a State is brought before an international Court and when a custom generally recognised by others is invoked against it, in spite of its denial, in spite of its opposition, that custom may be imposed upon the State as a law, as a rule giving rise to obligations.

There is, however, the following difference. A custom which is denied by one State, and pleaded by many others who are opposing that State, may be imposed upon it in virtue of the

judge's decision, after careful study and analysis of the law which is composed of rules, customs and principles. But, if international custom is recognised in virtue of a rule or code, it is the majority that decides what is an international custom. The custom would be recognised, not in virtue of the law stated by the judge but in virtue of a personal obligation, an obligation into which I have entered by convention or treaty or by that code.

As this difference undoubtedly exists, we submitted an amendment recognising it. If we are to codify the obligations that arise from long-standing international custom, I must myself recognise such international custom before it may be invoked against me. If I do not recognise it, the judge is entitled to impose it upon me, but then it is imposed in virtue of the judge's decision and not in virtue of my own consent or of any rule I accept.

Yesterday, the Egyptian delegate adduced against me the argument that, according to the Roumanian delegate's interpretation, we could not decide whether any particular custom was recognised by everybody and that an enquiry would be needed in order to ascertain that fact.

That was not what I meant to say. The position is really as follows. One State, which is sued by another before an international tribunal, is unwilling that a custom which it does not recognise as a definitely established custom should be invoked against it or imposed upon it as a source of international obligations.

Has it the right to adopt this attitude? Undoubtedly. It has the right to say: "That is not a custom; you are wrong in claiming that it is so; I dispute it; let us argue the matter; the judge will decide". That is the position.

H. E. M. Politis will remember a somewhat similar case, in which one State invoked common international law.

M. Politis (Greece):

Translation: There was never any question of custom in that case.

M. Sipsom (Roumania):

Translation: But there was a question of something equivalent to custom, that is to say, of the evolution of legal doctrine. It was what advanced thinkers, those thinkers who had definitely adopted the idea of evolution, had stated as what ought to be the international law of the future. They were formulas, and we are dealing with formulas.

According to that formula the rule of law could not be deduced from custom — that is admitted — but from the tradition of the Courts or from the evolution of legal doctrine. It was claimed that it might be imposed as being recognised by all civilised States. It was said: "A State is entitled to treat its nationals as it will; it is not entitled to treat foreigners on the same footing as its nationals. Foreigners have rights which exceed those of the nationals of any given country." That was the doctrine invoked.

Fortunately, the League of Nations, in its advisory capacity, had been called upon to settle this question, and had decided that the claim was ill-founded. But if that claim had been recognised as really coming within the field of obligations, then everything recognised by custom or by general legal doctrine, or by principles — all these obligations — might have been imposed upon me, but only because I recognised them myself, and because I was bound to recognise them if I recognised a certain text. If I do not recognise them, the situation remains unchanged; no custom can be invoked against me as a rule, unless I myself formally recognise it as indisputable.

In the case of any other customs that are invoked against me, I shall have the right to discuss them before the international Court. The Court will, on the one side, hear my argument that this is not common international law or a long-standing and generally admitted custom and, on the other side, it will hear the claim of the opposing party. The Court will have to decide and may say: "You are wrong. The claimant State was right, because it appreciated better than you did the state of international custom on this point." But that would be an example of a legal difference settled by the judge's opinion. It would not be a difference settled with the defendant's hands bound by any recognition that he might previously have given by signing a document. That is why we thought this distinction should be made.

I should like to add a few words in reply to what the Norwegian delegate said. He said: "It was decided not to include Article 38 of the Statute of the Court. Nevertheless, I think a part of that article should be included in our formula". There are two quite different things which the Norwegian delegate has overlooked — the judge's duty and the legislator's duty. The judge's duty is one thing; the legislator's duty is another. They are too readily confused. Even if we leave to the judge the duty of creating the law — and that is what we are doing, for, if we resolve not to define custom, it is the judge who will have to say what is the custom — we are defining what custom is binding. Ultimately, the case comes before the judge, and the Permanent Court expresses itself very simply through its Article 38: "I am compelled to decide. If a basis for my decision cannot be found in the written law, I must refer to the whole body of law to ascertain what are the customs, principles and sources not yet embodied in written law, which I must examine and consider in order to give my decision. I cannot refuse to give a decision, for that would be a denial of justice."

That is the meaning of Article 38 of the Statute of the Permanent Court. The Permanent Court may indeed say that it is compelled to consult all possible sources if there is not any written law. But we are making a written law. We are making a convention. It will have binding force and will state the law. Consequently, as we are stating the law, we must do so in precise terms. We, however, are saying

something which is almost indefinite. Our work will not prevent the Permanent Court, if it finds that the codified rules are not sufficient in themselves to form a basis for its decision, from saying : " I must seek reasons for a decision, not in written rules which are inadequate, but in custom, in general principles, in legal doctrine and in judicial decisions." In this way, the judge incidentally has the right to create law when there is no law, or to deduce it from all the latent sources of law — namely, custom, legal doctrine and judicial decisions.

I would like my Norwegian colleague to consider those differences. He need not be anxious as to the Permanent Court's right to decide according to principles, for the rights of the Permanent Court are not restricted by any codification at this initial stage.

For those reasons we thought that the wording should be somewhat modified and that we should say " recognised to be essential by the respective States " instead of " recognised to be essential by the community of nations ".

M. Richter (Germany) :

Translation : The German delegation is prepared to accept the Drafting Committee's formula if the Rapporteur's interpretation is adopted for the words : " principles recognised to be essential ". According to the Rapporteur, these words refer to principles which impose upon States the obligation to grant foreigners certain minimum rights.

Now, I am not sure that these words are not capable of bearing another interpretation, by which a distinction would be made between essential and non-essential principles of customary law. To obviate any such misunderstanding we propose the following wording : " principles recognised by the community of nations as applicable — apart from all treaties ".

M. Cruchaga-Tocornal (Chile) :

Translation : The Drafting Committee's proposal does not, in my opinion, satisfy the desire that was expressed for a precise definition of the words " international obligations " as employed in the Convention we are framing. The Drafting Committee has prepared a definition which entirely fails to make clear the question under consideration. It merely says that the obligations in question are those which have for their object to ensure for the persons and property of foreigners treatment in conformity with the principles recognised to be essential by the community of nations in virtue of treaty or customary law. But it does not say what obligations are recognised as essential by the *Magna Civitas*.

Thus, the desired definition has not been given. Vagueness still remains and, even if we accept the proposed wording, we shall not make any great progress with the work of definition which many delegations rightly desired.

For my part I would go so far as to say that no definition of the words " international obligations " is needed. That would go beyond the objects which this Conference is trying to achieve. The very title of the Bases of Discussion submitted for our consideration by the Preparatory Committee shows that I am not wrong. We have been invited to codify the laws relating to the responsibility of States. The question of international obligations is both very wide and very complicated. Such obligations are connected with very diverse problems in the life of States.

The sole purpose of this Conference is to study and codify the laws relating to the responsibility of States for damage caused to the person or property of foreigners. The definition of a State's international obligations would be a very heavy task, which would necessarily cover a vast field unconnected with the question of responsibility. That question is confined within narrow limits by the very nature of the Convention we are endeavouring to draw up here.

The French proposal, which was accepted by this Committee, involves the same idea, since it says that a State is responsible for any failure to carry out its international obligations which causes damage to the person or property of a foreigner. We should not define international obligations, but should limit ourselves to deciding when and in what circumstances a State incurs responsibility. That is the point of view of the Chilian delegation, which I expressed at the meeting two days ago.

In our opinion a State's municipal responsibility is determined by its national law, and that is a precedent of its international responsibility. Municipal responsibility becomes international responsibility only in the cases to which we previously referred. I need not repeat those cases now. They will be found in the Minutes of the meeting of March 18th. For the purposes of the Convention we are drawing up, no international obligation arises, in my opinion, unless the remedies established by the national law and the procedure devised for securing the proper pecuniary reparation have been exhausted.

A State's responsibility begins only when an injustice has been committed ; and that is the case only when the injustice remains after the correct proceedings have been taken with a view to securing reparation. The question is one of degree. Theoretical international obligations, which exist in principle, become effective international obligations within the meaning of this Convention only when municipal means of remedy have been exhausted. Any other solution would remove the question of international obligations from the legal sphere, in which it is desirable it

should remain, to the purely political sphere. That would be a serious danger to the good relations existing between States.

I think the codification of that part of international law which relates to the responsibility of States should be undertaken in a practical manner, that is to say, not in connection with the much wider problem of international obligations but by strictly limiting ourselves to determining those general principles from which, in any given case, international responsibility may be deduced. This was pointed out by the German delegation in its general observations, with which I entirely agree.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : I am very sorry the Roumanian delegate took amiss what I said yesterday. In so far as it related to custom, I think M. Guerrero's proposal adopted the correct view. At all events it is the traditional view of custom. M. Sipsom's commentary on this principle, however, introduced another idea, that of certain States which dispute the binding force of international custom inasmuch as the new States do not participate in the formation of that custom.

This individualistic tendency is quite new. However worthy of respect it may be, it is none the less a new idea. The notion of custom is, indeed, somewhat opposed to that of written law, written legislation and written treaties, which demand general and unanimous acceptance. Custom has its origin in certain facts and in the way in which those facts are treated. Such facts do not necessarily occur in all States and at all times, but, when the same facts and the same treatment of those facts are repeated, custom is considered as being formed. That was the position under the system of custom before the Civil Code. The binding force of custom could obviously not be questioned whenever any individual engaged in litigation before the courts disputed the existence of such custom. If any individual were allowed to say that he did not recognise a custom because he had not had any part in its formation, that would be a return to the system of private justice under which every man made his own law.

I was therefore somewhat perturbed by the interpretation given to M. Guerrero's formula. I merely wished to enquire whether that formula was submitted as being the expression of the traditional view of custom or whether it should be regarded as the expression of the new view of custom by which custom would be equivalent to written law or treaty law. Perhaps the way in which I expressed my uneasiness somewhat displeased M. Sipsom.

M. Sipsom (Roumania) :

Translation : Not at all.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : It was stated that, if a custom is to be recognised by the contracting States, there must be an explicit act of recognition. I wondered how such an act could be invoked. As every dispute with regard to custom arises only at the time of litigation, when the question is before the courts, it is at the very moment when it is in the interest of a State to dispute custom that the State would claim that the custom is not recognised.

I find still greater difficulty on account of the way in which the objections I have just stated have been combined with those raised to-day by the Norwegian and Netherlands delegations as to the relationship betweeen the new proposal and the rules contained in the Statute of the Permanent Court of International Justice.

As submitted, indeed, the definition of international obligations seems to exclude any obligation arising from any sources other than those mentioned. I think that is the natural way to interpret this proposal. In this case, an argument *a contrario* would be quite correct as, by defining international obligations for the purposes of this Convention as only those obligations resulting from treaties or founded on custom, the application of general principles is excluded. I think that is quite clear unless this provision is accompanied by a reservation or explanation.

M. Sipsom, indeed, spoke of combining the two ideas. But I think he will admit that the other principles of international law will still continue to be in force. He even admitted that a custom which is disputed may be imposed by the Court itself. I therefore find myself faced with this contradiction. He considers that a custom may be imposed upon him if the majority of the Court declares it binding, put he will not admit the binding force of that custom on the ground that it is recognised by the majority of States.

Thus, we are not on very sure footing, because we started on a difficult and dangerous course in defining international obligations. We ought not to have considered this question. I thought the duty of the Conference was to make only what is called in English " a remedial law " as contrasted with " a substantive law ", that is to say, to codify the technique of responsibility and not the thorny question of international custom.

The basic rules of responsibility are in fact the subject of the Conference on the Treatment of Foreigners. It was the duty of that Conference to find a solid basis for all those questions relating to the position of foreigners. The application of those rules in the Bases of Discussion prepared for this Committee is only a fragmentary and isolated attempt to settle this general question of the treatment of foreigners.

When we speak of the protection or liberty of foreigners we must know how far that protection is to be ensured, that liberty safeguarded. Is it to the extent of the protection ensured to a national? Is it more, is it less?

Those are questions that cannot be solved here.

According to international law and to the Statute of the Permanent Court, the general principles recognised by the civilised world may also be taken into account. Consequently, the Court is free to determine what exactly are the obligations of any country.

But, if we adopt such a definition as is now proposed, the Court would no longer be allowed to take account of any obligation that is not based either on a treaty or on customary law as interpreted here.

For all these reasons, I fear agreement may be very difficult to reach so long as we pursue the present course. If we are quite determined to define obligations in an international Convention, I think it would be better to be satisfied with a quite general formula.

The French proposal speaks of any failure to carry out an international obligation. That should be sufficient, since no responsibility can be incurred except in so far as an international obligation exists. The nature of such obligations might still be freely discussed and, after the Convention we have undertaken to conclude, the situation will remain unchanged until a specific Convention determines and defines the treatment of foreigners. Such a Convention will definitely determine the obligations of each State in relation to foreigners.

In that future Convention account will be taken not only of customs but of the general principles of law. In that way a concrete, definite result will be achieved. But now we appear, as it were, to be prohibiting the Court from dealing with any question or any obligation which depends merely on the general principles of law, unless the Conference recognises that all these principles continue in existence in so far as responsibility is concerned.

I was anxious to lay special emphasis on all these difficulties in order to show the dangers of the course we are invited to follow. According to the definition we give, the Court will or will not be prohibited from taking account of any obligation which is not based either on treaties or on customary law as defined.

But that would not be progressive codification at all. We should have made impossible a thing which was possible yesterday. Hence, it is perhaps better to confine ourselves to the technique of responsibility and to leave aside the question of obligations, which is very complex and which cannot be separated from the principles underlying the treatment of foreigners.

The Chairman :

Translation : Gentlemen — There are still four speakers on the list and other names may possibly be added. Before calling on them, I should like to make the position clear.

The situation is not exactly promising at present. We are asked to consider a proposal made by the Drafting Committee and accepted by certain delegates. I think I may say that certain delegations will vote for that proposal without any great enthusiasm. They will do so in a spirit of conciliation and in the hope that this provision will be widely accepted, so that it may become an important factor in our subsequent deliberations.

Unfortunately, it seems that some delegations, whom this text was meant to satisfy, find it inadequate. Amendments have been submitted. One of them would doubtless not be acceptable to all those delegations which have endeavoured to find a basis for agreement and compromise.

During the discussion, the suggestion has again been put foward that we are perhaps making a mistake in seeking to define those obligations which, as regards the subject we are considering, result from international law.

It has just been said that it would be better to confine ourselves to the technique of responsibility. That is not a new idea. It had already been clearly expressed by the German delegation. It has just been repeated by the Chilian and Egyptian delegations, and I think it is is not far removed from the ideas previously put forward by the Italian delegation. I think I may add that a number of other delegations are prepared to adopt the same idea.

If they are willing to set it aside, and if they agree to consider a text like the Drafting Committee's proposal, they do so in a spirit of conciliation and in order to secure a large measure of agreement with those delegations which desire certain definitions.

That is the position. If we proceed to vote, what will be the result? I do not wish to prejudge it, but either the Drafting Committee's proposal will be accepted, with or without amendment, or it will be rejected. If it is rejected, we shall be back in the situation contemplated yesterday ; a number of delegations will say : " We are not satisfied and therefore we cannot usefully continue to take part in the proceedings with a view to codifying the questions submitted to this Committee. "

If the proposal is accepted, it will be accepted by certain delegations who are voting without much enthusiasm and for different reasons. Moreover, if this proposal is accepted, it is probable that the acceptance will be the result merely of a majority vote.

Acceptance, with or without amendment, or rejection, will be the result of a majority vote. Thus, on a point which certain delegates think important — perhaps fundamental — there may be a source of difficulty for our subsequent work.

The meeting will adjourn shortly. I ask you to consider the position. In particular, I would ask those delegations which urged yesterday that this point should be dealt with immediately, to consider the efforts that have been put forward to secure a compromise and the

difficulties that have been encountered. I would ask them whether they cannot agree to submit this proposal to new and further examination outside the plenary meeting. In that way, the necessary time might be devoted to it while we could continue our work on the remainder of our agenda.

We are not voting on texts at present but on ideas. Those ideas will be expressed and will take the form of articles which we shall have to discuss again and the nature of which we shall have to determine subsequently. Should they be given the form of a treaty? Should we adopt any other course? How far can we go with the codification of international law, remembering that that codification must be progressive?

The meeting was adjourned at 5.25 p.m. and resumed at 6 p.m.

The Chairman :

Translation : Before calling upon the six speakers whose names are on the list, I should like to say that, judging by the conversations I was able to have during the adjournment, there seems to be a certain amount of support for the suggestion I made just now — namely, that the question we are considering should be referred to a sub-committee. With a view to shortening our work, I would therefore ask the speakers to remember that suggestion, so that a discussion, which in all probability cannot be concluded this evening, may not be unduly prolonged.

M. Guerrero (Salvador) :

Translation : My object in speaking is to express my agreement with the Chairman's opinion that it will be difficult to reach any solution of this question in this Committee. I submitted certain amendments, thinking they might be acceptable as compromise texts. As that is not the case, I propose that the sub-committee to be set up should be wide enough to represent all the currents of opinion which have been revealed, so that the result achieved may be satisfactory to all.

The Chairman :

Translation : I should like to ask H. E. M. Guerrero one question, as I am not sure that I quite understood him. In my view, the sub-committee ought, as far as possible, to represent all the opinions that have been expressed. The sub-committee would be required to undertake a fuller, deeper and longer study of the question than was possible yesterday for the Drafting Committee. It should submit a reasoned proposal to the Committee. That being so, I think it is essential that during the work of the sub-committee, and parallel with that work, this Committee should continue its own work. Does M. Guerrero agree?

M. Guerrero (Salvador) :

Translation : I quite agree.

The Chairman :

Translation : As a result of M. Guerrero's timely remark, we are faced by a new situation — namely, the proposal to refer the problem we are considering to a sub-committee. I would ask speakers whose names are on the list whether they still desire to address the Committee, or whether they will refrain from doing so in order that a vote may be taken on the appointment of the sub-committee.

M. Dinichert (Switzerland) :

Translation I apologise for insisting and I promise that my remarks will be brief, clear and perfectly friendly. I think — I may be wrong — that what I say may help the sub-committee in its work.

It would be ungracious of me not to recognise that a great effort at conciliation has been made. When such an effort is put forth, we should, as far as possible, support it. I am going to ask a question which may, perhaps, surprise you. I do so merely in order to throw light upon the discussion. Is there really any compromise to be effected between us on the question which we are now discussing and to which we have devoted two days? I favour compromise when there is any question of setting up a new international statute or convention involving new undertakings. But I would point out that what we are now trying to determine is, in my opinion, already the law. I think there can be no doubt that States which claim to belong to the community of nations have obligations. They are bound to fulfil them and, if they do not, they violate international law.

For such cases an institution, to which we almost all belong, has provided a supreme jurisdiction based upon a Statute which prescribes the principles of law by which such violations of international law shall be judged by the Court of Justice.

That is the famous Article 38, to which such frequent reference has been made during this discussion.

We are all, I think, with very few exceptions, parties to the Statute of the Permanent Court of International Justice. Most of us are parties to the Optional Clause of Article 36 of the Statute. Most of us, moreover, have our part in that network of treaties of arbitration and judicial settlement which now covers the whole world. Consequently, we are bound one towards another to refer to arbitration or to the Permanent Court of International Justice any conflicts which arise between our States through the violation of international law. Such questions are decided in accordance with the sources of law referred to in Article 38.

In these circumstances, I would make an urgent appeal and would ask: Have we been sent here by the League of Nations and by our own Governments to draw up rules, whether old or new, concerning the law on foreigners, and in that connection to set up what I might call a minor or inferior law? How would public opinion throughout the world view our action if we decided to apply any inferior

law or refer to sources of law which give less guarantees regarding questions concerning the responsibility of States for damage caused to foreigners? For, of all questions concerning the responsibility of States, it is just those that have been selected for our consideration. We should find it difficult to approve any such retrograde step. I would ask my friends with whom I disagree, whether that is not the situation? We are bound by an undertaking to submit our differences to an international tribunal. Is there not therefore a law which applies to us already? Why do you wish to change it? Why do you wish to make it less certain and less complete? I think that is a dangerous course. We ought not to enter upon it. I, personally, cannot follow it.

I feel that you think I am insisting overmuch. I must say that, as the representative of the Government of a small country, I think it is my right, perhaps my duty, to tell you how the people of that country feel and think. In Switzerland we have no fear with regard to the terms of the undertakings we are asssuming.

We shall all agree that our policy towards foreigners should be actuated by the principles of justice, equity and civilisation. What is there to fear, then, from this impartial judge? Mention was made yesterday (by my friend M. Buero) of events which occurred in the recent past. I know the matter to which he was referring. It is not my duty to speak of it at present, but he will agree that those events belong to an epoch that is now closed. Times have changed. Great and small States are now subject to precisely the same law — the one that we have hammered out, the one that exists, the one we intend to develop and not to destroy.

That is what I wanted to say. It will explain why the Swiss delegation will very regretfully be unable to support any proposal that does not confirm the existing law.

M. Giannini (Italy):

Translation: I am sorry to have to speak again on this question. I shall not deal with the substance of the problem, as we have before us a proposal to appoint a sub-committee.

The Italian delegation anticipated a storm and you see that it was right. When an attempt is made to solve such questions, a storm is inevitable. Several of my colleagues who, like myself, have a long experience of Conferences will, unhappily, find themselves bound to agree with me when I say we must show a certain tolerance towards some useless proposals. Sometimes (if you will allow me to speak frankly) we have to put up with certain follies without which no Convention could secure approval. Let us, on this occasion, try not to introduce too many useless things and to commit as few follies as possible.

The Italian delegation, with its urgent wish for compromise, said: "Either you must retain only the words 'international obligations' or you must insert something equivalent — that is to say, you must define the words 'international obligations'". That is all you can do in a Convention which is not intended to settle international obligations.

In a spirit of compromise we accepted the formula submitted by M. Guerrero. In the same spirit we are to-day prepared to adopt the Drafting Committee's proposal, with regard to which I have only one slight proposal to make — namely, that the words "to be essential" should be struck out, as the German delegation has already requested. We do not, however, desire to add the words suggested by M. Richter. I must say frankly that is as far as we can go.

I should like to share the Chairman's hope for unanimity on this question, but I would ask: "What can the sub-committee do?" Either it will maintain the present point of view and, in that case, it will have no fresh suggestions to submit to us, or it will abandon that point of view and in that case our answer must be negative. In these circumstances, and in a spirit of frankness, I am bound to say I do not approve of the appointment of a sub-committee.

There are other reasons why I do not approve of it. As one who has a professional interest in statistics, I venture to point out that at present, with all the bundles of documents that are delivered to us at 9 o'clock every morning, we have not definitely adopted a single Basis of Discussion, and we have an enormous number of amendments. On some questions there are as many as eight amendments. On a dozen articles there are three or four for each. If you add new proposals, you will see that, if we go on in this way, we shall have to ask our Netherlands friends to prolong their hospitality.

Are we, in short, prompted by that spirit of compromise which is necessary if we are to achieve any agreement? Let us see whether in the whole Convention it is possible for us to agree on any points. If there are disagreements, we shall have to introduce some of those little follies of which I spoke in order to ensure agreement.

Before we take up any question that is not related to responsibility, I would urge reflection. Amendments may always be submitted up to the last moment, but if, in a Conference where more than forty States which will be parties to the Convention are represented, we go on submitting amendments up to the last moment, we shall perhaps run the risk of being swamped by them and of failing to reach any conclusions.

In these circumstances, if the discussions on the same problem are to start again in the sub-committee, and are then to be repeated in this Committee, I shall accept your decision, but I cannot agree with it.

M. Nagaoka (Japan):

Translation: After hearing the previous speakers I feel that there is a misunderstanding as to the relationship between the interpretation of the Statute and my proposal.

My Netherlands and Roumanian colleagues stated that the Permanent Court of International Justice applies all the articles included in the Statute. I am sure that disputes regarding the future Convention will in all probability be settled in a friendly way, through diplomatic negotiations or through conciliation, without ever reaching the Court.

I fear that the omission from the Convention of a principle which we consider essential may lead to an interpretation *a contrario*, according to which the general principles of law referred to in paragraph 3 of Article 38 of the Statute of the Court would not be applicable if diplomatic negotiations were started. For that reason, I request that Article 38, paragraph 3, of the Statute of the Court should be included in the body of the Convention.

M. Erich (Finland):

Translation: The formula proposed by the Drafting Committeee shows it would have been better not to embark upon a definition of international obligations. In point of fact, we have made hardly any progress. We have not even ascertained whether, and, if so, how far, the general principles of law may be taken into account according to the wording proposed.

The wide application that has been given to the words "in conformity with the principles recognised to be essential by the community of nations" cannot do away with the fact that only those international obligations resulting from treaties or from custom are contemplated.

The inadvisability of excluding any consideration of the general principles of law is very clear from the terms of some of the Bases of Discussion.

Basis No. 8, paragraph 2, says: "It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it". Basis No. 4, paragraph 2, says: "A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service in whole or in part, by a legislative act, unless it is driven to this course by financial necessity." Basis No. 9, paragraph 2, says: "A State incurs responsibility if the executive power without repudiating a State debt, fails to comply with the obligations resulting therefrom unless it is driven to this course by financial necessity". Basis No. 24, paragraph 2, says: "Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined".

These provisions show that the Bases of Discussion definitely contemplate consideration of the general principles of law. It is intended that the judicial body which has to apply these bases — that is to say, an arbitral tribunal or the Permanent Court of International Justice, should take into consideration arguments and circumstances which are related neither to treaties nor to custom, but refer rather to the general principles of law and even of equity.

Hence, any intention to exclude all application of the general principles of law would be quite contrary to the principles adopted in these bases. The only fact which may to some extent justify consideration of the general principles of law recognised by civilised nations, is that, in the last resort, we implicitly admit those international obligations which exist apart from the present Convention and which are related to the position of foreigners and their property.

Nevertheless, such an interpretation, it must be admitted, is somewhat forced, and the formula, as submitted to us, is not such as will satisfy those delegates who, since yesterday, have expressed doubts regarding this exclusion of certain provisions which are to be found in Article 38 of the Statute of the Permanent Court of International Justice.

For these reasons, I think we cannot do other than adopt the Chairman's proposal that the discussion on this question should be continued.

M. Urrutia (Colombia):

Translation: Mr. Chairman — I think the best thing we can do is to adopt your proposal. It has already been approved by M. Guerrero and several other delegates who have taken part in the discussion.

Your proposal, indeed, seems to be generally approved. I should, nevertheless, like to submit certain observations of a general nature.

When the codification of international law was discussed in the Assembly of the League of Nations, it was intended that this Conference at The Hague should be a continuation of the earlier Conferences, not merely a material continuation through the fact that we were meeting at The Hague, but also a spiritual continuation.

I would therefore ask the Committee to consider the importance of the texts accepted by the Hague Conference. If certain points have already been settled by earlier Conventions, it would be wise not to reopen the discussion of those points, particularly as those Conventions have been ratified by most States.

This remark relates to the discussion on customary law.

I think that in the organisation of international justice and, one might say, the organisation of peace, which has been the fruitful work of recent years, we might regard as the chief bases, first, the Hague Conventions, next, the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice and, finally, all that mass of international agreements and conventions which have made it possible to effect such progress in the direction of justice and peace.

As we are attempting to take a step forward, we should do well to consider those texts which have already been accepted and ratified by most States. We cannot ignore such texts in the work we have undertaken.

I was anxious to submit all these observations, because I thought that, in the interest of our work, it would be well to remember these points.

The Chairman :

Translation : A vote must now be taken. I suggted that the point which has given rise to these difficulties should be referred for consideration to a sub-committee. The sub-committee will be so constituted as to include representatives of the various points of view. It will be required to study at leisure the problem we are considering and, while it is working, we shall continue our consideration of the remaining Bases of Discussion.

I put to the vote the proposal to refer this matter to a sub-committee.

The proposal was adopted.

I propose that the sub-committee should be constituted as follows :

M. RICHTER, M. BORCHARD, MR. BECKETT, M. CRUCHAGA-TOCORNAL, M. MATTER, M. GIANNINI, M. NAGAOKA, M. LIMBURG, M. SIPSOM, M. GUERRERO, M. DINICHERT, and M. DE VISSCHER, the Rapporteur, who will act as Chairman of the sub-committee.

Is there any objection?

The proposal was adopted.

The Committee rose at 6.50 p.m.

FIFTH MEETING

Friday, March 21st, 1930, at 3 p.m.

Chairman : M. BASDEVANT

12. CONSIDERATION OF BASIS OF DISCUSSION No. 7.

The Chairman :

Translation We shall now take up the consideration of Basis of Discussion No. 7, which reads as follows :

> "A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power incompatible with the treaty obligations or other international obligations of the State."

Several amendments have been proposed. The Belgian and Mexican delegations would add a supplementary paragraph concerning the preliminary exhaustion of remedies at municipal law. That point will be considered after Basis of Discussion No. 7. I would ask you to leave it aside for the moment, so as not to confuse two different questions.

At present we shall consider Basis No. 7 alone.

Other amendments have been proposed with regard to Basis of Discussion No. 7 (Annex II). The object of those submitted by the delegations of the United States of America, Greece and Spain is to combine Bases Nos. 2 and 7.

That is merely a question of drafting, and I think there will be no objection to our regarding these amendments as referred at once to the Drafting Committee.

There is another amendment of the same nature, but of wider scope, submitted by the Indian delegation, which would combine Bases Nos. 2, 7, 12, 13 and 15. That, too, is a question of drafting, and this suggestion may simply be referred to the Drafting Committee.

After that, we have two amendments, submitted by the Hungarian and Portuguese delegations respectively. Reasons for these amendments will be given presently.

Mr. Latifi (India) :

With your permission, Mr. Chairman, I should like to add Basis No. 1 to Bases Nos. 2, 7, 12, 13 and 15, which are to be referred to the Drafting Committee.

The Chairman :

Translation : That question also might be referred to the Drafting Committee subject

to any decision that may subsequently be taken regarding Basis No. 1.

Mr. Latifi (India) :

I agree.

M. de Berczelly (Hungary) :

Translation : The Hungarian delegation has submitted the following amendment relating to Basis of Discussion No. 7 :

Replace Bases of Discussion Nos. 7 to 9 and 11 to 14 by the following text :

"If the damage suffered by a foreigner is the result of acts or omissions of the administrative organs, the State is only responsible if it does not afford the foreigner a possibility of enforcing his claims as against the organs at fault and if the State has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilised State."

We are considering the State's responsibility for the acts or omissions of its executive power and, we might add, of its officials.

An examination of the "Brown Book" (Document C. 75. M. 69. 1929. V) and the various proposals that have been circulated since the opening of this Conference, leads to the conclusion that the State's responsibility for its executive power and for its officials is generally recognised. It only remains to make clear, in the provisions of the Treaty to be concluded, how this responsibility will operate.

My Government thinks that the State is responsible for all the acts and omissions of its executive and of its officials. But, in our opinion, this municipal responsibility is secondary except in the case when, by the ordinary legal means, the State does not afford the foreigner a possibility of enforcing his claims regarding the act which is alleged to be illegal.

Apart from that case, there are two possibilities : either the laws of the State have been incorrectly applied by the executive organ or the official in question, or they have been correctly applied.

If they have been incorrectly applied, and if the authorities of the State concerned recognise this fact, there is no dispute, since the remedy provided by the municipal legislation is available. Reparation for the damage must be made.

If the laws and regulations of the country have been correctly applied by the executive organ or by the official, this will be shown by the fact that the possible means of redress provided by the domestic law have been exhausted without success. If the foreigner nevertheless claims that he has suffered damage because the act or omission alleged is incompatible with the State's international obligations, and if his claim is well founded, it is obvious that the laws or regulations of the State are incompatible with its international obligations.

In that case, it is not the State's responsibility for its organs, but merely its responsibility for its legislation, that should be invoked. This should be done, not by the foreigner himself, but only by the State concerned.

To admit any other possibility would entail two disadvantages :

(1) The State's responsibility for the acts or omissions of its legislative organ would only rarely be invoked, as it would be much simpler to bring claims before international courts regarding the acts and omissions of the executive organs or officials of the State. Thus, the first provision we have introduced into this treaty would be inoperative, as, in practice, the second would always be invoked.

(2) All remedial procedure which should be instituted before the State's municipal authorities would be transferred to the international courts, which would thus become congested. Moreover, such procedure would be much too costly.

Accordingly, I think that any settlement of this question should be based upon the following principles :

(a) The State's direct international responsibility may be invoked only if it refuses to foreigners in general or in any particular case access to municipal means of remedy with a view to bringing their claims against the author of the illegal act, or against the one who is responsible in place of the author of that act.

(b) When municipal means of remedy have been exhausted without success, the State's international responsibility for its executive organ or for its official may not be invoked, but only its international responsibility for its legislation.

(c) In both cases, any claim before an international court may be made only by the State and not by the individual, unless such a right has been conferred upon him by treaty.

Those are the observations I desire to submit to the Committee.

The Chairman :

Translation : Your proposal is intended to replace Bases Nos. 7 to 9, and 11 to 14. It relates to the general basis at present under discussion and also to a number of special applications which we shall consider later.

To make the matter clear, I would ask you, in the first place, whether you have any objections to Basis of Discussion No. 7 itself, or whether you think it acceptable. In the latter case, you might restate your point of view when we come to Bases Nos. 8, 9 and 11 to 14, and you might possibly ask that those bases should be amended or struck out.

A second point on which I should like some explanation is as follows : If you are prepared

to accept Basis of Discussion No. 7, would you not also be prepared to admit that your amendment in fact raises the question of the exhaustion of municipal remedies and that, accordingly, it is on the same footing as the Belgian and Mexican proposals which we shall consider after reaching a decision on Basis of Discussion No. 7?

M. de Berczelly (Hungary) :

Translation : Basis of Discussion No. 7 should be replaced by the provision included in the Hungarian proposal. We mentioned Bases Nos. 8, 9, 11, 12, 13 and 14 because we intended to make the same proposal when those bases came under discussion.

My amendment not only relates to the exhaustion of any possible municipal remedy, but it also involves the idea that the State's responsibility for its executive organs and its officials is only secondary. Such responsibility could be admitted only in the case referred to in the amendment. In other cases the State's responsibility must be invoked in respect of its legislation.

If, however, the Chairman thinks it would be advisable to discuss this amendment at the same time as the Belgian amendment, with which it has points of similarity, I have no objection to that procedure.

Mr. Beckett (Great Britain) :

On a question of procedure, might I suggest that it would clarify the situation a little if we were to deal with the exhaustion of municipal remedies before Basis No. 7 instead of after, because the two seem to be becoming inextricably mixed?

The Chairman :

Translation : I do not think it would be advisable to take up immediately the question of the exhaustion of municipal remedies. Basis of Discussion No. 7 says that the State is responsible for the acts of its executive power and that, accordingly, any of those acts which are incompatible with the State's international obligations involve its responsibility in virtue of the principle we have already adopted. That point can be quickly settled. It is very simple, and there can be no serious hesitation on the subject. Afterwards, we shall consider the question of the exhaustion of legal remedies. That problem is more complex, and wider discussion will be necessary. In these circumstances, I feel bound to follow the procedure I outlined at the beginning — namely, that we should discuss Basis No. 7. Several speakers have sent in their names, and I invite them to speak on this basis. If they intend to speak on the exhaustion of municipal remedies, I would ask them to refrain and they will speak in due course.

M. d'Avila Lima (Portugal) :

Translation : In accordance with the classical view of the general mechanism of the State adopted by the Preparatory Committee, we come now to the question of the governmental executive power. Thus, we have before us the case *par excellence* of the equation of the State's responsibility. The legislative and judicial powers, within their respective limits, involve the State's responsibility solely from the standpoint of the origin and interpretation of the law, whereas the governmental power, even if its function be strictly limited to the application of rules, is by its nature the permanent and direct agent of public authority. The "governmental power" comprises the whole body of officials and those natural or juridical persons who, according to the established order and within the respective limits of their authority, act as representatives of the State. In any case, our most important duty is to define the nature and conditions of the responsibility of the governmental State-power — that is, of the State as official.

The first condition is the easiest to enunciate. It has, moreover, already been accepted with regard to the legislative power. It is that the governmental State-power is fully capable of assuming any international responsibility incurred through its violation of rules that are internationally recognised.

But are these factors — the capacity of the agent, the breach of rules and ascribability — sufficient to constitute an international illegality and to entail the reparation consequent thereon?

When does a State become responsible, through the action of its agents, for an act which is illegal from the international standpoint? We think that this question brings us to the *punctum pruriens* of the section of international responsibility which is now under consideration. The importance of the subject must be emphasised, since once we have established the starting-point or origin of responsibility — for instance, a breach of objective rules — we must ascertain the form and degree of the offending State's responsibility for the act which is *contra jus.* In this connection, we must be guided by the results of the great discussion that has long proceeded in the domain of civil and criminal law.

According to the classical doctrine, a State's international responsibility is determined by the principles of the old Roman law, those strictly individualist principles of the *culpa aquiliana.* That is tantamount to asserting that a State which has infringed a rule can be held responsible only if the acts which prejudice the rights of one or more other States were committed fraudulently or negligently. Now the theory of fault, like other similar theories — for instance, those of contractual fault, fault *in re ipsa* and professional risk — seems to be inadequate to determine international responsibility.

In the first place, this responsibility arises under circumstances very different from those connected with civil responsibility. Accordingly, it is logical that, as the relationship

between States differs in nature from the relationship between individuals, it should come under a different juridical system.

Further, the theory of fault fails to explain several cases of responsibility which are admitted by legal doctrine and by the practice of States. These cases are so important that we should like to mention them explicitly.

It is a recognised principle of international law that the state of a country's legislation is no excuse for the non-fulfilment of its obligations towards other States. On what, then, can this responsibility be based? To accept the theory of fault would involve the same consequences if we consider a State's responsibility in the following cases: acts performed by a country's vessels on the high seas, acts performed by officials who exceed their authority and with regard to which the theory of fault *in eligendo* or *in custodiendo* is as inadequate as the principle by which the responsibility would fall on those *qui custodient ipsos custodes*.

These facts show that legal doctrine and positive law both recognise the need to replace fault as the sole and fundamental basis of international responsibility by the objective conception of the effects of the breach of obligation. The objective conception harmonises best, not only with the nature of international law, but also with the objects of State responsibility. In point of fact, the international juridical order — which is the result of the common will of States — does not yet recognise any power superior to each unit or State (a sort of super-Government) which might, in virtue of its position, enjoy great liberty of action in the application of international rules. In the absence of such a possibility (we would even say, such a revolutionary threat) there must be a substitute. This can be provided only by accepting the objective principle of responsibility. According to this principle, a State would be held responsible for any infringement of the rules which guarantee the existence and equilibrium of the international community.

There need be no fear that, by admitting the objective conception of responsibility, we shall set aside all individualist or subjective factors. This conception naturally leads us to consider the infringement of the obligation as the fundamental fact which is sufficient to involve responsibility. But this responsibility may vary in extent and gravity according to the nature of the infringement itself. (It may involve a pecuniary indemnity, criminal action against the agent of the State, an explanation through the diplomatic channel, an undertaking to amend the municipal law, etc.) It may also vary according to the circumstances in which the irregular or illegal act is committed, and those circumstances may vary in gravity. They may, for instance, amount to fault, fraud or negligence.

M. Nagaoka (Japan):

Translation: Mr. Chairman, in order to make Basis No. 7 clearer and to avoid any misunderstanding, the Japanese delegation thinks it should be stated that, where there are administrative tribunals exercising jurisdiction with regard to private individuals and their property, the acts of such tribunals come within the scope of this article.

If the Committee agrees with this view, the Japanese delegation asks the Rapporteur to mention it in his report.

If, on the other hand, the Committee thinks that administrative tribunals should be assimilated to judicial tribunals, I should have no objection, provided that interpretation appears in the report.

The Chairman:

Translation: I do not think the Committee will have any hesitation in deciding that the provisions which, from our point of view, apply to judicial decisions apply also to the decisions of administrative tribunals. It is in that sense that the assimilation should be made.

M. Sipsom (Roumania):

Translation: A proposal has been made by the Hungarian delegate.

The Chairman:

Translation: May I give an explanation? The Hungarian delegate agreed that his proposal should be discussed at the same time as the Belgian proposal relating to the exhaustion of legal remedies.

In that connection, I would remind you that the question of the exhaustion of legal remedies is not yet under discussion.

M. Sipsom (Roumania):

Translation: The Hungarian delegate said that most cases covered by Basis of Discussion No. 7 are really cases of wrong done by the legislative power. He argued as follows: Either the official has applied the law or he has not applied it. In any case, the legislative power is responsible for the wrong done.

I think that is a mistake. The wrong is not done in every case by the legislative power. In point of fact, the executive may perform an act of authority; it may issue ministerial decisions and promulgate decrees. Consequently, it may incur responsibility by acting contrary to an international obligation. Thus, we have to consider, not one case, but two distinct sets of cases — on the one hand, legislative acts, and, on the other, acts performed by the executive power which may be guilty of a breach of obligations at international law.

Such are the observations I desired to submit in view of the Hungarian delegate's statement.

As regards the learned statement made by the Portuguese delegate, we must conclude that the responsibility contemplated in this Basis of Discussion is quite objective. That

is the point of view adopted by the Preparatory Committee. The obligations in question are pre-existent. They arise from treaties or from other sources that we shall determine. The mere violation of such an obligation entails responsibility. It is sufficient to show that a State has not fulfilled an obligation in order to prove that it has incurred responsibility.

The Portuguese delegate's view agrees exactly with that of the Preparatory Committee.

There can be no objection to our adopting this view, subject, of course, to a reservation regarding the Belgian proposal, which, in my opinion, states the conditions on which the whole article is dependent. It makes any proceedings concerning responsibility dependent on the fact that the injured party has not received satisfaction through the preliminary exhaustion of remedies at municipal law.

The Chairman :

Translation : There are still three speakers on the list, and I would ask them to pass over any details relating solely to drafting. In that way we shall save time.

M. Plesinger-Bozinov (Czechoslovakia) :

Translation : I wish to say that the Czechoslovak delegation approves of Basis No. 7, subject to the reservation on Article 2 concerning the definition of international obligations.

M. Guerrero (Salvador) :

Translation : It need hardly be said that this article must be brought into line with the preceding article.

The Chairman :

Translation : We are considering the ideas expressed in the Bases of Discussion. The Drafting Committee will give the text its final form.

M. de Berczelly's amendment is before us. He agrees that it shall be considered at the same time as that of the Belgian delegation. The Portuguese delegation has submitted an amendment which would replace the word "executive" by the word "governmental" and would provide for the possibility of the power of a State being concentrated in a dictatorship. No decision on these questions of drafting need be taken at present. They may be regarded as referred to the Drafting Committee.

We can now proceed to vote on Basis No. 7.

M. Urrutia (Colombia) :

Translation : It is understood that I may reconsider my vote in the event of any of the amendments proposed not being adopted.

Basis of Discussion No. 7 was adopted.

The Chairman :

Translation : We have before us the additional proposal submitted by the Belgian delegation and the amendments proposed by the Spanish and Mexican delegations. You have, moreover, heard the reasons for the Hungarian amendment.

M. De Visscher (Belgium), Rapporteur :

Translation : I will read the Belgian proposal :

"This responsibility (that is, the State's responsibility for acts or omissions of the executive power) may, in principle, be invoked only after the parties concerned have exhausted the remedies allowed them under the internal law."

The Belgian delegation proposes that this idea of the preliminary exhaustion of legal remedies should be expressed in the Bases of Discussion. It is already expressed in a somewhat unsatisfactory manner in Basis No. 27 as proposed by the Preparatory Committee.

The proposal is justified by the capital importance we attach to the condition of the preliminary exhaustion of legal remedies. It is certain — and I think the Committee will be unanimous in taking this view — that no act or omission may be definitively ascribed to a State or alleged against that State so long as there is good reason to believe that the State in question is prepared to make good the damage caused by that act or that omission. Thus, it is only after the exhaustion of these remedies that the international responsibility of a State may be invoked.

I recognise that there may be some exceptions to this rule. For instance, the obligation to employ municipal remedies at municipal law does not arise if there are no efficiently organised means of remedy.

Again, this condition would not apply if there were unwarrantable delay on the part of the local courts or obvious negligence with regard to claims put forward.

I would merely point out that, in such cases, the State's responsibility may be invoked in virtue of other principles, particularly those expressed in Bases Nos. 5 and 6.

In submitting this additional proposal, the Belgian delegation is actuated chiefly by a desire to bring closely together two things which, in real life, are intimately connected. They are, on the one hand, the existence of responsibility, the affirmation of the principle we have just adopted, and, on the other hand, the enunciation of a condition that is essential before the responsibility may be pleaded or invoked — namely, the preliminary exhaustion of legal remedies.

We must put at the head of these fundamental provisions the rule that no direct action, as between one State and another, can arise until after these remedies have been exhausted.

I do not at present wish to give a definite opinion as to the exact place in which this provision should appear. If, for instance, we adopt the Greek delegation's suggestion that we should include in the same text responsibility for the acts or omissions of the govern-

mental power and for those of officials, I think it would be logical to place the text I propose after the provision containing those two ideas.

The essential thing, in my view, is that the provision should appear at the very head of the fundamental principles. I note — and that is an argument in favour of this procedure — that the Preparatory Committee adopted that plan in the case of acts or omissions of the judicial power. Basis of Discussion No. 5 says that a State is not responsible unless there has been a judicial decision which, according to the text, is final and without appeal. It might be better to say " a final decision ". As that plan was adopted in the case of the judicial power, we should follow it also in the case of the executive power, and should therefore include this proposal in the bases now under consideration.

I repeat that Basis No. 27, which expresses the idea of the exhaustion of legal remedies, does not, in my opinion, do so in a satisfactory way. It is as follows :

> " Where the foreigner has a legal remedy open to him in the courts of the State, the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision."

I think the basis as worded is not quite correct. In point of fact, there is no need for the State to make any such request. It need not ask for any postponement when its responsibility is alleged. The exhaustion of the legal remedies is a fundamental condition before responsibility can be invoked. Hence, the postponement in question is obligatory. It is a right.

Finally, we introduce this proposal at the present stage of our deliberations chiefly because we think that, if this text is now adopted, agreement in this Committee will be greatly facilitated. We are anxious thus to contribute to the realisation of that agreement which we all desire.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : The formula proposed by M. de Visscher would lead to the conclusion that municipal means of remedy must be exhausted before international responsibility can be considered. Once these remedies have been exhausted, however, and a final decision has been given, the question which was the subject of this municipal procedure may be taken before an international court. Thus, a national decision would be judged by an international body.

I should like this proposal to be brought into connection with the Bases of Discussion relating to denial of justice. According to those bases, international responsibility through acts of the judicial power is incurred only in the case of a denial of justice.

The Basis of Discussion relating to the judicial power means that, so long as there has been no denial of justice by the national courts, no international responsibility can be incurred as a result of their decision, whatever that decision may be.

That situation certainly arises when proceedings between a foreigner and a private person are taken before the judicial power. Thus, if the foreigner is not refused access to the courts and if the judicial decision is given under normal conditions, there can be no question of international responsibility.

If, on the other hand, an act of the executive power is in question — or of an official, whether or not he exceeds his authority — the national courts will, so far as they are allowed to do so by law, hear the action brought by the foreigner against the State or against the officials concerned. Once the decision has been given, the case may, according to the Belgian proposal, be taken before an international court.

Personally, I should have liked a uniform rule according to which international responsibility would be incurred though acts of the executive power or of an official only in the case of denial of justice.

Instead of saying, " This responsibility may, in principle, be invoked only after the parties concerned have exhausted the remedies allowed them under the international law ", we ought to say : " This responsibility for acts of the executive power or for acts of officials arises only in the case of denial of justice. "

It is not only the exhaustion of municipal remedies that should be considered. If we consider that factor only, we shall have to distinguish between acts of the judicial power according to whether the proceedings relate to an act of the executive power or whether they are taken by one private individual against another.

My remarks are intended both as a request for enlightenment and as a criticism of the Belgian proposal.

The Chairman :

Translation : Before calling on M. Vidal, I will read the amendment submitted by the Spanish delegation :

> " Such responsibility, however, may not be pleaded until the interested persons have exhausted all remedies open to them under the internal legislation of States. "

M. Vidal (Spain)

Translation : The Spanish delegation is of opinion that the question of the exhaustion of legal remedies arises at the very outset. This question is badly expressed in Basis of Discussion No. 27, which says :

> "...the State may require that any question of international responsibility shall remain in suspense . . . "

In point of fact, it is incorrect to say that this responsibility remains in suspense. We are not concerned with a kind of concession which is made to the claimant State and which is

mentioned at the end of the Bases of Discussion as though it were a subordinate consideration.

On the contrary, before international responsibility can exist, the legal remedies must have been exhausted. Until the State has said its last word, international responsibility does not exist. We are not concerned, therefore, with any suspension of that responsibility. The question is rather one of the origin of responsibility. Obviously, responsibility arises the moment the damage is inflicted; but, in the first place, it is a responsibility of the State from an internal point of view. I therefore agree entirely with the principle stated by the Belgian delegation.

The Spanish proposal covers several points and would combine the responsibility of the legislative and executive organs and that of officials, whether acting within the limits of their authority or exceeding that authority. It states that international responsibility is dependent upon the exhaustion of legal remedies.

Although, in principle, I agree with the idea underlying the Belgian amendment, I cannot fully support the terms of that amendment. It says :

> " This responsibility may, in principle, be invoked only after the parties concerned have exhausted . . . "

This formula does not bring out the general character of the principle of the exhaustion of legal remedies. M. de Visscher, in his observations, explained the meaning of the words " in principle ". In his opinion, these words are needed in view of the possibility of certain exceptions to the rule. Such exceptions were expressly mentioned ; for instance, unwarrantable delay on the part of the local courts in settling claims.

In my opinion, however, these exceptions in no way contradict the general nature of the principle, and, as they have been mentioned, I think the principle should be stated without any restriction. Just as we unanimously adopted the French proposal to the effect that " a State is responsible for any failure to carry out the international obligations of the State which causes damage to a foreigner ", subject to a reservation regarding the subsequent definition of the words " international obligations ", so, I think, we ought to lay down the principle of the exhaustion of legal remedies, regardless of any slight exceptions it may entail. I therefore propose that we should strike out the words " in principle " from the Belgian amendment.

Further, the Belgian amendment has a defect similar to that which occurs in Basis No. 27. The amendment says :

> " This responsibility may, in principle, be invoked . . . "

This might lead to the inference that the responsibility exists from the moment when the damage was inflicted, but that it cannot yet be invoked. In other words, it remains in suspense. I think it would be more accurate to say, as the Egyptian delegate proposed, that this responsibility does not originate, does not arise, until after legal remedies have been exhausted. In that way we should clearly recognise that the existence of a State's international responsibility depends on such an exhaustion of legal remedies.

M. Matter (France) :

Translation : I wish merely to express my agreement with the Belgian proposal. I think it marks a great advance as compared with the provisions set out in the present document. The "Brown Book" used the words "final decision ". That was quite inadequate, for what is known as a final decision in the codes of civil procedure of all countries is that decision in regard to which no further legal remedy is available, either because all those remedies have been exhausted or because the parties concerned have not observed the time-limits prescribed for the employment of such remedies.

But the Belgian proposal goes much further. It requires that the remedies should have been exhausted. Accordingly, the superior jurisdiction of The Hague cannot be invoked because the court of some small town or some unimportant court of appeal has, rightly or wrongly, decided a question of international law, and has or has not thereby committed a breach of international obligations. It is certain that the Hague Court will be appealed to only in the case of serious differences, which have already been argued before all stages of the courts of the defendant State.

For that reason we, too, prepared a text, but did not submit it to the Committee because it did not amount to an amendment of substance. In that text we employed the clause : " when all remedies have been exhausted ".

In that respect, we consider the Belgian formula infinitely superior to that proposed in the Bases of Discussion. This is, indeed, a question which deserves the deepest consideration, and I gladly support the Spanish and Egyptian delegations in their suggestion that the Belgian proposal should be made a little more definite.

The right to take proceedings against a State, to invoke its responsibility and therefore to bring an action, if need be, before the Hague Court, is based not only on a breach of obligations but, above all, on the infringement of an international law. You are about to decide that it is only when all remedies have been exhausted that a new action may, as it were, arise through a Government's refusal to observe international law. Consequently, as one delegate very rightly said, an action regarding responsibility arises, in practice, less from the fact itself than from the State's refusal — through one of its organs — to recognise the claim.

Perhaps the Rapporteur, with his great knowledge of these questions, might find it possible, by a slight change in the amendment he proposes, to express the principle that an action regarding responsibility cannot be brought until a State has refused to make

reparation for failure on the part of one of its organs to carry out an international obligation.

I venture to repeat the hope that this provision will not be placed after Basis No. 27. I think it is one of those fundamental articles which dominate the whole question. In some countries the remedy will be against an organ of the legislative power. In the United States and in certain federal States, for instance, acts of the legislative organ may, to some extent and under certain conditions, be called in question, and there is a judicial organ to deal with the matter. In other cases, the remedy will be against an organ of the executive power. I think the expression "executive organ" is better than the expression "governmental organ". Finally, in the case of remedy for a failure on the part of the courts, the same principle will apply — namely, there can be no action regarding the State's responsibility until the series of available remedies has been entirely exhausted.

This provision should be inserted, not in Article 27 — that is to say, at the end of the Convention — but in the fundamental articles. The first of these will enunciate the great principle you adopted unanimously. The second will give the definition of international obligations which, thanks to the future work of the Sub-Committee, you will doubtless adopt unanimously; and the third will state the principle now under consideration. Thus, we shall have a framework of central provisions whence applications to the legislative, executive and judicial organs will follow naturally.

I venture to add, not a criticism, but merely an observation. If, in any given country, there were no means of remedy which made it possible to secure just reparation in respect of an act of the executive power. I think such a case would obviously be covered by the general formula, and that "no remedy" would be tantamount to "exhaustion of remedy". But that is a pure hypothesis, for I am well aware that in all the States of the civilised world there is a means of remedy against administrative acts.

With these remarks, I would urge the adoption of the Belgian amendment, perhaps slightly modified as suggested by our Egyptian and Spanish colleagues. Here, again, we shall be effecting a certain amount of progress, for we are laying down the foundations of the responsibility of the State.

We are helping to remove certain fears and certain hesitations. Thus, perhaps unconsciously, we are slowly but surely making progress towards the realisation of that international justice which is our ideal.

M. Politis (Greece):

Translation: Gentlemen — I am glad M. Matter spoke before me. He has made my task easier, and I can now speak more clearly than I could otherwise have done.

We are considering a question that is fundamental with regard to responsibility. In international practice, the exhaustion of remedies at municipal law has long been considered an essential condition of the application of responsibility. I do not intend to examine whether we ought really to call it, as has hitherto been the custom, a condition of the application of responsibility, or whether it is a condition of the very existence of responsibility. Ultimately, there is no difference.

I am so anxious to emphasise the importance of this condition that I can readily endorse the opinion expressed by the Spanish delegate.

The essential thing, indeed, is to show that international responsibility is exceptional and also that it is a serious thing. It is exceptional, because it accords to the foreigner in any country a situation apparently privileged as compared with the nationals of that country. It allows him to do something more than nationals can do — that is to say, after exhausting the means of remedy which are equally at the disposal of nationals of the country, he may appeal to a higher international court to redress a wrong he has suffered.

International responsibility is serious, too, because it implies that a State has failed to comply with its international obligations, and, before such an accusation can be brought against a State, the facts must be doubly clear and doubly certain.

To achieve this result, the foreigner who complains of the attitude adopted by a State must have been able to employ all the remedies offered him by the law of the country in which he happens to be or with which he is dealing.

Here I would note that we have been wrong hitherto in considering only judicial remedies. The Spanish delegation's proposal, too, speaks of judicial remedies. Now, the rule should apply to all remedies whatsoever. There may, in fact, be judicial remedies and administrative remedies — in the sense that they are not jurisdictional. There may also be remedies by act of grace or equity.

All the remedies at the disposal of nationals of the country must equally be at the disposal of the foreigner. They must all have been exhausted before the foreigner's Government can say that the State whose attitude is criticised has incurred international responsibility.

I think this condition should, therefore, be made as wide as possible. It should apply to all remedies without any exception whatsoever. It should apply also to all cases.

When I say "to all cases" I mean two things. First, whatever the source of the responsibility, on whatever grounds the responsibility arises — the legislative or administrative or judicial activities of the State — in all these cases there will, in practice, be no responsibility until remedies at municipal law have been exhausted and the wrong done by the State is manifest.

By the words "in all cases" I also mean in whatever circumstances a dispute arises, whether it be a dispute between two Govern-

ments or between a foreign Government and a private individual, or, finally, a dispute between two private individuals.

What I mean by this last case will explain the slight difference that separates me — though I hope we shall soon agree — from my Egyptian colleague. He said: "When a case comes before the courts, it is only a denial of justice that can be the source of responsibility."

I do not think that is correct. When, for instance, the law of a State is called in question, when it is alleged that a State has enacted a law which, in the words of the basis you adopted yesterday, is incompatible with the international obligations of the State, there is no means of knowing whether this incompatibility really exists until, in a particular case, the courts have been called upon for a decision and have confirmed the incompatibility.

But the interpretation of the legislative measure given by the local courts of the country may, in fact, cause no damage to the foreigner. It would thus be shown that there is no incompatibility between the law in question, as interpreted and applied by the courts, and the State's international obligations.

In that case, it would be proved that there was no responsibility.

Responsibility would, however, arise without any kind of denial of justice if the courts applied the law in the spirit in which it had been enacted, and thus showed, by their very decision, that the incompatibility existed and that the responsibility of the State was therefore involved.

Accordingly, I propose that this condition of the exhaustion of municipal remedies should be made as wide as possible. It is a guarantee for the State; it respects its independence; it makes it possible to avoid unnecessary disputes. Only those cases which are really worthy of consideration should be allowed to come before the international courts.

Therefore — and that is why I desired to speak — whereas the Belgian delegation proposes that this essential condition of the exhaustion of municipal remedies should follow Basis No. 7, I think, with M. Matter, this condition should be stated, not with regard to any particular bases, but with regard to all the bases.

As he very truly said, this is a fundamental rule in the matter of responsibility. Therefore, we should not say, after Article 7, "*this* responsibility", but "responsibility" in general.

If, then, as I propose, you put this rule in an article that is to be included in the fundamental provisions of the Convention, I would ask you to say that a State's responsibility on the various grounds mentioned in the present Convention does not become international in character — that is to meet the view of the Spanish delegate — and cannot in practice be invoked until the parties concerned have completely exhausted the remedies allowed them under the internal law.

I would ask the Rapporteur to note this suggestion as to form so that, if the Committee agrees with my proposal, this rule as to the exhaustion of remedies may be given a very wide and fundamental character. It should be clearly laid down that the exhaustion of all remedies must be complete and must apply to all means of remedy whatsoever that the internal law allows to the parties concerned.

Hence, in the first place, I should strike out the word "this" from the Belgian proposal, and I should hesitate before adopting the expression "in principle", as I think it might, in practice, give rise to difficulty.

I know there may be cases where no effective means of remedy are provided. Fortunately, such cases are very rare, as, nowadays, States are anxious to provide means of remedy for the protection of the rights accorded by law to the parties concerned.

Further, the words "in principle" are open to the following objection. In international relations, although equality is the rule, there is, in fact, a certain inequality through which some Governments are able to stress such words and thus exert a certain pressure on other Goverments.

I therefore think it inadvisable to retain the words "in principle" and I would say: "the complete exhaustion of all remedies allowed them under internal law".

That is the meaning I propose you should give to this condition. I hope we shall all agree to make of this fundamental clause a provision that will appear at the head of the Convention together with that submitted by the French delegation, and unanimously adopted.

Abd el Hamid Badaoui Pacha (Egypt):

Translation: Gentlemen, — I cannot agree with the opinion expressed by the head of the Greek delegation. With a view to harmonising my opinion with his, he examined the question of the legislative power. He took the case of a law which was incompatible with international obligations, and so, though correctly applied by the courts, involved the State's international responsibility.

In this connection we must confine our consideration to acts of the executive and of officials; for, normally, the constitution of a State does not provide any remedy against the legislative power. Even in States where there is such a remedy it is admitted solely on constitutional grounds and never on the ground of international law, except, perhaps, in countries which incorporate international law in their constitution. Such cases, however, are very rare.

Consequently, any responsibility through legislation is essentially an international responsibility. In this connection, there can never be any possibility of exhausting remedies, because there are no municipal remedies, on international grounds, against the legislative power.

Remedies are available only as regards acts of the executive or acts of officials.

For that reason, I venture to supplement the Belgian proposal as follows :

> " This responsibility may, however, arise only after the parties concerned have exhausted the remedies allowed them under the internal law and only in so far as there is a denial of justice according to Articles. . . " (that is, the articles concerning the denial of justice).

(The meeting was adjourned at 5.15 p.m. and resumed at 5.35 p.m.)

M. Limburg (Netherlands) :

Translation : In M. Politis's brilliant speech there is one part with which I agree wholeheartedly and one which, unfortunately, I must oppose.

As I agree with the former part I need only refer to it briefly. The question of the exhaustion of remedies relates not only to the executive power mentioned in Basis No. 7 but also to Bases Nos. 5, 12, 13, etc. When we finally draft the Convention, the principle we adopt must be inserted at the beginning. On that point we are in agreement.

I am sorry the Belgian amendment is submitted with regard to Basis No. 7. I should much have preferred to consider it in connection with Basis No. 27, and I think it would have been better if the present discussion had occurred after a thorough consideration, not of the question of remedies, but of all the preceding bases. Before we can be absolutely clear as to what we wish to include in the Convention with regard to the exhaustion of remedies, decisions must be taken concerning Bases Nos. 2, 7, 11, 12 and 13. I therefore agree entirely with M. Politis when he says that we are discussing a general question which should be stated in an equally general manner.

I now come to the part of our distinguished colleague's speech which, very regretfully, I must oppose. He expressed the opinion that the exhaustion of remedies is an essential condition of a State's responsibility. I do not agree with him. *Verba valent usu.* We must first know what is meant by " essential condition ".

All that M. Politis said leads me to think that, in his opinion, an international action arises only when the means of remedy have been exhausted.

That is where I do not agree with him. The initiation of proceedings may certainly be made to depend on the exhaustion of the remedies. That is a question of procedure, of expediency, perhaps of international courtesy. But the action arises — *actio nata est* — at the very moment when the fact occurs which involves the responsibility of the State. When a law is contrary to the international obligations of a State, the action regarding the State's responsibility arises at the moment when the law is enacted. The question whether the law was in conformity with the international obligations of the State may be argued ; but, if an international court (perhaps after two years) decides that the law was contrary to the international obligations of the State, its decision is retrospective and is applicable as from the day on which the law was enacted.

Where would the system supported by the Greek delegate lead us? It would have the following consequence : the question whether an international action arose would depend on whether the individual foreigner had or had not employed the means of redress. Now, if the individual had not employed the means of redress (if, for instance, he had died subsequently to the occurrence with regard to which the action arose), there would be no responsibility on the part of the State. I cannot support any such view. If the difference between my view and that of my distinguished colleague were purely theoretical, it would be of no importance in this discussion, and I should not mention it even in a private conversation with M. Politis. But this difference in our views affects Basis No. 27 as proposed by the Preparatory Committee. I think that basis is better than it would be if modified in accordance with the Belgian amendment. Basis No. 27 could and should be expressed in general terms.

I repeat that I agree with the first part of M. Politis's speech. Basis No. 27 should, in particular, relate to means of redress. But, in that case, it would be better to say : " Where the foreigner has a legal remedy open to him in the courts of the State, the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision." The idea is the same as in the Belgian amendment, but it is stated less absolutely. I think we need a system that is less absolute.

Let me give an example to show the difference between the legal effects of M. Politis's system and the one I favour. Basis No. 29 states the legal and international consequences of a fact which involves a State's international responsibility :

> " 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 the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) . . . "

Suppose a foreigner — we need not say " a foreigner invested with a recognised public

status", but merely "a distinguished foreigner", as our English friends would say — has been assassinated in a foreign country. Is it necessary to wait, before invoking the State's responsibility in all its forms, until the means of redress have been exhausted? The proceedings might last a year, two years, or perhaps more. I would ask you to note that M. Politis's theory would make even diplomatic action impossible, for, according to his view, such action would not be allowed until the municipal remedies had been exhausted. As the action does not yet arise, there is not yet any responsibility on the part of the State.

In holding this opinion, I am in good company. I agree entirely with Basis No. 27 as drafted by the Preparatory Committee and also with Article 31 of the Geneva General Act; and, in regard to that Act, my honourable colleague may say *magna pars fui.*

Article 31 of the Geneva General Act says:

"In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, the party in question may object to the matter in dispute being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced, within a reasonable time, by the competent authority."

Those are the principles that govern this question. I should like to preserve them in the Convention we are framing.

M. De Visscher (Belgium), Rapporteur:

Translation: Before this meeting adjourns I should like to make one observation. I do not intend to consider the various views that have been put forward with regard either to the origin of responsibility or to the invoking of responsibility. I will merely submit the following remark, which I hope you will be good enough to consider before our next meeting.

In my proposal, I spoke intentionally of the invoking of responsibility. I think we can all agree that no claim may be preferred, and no responsibility may be invoked, until the remedies have been exhausted.

As to the moment at which responsibility arises, that question has become classical in legal doctrine. It has led, especially in recent years, to great controversy into which I thought it better not to enter. The Preparatory Committee adopted the same attitude and refrained from taking up a position on the question.

I think we should do well to take the same stand and to confine our attention to a point on which there is agreement. From the practical point of view, we need consider only the conditions under which responsibility may be invoked and we may refrain from continuing a discussion as to the circumstances in which responsibility arises or exists. The importance of that question is largely theoretical. Thus, agreement might be quickly reached and we should avoid delay in a Committee where rapid progress is needed.

The Committee rose at 6 p.m.

SIXTH MEETING.

Saturday, March 22nd, 1930, at 3 p.m.

Chairman: M. BASDEVANT.

13. CONSIDERATION OF BASIS OF DISCUSSION No. 7 (continued).

Mr. Beckett (Great Britain):

I think my task is considerably shortened owing to the fact that I follow so many other speakers on this subject. On certain points, therefore, I have only to say that I agree with what previous speakers have already said. I think, however, that I should make clear the points on which I do agree.

First of all, I entirely agree with M. Matter that this principle is a fundamental one which, generally speaking, governs all the matters with which we are now dealing and, therefore, should be so placed in the Convention as to apply to the whole of it. That was, in fact, the idea which was in my mind when I made a possibly somewhat ill-timed interruption at the beginning of yesterday's meeting, and which you very justly turned down. I thought that, unless we made it clear then that this principle governed the whole Convention, we might get it confused with Basis No. 7. Our Chairman did not think so. He was perfectly right, as I

am sure he always will be perfectly right. That, however, was the idea in my mind.

Secondly, I entirely agree with M. Politis and M. Limburg that this basis applies to all kinds of remedies, not merely to remedies in the ordinary judicial tribunals, but to those in administrative tribunals or any other method of administrative procedure.

The practical aspect of this matter can be very simply stated. It is this : if in connection with any matter any effective municipal remedies exist, those remedies must be exhausted before any diplomatic claim for reparation can be made, and, if the municipal remedy is successful in producing adequate redress, that is the end of the matter.

Such is the purely practical side of the matter. Underneath this purely practical aspect, on which there seems to be no difference of opinion, there are two possible theoretical positions. The first is that the international responsibility of the State may arise at the moment the act is committed, but that it remains, so to speak, in suspense until the municipal remedies have been exhausted. To put it in another way, the State has the right first of all to discharge its liability in its own way. In that case, if the municipal remedy produces redress, the responsibility is discharged and that is the end of the matter.

The other theoretical view is that no responsibility arises till the remedies have been exhausted.

These two views were presented here yesterday, on the one hand, by M. Politis and M. Vidal, and, on the other, by M. Limburg. It so happens that about two or three days ago I looked into some of the books and I found exactly the same difference of theoretical opinion between their learned authors as was apparent in the debates yesterday between M. Vidal and M. Limburg. For instance, the Amerîcan author Hyde and the German author Strupp take the same view as M. Limburg, while Calvo takes the same view as M. Vidal and M. Politis. When, however, we come down to the facts it may be that both these views, if applied to all possible cases, may be wrong. On the other hand, if as applied to certain special cases, both views may be right, since it may be that the question really depends on the types of facts which are being dealt with, and the same theoretical principle does not apply to all types of facts.

We are now dealing with a principle which is to govern everything. I think, therefore, that the text proposed by the Rapporteur is extremely wise, because it uses the expression *mise en jeu*, which is consistent with either view and fits every possible case.

I fully support everything M. De Visscher said yesterday evening to the effect that we should be foolish if we were to try and decide purely theoretical questions of this kind, especially in a general provision which applies to everything. We ought to state the matter in a practical way, because its practical side is perfectly clear, and leaves a purely theoretical question to the learned authors to write about, or, possibly, for the Permanent Court at some time to decide.

I now come to another point, and that is the question whether we should insert in the text some qualification to this general rule. In M. de Visscher's draft the words " in principle " occurred, and I think that everybody admits that some qualification exists. There is always the condition that an effective municipal remedy exists, because it is no good telling an injured person to exhaust his remedies in justice if there are no such remedies ; and there may be some cases where, by their very nature — and I rather think M. Limburg mentioned one yesterday — the rule may not apply at all. In any case, I think everybody admits that there is some qualification.

M. Politis criticised the words " in principle " as being somewhat too wide. He thought, I believe, that the phrase might give rise to difficulties, that it might lead States to rely on these words and to ignore the rule, to bring pressure in cases where the rule ought to apply. Personally, I do not think that, in the existing state of affairs, there is really any danger of that. I know perfectly well that, in the old days, exaggerated claims were put forward on behalf of nationals and were resisted by the same exaggerated idea of *amour-propre*. The two things balance.

I think, however, that we have now arrived at an entirely different state of affairs. We are here to lay down reasonable rules and, what is perhaps more important still, the practice of arbitration and judicial settlement has now reached such a stage of development that in any dispute it can be said : " It need not be made a matter of national honour ; let us go to the court and let the court decide ". In my view, this new state of affairs makes the fundamental difference to the whole of this work which we are now doing, and there is not, therefore, any real objection to inserting even such a qualification as the words " in principle ".

What does this term mean? It means that the general rule has been stated. If anybody invokes a case which he says is an exception to the general rule it is for him to prove it. It will be for him to make out and to prove his exception before the Court if necessary.

I see that M. Politis is not here this afternoon, but I think, if he had been, that he would remember very well that, in one of his brilliant successes of advocacy against my country, before the Permanent Court of International Justice in this building, we invoked this rule about the exhaustion of municipal remedies. M. Politis, however, was successful. So there are exceptions.

We are not here to draft texts and to say exactly whether the words "in principle" should be used or not; but I think that some phrase should be inserted to show that there may possibly be cases where this rule does not apply.

I want now to turn, if I may, for a minute to another point raised by Badaoui Pacha, who proposes to add to this text the words "unless there is a denial of justice". In this case, I think the text proposed is too wide. I agree with the remarks which M. Politis made yesterday when he gave one case in which it might be too wide. A municipal law may or may not be contrary to international law; but, until the court has pronounced upon it who knows whether it is contrary to international law or not?

It is not the enactment of the law which produces the breach of an international obligation, but its application, and, until the court has applied the law, it cannot definitely be said if there has been a breach of international law.

Another case which "denial of justice" would not cover is that in which the court may be concerned with a question which depends on the interpretation of a treaty. In such a case it is not true that it is only possible to have recourse to international responsibility for a denial of justice; it may be possible to have recourse because the treaty has been wrongly interpreted. In other cases, of course (and I agree they are by far the most frequent), the only ground is the denial of justice; but it is too absolute to make it apply to everything.

M. Suarez's amendment, I think, puts the matter rather more correctly. His amendment is as follows: "It is a prerequisite to the extension of international responsibility of the State that the alien exhausts all municipal resources without obtaining redress." This text is wider and, in my view, covers all the cases more adequately. In any event, in dealing with a denial of justice in connection with the exhaustion of municipal remedies we are anticipating things. The State's responsibility for denial of justice and all cognate matters has to be considered fully, in all its aspects, in connection with Bases Nos. 5 and 6, and when we have finished that discussion we shall see more clearly how these matters stand.

The rule which we are now considering does not say when a State is responsible, but it states that its responsibility cannot be invoked until some condition is fulfilled, which is a different thing. Later bases will decide when it is responsible.

In conclusion, I will say just one word about the amendment proposed by the Hungarian delegation. This amendment introduces two conditions which, if they are *cumulatively* fulfilled, relieve the State of liability.

The first condition is that there is an opportunity of enforcing claims against the organs at fault, and the second is that the State has punished the individual responsible. Those are not the exact words, but they convey the sense, and the considerations have been put cumulatively. The first — namely, the provision of a means of enforcing the claim — is dealt with and included in the Rapporteur's proposal, the exhaustion of a municipal remedy; but another has been added which the State is also required to fulfil — namely, that it must punish the offender.

It is perfectly true that, in a great many cases, the State is under a duty to punish the offender, and we shall deal later with those cases and the responsibility under them when we discuss Basis No. 18. I think, however, it is too sweeping to say that in every case where anything has been done which might involve the State in responsibility some individual must be punished. For instance, in the cases with which we are dealing, it might be the Minister for Foreign Affairs or it might be the Minister of the Interior who was involved.

It is always rather difficult to deal with a short compressed basis of four lines which includes within its scope half the Convention. I think, therefore, it would really assist the clarity of our debates if we could leave this question of liability for non-punishment to a later stage when we come to deal with Basis No. 18.

M. Matter (France):

Translation: On my own behalf and on behalf of some of my colleagues, I desire to thank the British delegate for the clearness of his statement. It will simplify our task, and we are therefore very grateful to him. He has just introduced into this somewhat confused discussion a very important distinction which may to some extent serve us as a guide.

There is, indeed, on the one hand, the original source of responsibility. That problem according to the British delegate, is chiefly theoretical. In the words of the law schools we may say of it *adhuc sub judice lis est.* Perhaps that subjeet is not yet ripe for decision. On the other hand, in contrast with the theoretical problem of responsibility, there is the practical problem as to the invoking of responsibility. That is the problem we are now called upon to decide. If we confine ourselves solely to ascertaining the circumstances in which a State's responsibility may be invoked, I think we shall all be able to support the Rapporteur's proposal. I beg to raise a point of order in that sense.

I would merely add that the postponement of the invoking of a State's responsibility, of course, in no way precludes friendly diplomatic action, for that is permissible even before the final decision is given.

The Chairman:

Translation: A point of order has been submitted. The proposal is that the discussion

should deal, not with the manner in which responsibility arises, but with the practical question of how this responsibility is invoked.

The procedure suggested appears likely to facilitate our work and to indicate the lines on which opinions might be expressed in the Committee. I shall ask you to vote on this motion.

M. Giannini (Italy) :

Translation : I desire to speak on the point of order.

M. Guerrero (Salvador) :

Translation : I also desire to speak, as I do not understand the reasons for the point of order.

The Chairman :

Translation : If any member asks to speak on the point of order itself, I cannot say no, unless the motion is withdrawn. If, however, we discuss the point of order, we may not really save time. I shall repeat what it is. The Committee is to be asked to discuss, not the question of the manner in which responsibility arises or the moment at which it arises, but how it is invoked, and the importance from this point of view of the exhaustion of the internal legal remedies.

M. Giannini (Italy) :

Translation : Since yesterday we have seen that points of view on this problem differ so widely that I think it is impossible at present to limit the scope of the discussion. Any such limitation would be useless as, in practice, everyone would still speak on the problem excluded by the motion.

M. Guerrero (Salvador) :

Translation : I oppose the motion on the point of order because, instead of facilitating our work, it is likely to complicate it. The question under discussion is extremely important, and I think we might soon either reach an agreement or refer the question to a sub-committee. But we cannot vote on this point of order ; in my opinion, it is not clear. The distinction made between responsibility and the invoking of responsibility is perhaps due to the fact that the Egyptian delegation's proposal was not clearly understood. I do not know whether I may speak on that subject or only on the point of order.

The Chairman :

Translation : On the point of order only.

M. Guerrero (Salvador) :

Translation : In that case I shall merely say that I oppose the motion.

M. Urrutia (Colombia) :

Translation : I waive my right to speak, as I agree with M. Guerrero.

M. Matter (France) :

Translation : The wisest course is to withdraw the motion on the point of order. It would doubtless give rise to very interesting speeches, but a vote on it would perhaps not be clear. I therefore withdraw the motion.

The Chairman :

Translation : As the motion on the point of order has been withdrawn, the discussion will be continued.

M. Suarez (Mexico) :

When I asked leave to speak, I had not had an opportunity of hearing the eloquent remarks of the first delegate for France and the delegate for Greece.

I only wish to emphasise two points in connection with the amendment I had the honour to propose to the French proposal which we approved at our first meeting. These two points are : first, that the rule of the exhaustion of legal remedies must be considered as an essential point covering not only the acts of the legislative branch of government but all acts of every branch of government and the acts of officials as well ; secondly, that the rule refers, not only to judicial means of redress, but to all kinds of redress.

These two points have been very eloquently supported by the delegations for France and Greece, and I can add nothing to what they have said. As, however, the delegate for the Netherlands and the delegate for Great Britain have raised two very important questions, I should like to take this opportunity of expressing the point of view of my Government upon them.

The delegate for the Netherlands stated yesterday that this question of the exhaustion of legal remedies was not, in his opinion, an essential one ; that it was rather a question of political expediency or, perhaps, a matter of international courtesy. I cannot agree with this point of view. In my opinion, there are two conditions which are absolutely indispensable to the existence of international responsibility : first, that the act be an act of the State, imputable to the State ; and, secondly, that it constitutes failure to comply with an international obligation. If neither of these conditions exists, I do not see how we can speak of international responsibility.

As the Belgian delegation has very properly pointed out, when some legal means of redress exist the act cannot properly be imputed to the State, and, international responsibility has not therefore arisen. I think that international responsibility, on the one hand, and the right to claim redress, on the other, are really two aspects of the same question. It is impossible to speak of a right without the possibility of enforcing that right.

I do not agree with Mr. Beckett and some other speakers that this question is only of theoretical importance. On the contrary, I think it is of great practical importance, and the example chosen by the delegate of the Netherlands shows how dangerous may be the

consequences of such a theory. Our learned colleague asked what, for instance, is to be done if a distinguished foreigner is murdered in a country ; is it necessary to wait until the legal remedies are altogether exhausted? My reply is that we all have in mind cases in which States have sent ships and asked for reparation and satisfaction when one of their nationals has been murdered in another country without waiting for the courts to pronounce a final decision. These cases have been condemned as abuses of force, and we hope that they will not be repeated in the future.

If a foreigner (I take it that both distinguished and humble foreigners rank equally before the law) is murdered in a country, the country has no international responsibility for this fact ; it would be responsible only if its courts failed to afford adequate means of redress for the act.

For these reasons, I think this question is of great importance, and that it should not be considered merely as a theoretical question for the purpose of academic discussions. On the contrary, it has a practical scope.

I would agree, however, with our Rapporteur that, in a spirit of conciliation, we might adopt a formula to cover the question on which we are all agreed — that regarding the invoking of the responsibility of a State — provided always that it is clearly understood that the question as to when the responsibility really arises is open to discussion and will be settled in future by international conference.

I do not agree with the view of the delegate for Great Britain, that the rule must be stated only with some qualification. If a country has not adequate means of redress, it would mean that the responsibility is left to the decision of international tribunals ; if the rule is qualified in any way, if another body is called in to control this question, the general principle is destroyed.

Another question was raised by the delegate for Great Britain — that of the denial of justice. I do not think that question has anything to do with the rule of the exhaustion of legal remedies ; it would be very misleading to connect the principles governing the denial of justice with the principle of the exhaustion of legal remedies. Suppose a branch of a Government commits an act that is considered to be against the international duties of the State. The State offers municipal means of redress against such an act. These means of redress can only have the following meaning : the State is going to put to a test the act committed by its officials, in accordance with the municipal law. If the act is considered to be against the municipal law, the tribunals (the internal bodies) will annul such an act, but the international tribunals will not say a word about the delinquency of the State or about the violation that has been committed against international law.

Suppose, for instance, that an act committed by the organs of the State is put to a test before the national tribunals and the national tribunals decide that the act is in full accordance with the national law, that there is no violation of internal law ; in such a case they would not give any redress to the person involved in such an act. The question of international responsibility would then be brought before the international tribunal, since an act may be accordance with national law and contrary to international law. For these reasons there is no denial of justice. The tribunals would decide that the act was in full accord with national law ; they would not give any redress to the interested person, but the act might then be brought before an international tribunal, which would decide whether it was contrary or not to international law, since, as I have said, an act may be in conformity with national law and contrary to international law. Consequently, it would be very misleading to include in the question of the exhaustion of legal remedies that of the denial of justice, which is altogether different.

Mr. Hackworth (United States of America) :

The delegation of the United States desires to support the proposal of the Belgian delegation for the amendment of Basis No. 7 with certain additions and modifications which have been set forth in the following amendment :

> " Where the foreigner has a remedy open to him in the courts of the State (which term includes administrative courts), international responsibility cannot ordinarily be invoked until the local remedy has been exhausted and a denial of justice or other breach of international law established."

In connection with this suggested amendment, I deem it pertinent to make a few observations in explanation of some of the changes and in answer to statements made by certain delegates in the discussion which took place at yesterday's meeting.

One of the objections raised, but which, I believe, was not seriously pressed, was directed against the statement that responsibility may arise " only after the parties concerned have exhausted the remedies ", and so forth. I agree entirely with the British delegate, Mr. Beckett, that the question when responsibility in the international sense arises is, so far as the work of this Committee is concerned, academic in character and should not, in my opinion, be allowed to impede the progress of the deliberations.

In order, however, to accommodate the two schools of thought — the one that responsibility arises when the wrongful act is committed and that the exhaustion of local remedies is merely a matter of procedure in satisfying the obligation of the State, which must take precedence over resort to the diplomatic channel, and the other that international

responsibility does not arise until the local remedies have been exhausted—the amendment suggested by the delegation of the United States declares that international responsibility cannot ordinarily be " invoked " until the local remedies have been exhausted.

This, we believe, is an entirely accurate statement, from whatever point of view it may be considered. It is not necessary for us to determine in these meetings the question when State responsibility arises, but it is rather for us to indicate when it is proper for the Government of the foreigner to interpose on his behalf by a formal claim.

Another suggested amendment to the proposal of the Belgian delegation is the addition of the clause " and a denial of justice or other breach of international law established ". This amendment, we believe, is fundamental. It is not sufficient, in order to establish State responsibility or to justify diplomatic interposition on behalf of a national who has been injured in a foreign country, to show that the national has exhausted the remedies available to him in such foreign country. The intervening State must go a step farther and show that the national has not only exhausted the available remedies but that he has not been able to obtain justice before the courts, or that there has been some other breach of international law.

Another matter on which I desire briefly to comment is the suggestion by the delegate for Greece, that the words " in principle " contained in the Belgian proposal, replaced in our suggested amendment by the word " ordinarily ", should be omitted. I would observe that one or the other of these expressions must necessarily be incorporated in any statement on this subject, unless the Committee desires to add to the paragraph a list of exceptions, which I deem it inadvisable to do.

I assume that no one will question the soundness of the statement that, as a general principle, international responsibility may not be invoked until the local remedies have been exhausted. To this general rule there are, however, certain well-recognised exceptions, as, for example, when the courts are notoriously corrupt, where there is amnesty or legislative immunity, where the courts have been superseded by the military or executive power, where the State refuses " either to entertain the complaint at all or to allow the right to be established before its tribunals ", and where there are " studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal ". Phillimore well states that, where the tribunals of a State are " unable or unwilling to entertain and adjudicate upon the grievances of a foreigner, the ground for interference is fairly laid ".

I would therefore suggest that the term " in principle ", employed in the Belgian proposal, was advisedly used and that unless the general statement regarding the exhaustion of remedies be qualified in some manner, it will be necessary to include a list of exceptions, which, as I have said, I deem to be inadvisable.

As regards the suggestion that it is not necessary here to introduce the question of denial of justice, I propose that we read together Basis No. 7 and the amendment suggested by the Belgian delegation. It will be observed that Basis No. 7 declares that " a State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power incompatible with the treaty obligations or other international obligations of the State ". The Belgian proposal states that " this responsibility may, in principle, be invoked only after the parties concerned have exhausted the remedies allowed them under the internal law ". There would appear to be a clear implication from these two provisions that the only prerequisite to the assertion of responsibility is the exhaustion of available remedies. Obviously, this is not the thought intended to be conveyed. The thought is completed only by the addition of the suggested clause regarding denial of justice or other breach of international law.

M. Giannini (Italy) :

Translation : The present position reminds me of an episode in Ariosto's " Orlando Furioso ". Rodomonte discovers that he has done wrong, dismounts from his horse, and decides to punish himself. I think the Committee should punish itself.

Yesterday, after hearing speeches by M. Politis and M. Matter, we reached a point at which we felt the need to find a general principle. Our Rapporteur has proposed a general rule. Latin minds love general rules, and on this occasion, you see, the Anglo-Saxons have followed us.

We are bound to admit frankly that our ideas are so confused that we must get to grips with the question. In the first place, I must say that I cannot associate myself with the criticisms that have been levelled against this basis. If we had discussed Basis No. 27 in its right place, we should have saved two days. Now we must see how we can best overcome our difficulties.

In the first place, it seems impossible to deduce any general rule from the Belgian delegation's amendment. In fact, to generalise the formula proposed by the Belgian delegation would at once raise the question of denial of justice. The dangers of any such text are immediately apparent.

I think we should also ask ourselves whether there has been any confusion between municipal responsibility and international responsibility. In spite of the great and successful work that has been done on this question by learned jurists, I am afraid we have been over-ready to confuse the two legal systems.

Consider the special case of the ambassador of one country who, as the result of a " crime of passion ", is killed in the territory of another State. There is a trial. According to the municipal law of the latter country,

there is a provision in the penal code in virtue of which the ambassador's murderer is acquitted because, let us suppose, the ambassador was caught with the murderer's wife. Could international responsibility be invoked? You see what difficulties are raised by this special case. Must the country concerned wait until the criminal proceedings have been completed in the normal way before raising the question whether international proceedings can be taken with a view to securing the punishment of the ambassador's murderer? That is a case which justifies our saying that the rule applies "in principle".

We must try to avoid confusion. The formula we adopt must have a certain elasticity. What formula shall we adopt? That is the central problem. Should we adopt a general formula covering the whole of the Convention? I doubt if we could find one. At all events, we could not find one before the end of our work or before considering all the special cases. To take account of these special cases, the formula must contain the words "in principle", proposed by the Rapporteur, or some equivalent expression.

M. Politis said: "You have the whole series of remedies accorded to nationals of the country by its municipal laws." I say "to nationals of the country", but Italian law, for instance, grants these remedies, even the remedy by act of grace, to foreigners also. M. Politis had in mind not only judicial remedies, but also administrative remedies. He said: "Why place a question on the international footing before all these remedies have been exhausted?"

I should like, in the first place, to point out that it sometimes happens that these remedies are futile. Whilst admitting that international action may be suspended until the municipal action has been completed, we must recognise that, in practice, some of the remedies are absolutely useless.

Let me give an example. In Italy, a foreigner may appeal to the administrative or judicial organs within the ordinary time-limit. What happens if he allows this time-limit to expire? Has he lost all his rights, as would be the case with an Italian? If we reply "No", we are really giving foreigners a privileged position that cannot be justified.

It is very difficult for me to decide between the two opposing systems. I think, however, that certain principles should be borne in mind. There is, at all events, a rule to be found in certain recent treaties. All the numerous treaties of conciliation and judicial settlement state that, when a question falls within the competence of the national judicial authorities, the conciliation procedure may not be initiated until the question has been dealt with by the national judicial authorities.

We ought not to go too far in generalising the rules we find in such treaties.

There must be no confusion between municipal law and international law. Just now I took the example of an ambassador. When the national judicial authorities have given their decision, the responsibility at municipal law ceases, but the international responsibility continues to exist.

Municipal responsibility and international responsibility do not entirely coincide. In this Convention we are concerned solely with international responsibility and all the consequences arising therefrom.

We can consider only practical cases. In these circumstances, if a question may in practice be solved by municipal means, why should it be transferred to the international sphere? That is the only problem we should consider. It is a practical problem and ought not to be connected with discussions that have been so often repeated. If we confuse municipal law and international law, we shall never be able to solve this problem. We must seek practical means of diminishing the number of disputes between States. If a problem can be settled by municipal means, is it necessary to wait until those means have been exhausted before the action may be taken to an international court?

I would point out one mistake that must be put right at once. International responsibility begins at the moment when international law is infringed. That is the rule adopted in municipal law; it is equally true from the international point of view. For practical reasons, if a debtor does not pay me, I try, before starting legal proceedings, to come to an agreement with him. Even if I wait a year or two years before taking legal proceedings, my right of action exists from the first moment. Similarly, in the case of international proceedings, the responsibility exists from the very first moment. We propose merely to suspend action until the problem has been dealt with by municipal means.

The Rapporteur made a proposal concerning Basis No. 27. It should not be enlarged to too great an extent. We must keep to that basis. When, through the act of an official of the executive power, international responsibility exists, international action may not be started until the municipal remedies have been exhausted. But that rule cannot be absolute; it cannot cover the whole Convention. It must be reduced to reasonable proportions. For instance, in the case I stated concerning the ambassador, the principle would not apply.

Subject to this interpretation, I should like to keep as close as possible to the Rapporteur's formula. I think we might consider some such text as this: "A State's responsibility may not be invoked until after the exhaustion . . ." That would show clearly that proceedings concerning responsibility may be started when municipal remedies have been exhausted, but that the responsibility exists from the very first moment. This wording may not be perfect, but it would remove some uncertainty.

In conclusion, I would urge the Committee to assign limits to the problem and not to prolong a discussion which has already lasted two days.

M. De Visscher (Belgium), Rapporteur :

Translation : The statements made by our Italian colleague have really helped the matter forward considerably. I wish to say that I quite agree with his views as to the position of the question.

This problem, as he says, is really one of practical organisation and nothing more. That is how we should look at the matter. The whole point is: When precisely does the action begin? That is the sole point we have to decide.

I also entirely agree with M. Giannini that we should not enlarge the scope of the text submitted to you and make it apply either to the legislative or to the judiciary power for the present. These texts should refer exclusively to acts or omissions of the executive. There will rarely be any means of redress open in the case of acts or omissions by the legislative power. In the case of acts of the judiciary, the matter of appeal arises in quite a different manner and involves the question of a denial of justice in another form.

I am also very much inclined to agree with the views upheld by our Mexican colleague, both as to the manner in which the problem should be regarded as a whole and as to the text he submitted. Lastly, I am authorised to inform you — and this is a very auspicious indication of the manner in which agreement is gradually being reached — that our American colleagues are not for the moment pressing for a vote on the last part of their proposal — namely, " and a denial of justice or other breach of international law established ". Our American colleagues agree that this question should be held over until we come to consider denial of justice under Basis No. 5, for that is the juncture at which the point should really be discussed. They are prepared to leave this point aside for the moment and limit their proposal to the amendment which I have had the honour to submit.

The Chairman :

Translation : In view of the measure of agreement announced by the Rapporteur, lateness of the hour and the very short time remaining at our disposal to-day, I venture to remind the speakers whose names are on my list that their speeches should relate only to the points they think really essential.

M. Castberg (Norway) :

Translation : In principle, I agree with the Italian delegate. In this connection it is absolutely essential to draw a distinction between two quite different sets of circumstances.

The first is that in which the executive has infringed only the municipal law of the country. In that case, the State's international responsibility is involved only — it exists only — if subsequently there is a denial of justice on the part of the courts.

The second is that in which the executive has infringed not, or not only, the municipal law, but international law as well. We might take as an example the case where the executive has treated a foreigner in a way contrary to the provisions of a treaty. The international responsibility of the State is then involved ; it has come into being. But it cannot be invoked until the means of redress afforded by municipal law have been exhausted.

Basis of Discussion No. 7 deals only with acts or omissions of the executive power which are incompatible with the international obligations of the State and not with acts which infringe only the municipal law. In this case, therefore, international responsibility is incurred immediately through the very act of the executive power.

Hence, it would be correct to say, as the Belgian proposal does, that responsibility may, in principle, only " be invoked " after the remedies allowed under the internal law have been exhausted. For that implies that the international responsibility arises at once, as soon as the executive power infringes an international obligation of the State.

On another point, too, I think the Belgian text is quite correct. It says that responsibility may " in principle " be invoked only after the remedies allowed under the internal law have been exhausted. The words " in principle " indicate that there are exceptions to the rule. Several delegates have already mentioned cases where responsibility may be invoked immediately. I venture to give another.

Suppose the executive has taken a measure that is contrary to the provisions of a treaty. All the parties concerned admit that there has been no infringement of the law in force in the country concerned. Nevertheless, a foreigner who is affected by this measure has certainly, in accordance with the civil or administrative procedure of the country, a formal right to take legal action against the State in question and to demand compensation. Obviously, he will obtain nothing, since the act of the executive was not illegal from the point of view of municipal law. Theoretically, however, the means of remedy are open to him. In such a case — that is to say, when the act of the executive is obviously in conformity with the municipal law — is it really just to insist upon preliminary proceedings before the national courts as a condition of the international claim? Is it just to make these absolutely useless proceedings, which can yield the foreigner no possible satisfaction, a condition of the international claim for compensation? The reply is bound to be negative.

Accordingly, I think it is quite right to say, as does the Belgian proposal, that the rule concerning the need to exhaust municipal remedies is not without exception.

M. Sipsom (Roumania) :

Translation : I think that every possible observation has been made with regard to

the Belgian delegation's proposal as to the conditions under which the international responsibility of a State arises. I hope, however, that I am not speaking too late to define the reasons for which the Roumanian delegation is in favour of certain proposals.

When all is said and done, two cases arise.

There is no responsibility :

1. When means of redress are still available under the internal law ;

2. When satisfaction has been obtained by those means.

That is perfectly intelligible. The responsibility of the State arises from the disregard of an international obligation. It is therefore proportionate or subordinate to the measure of the non-fulfilment of that obligation.

So long, however, as some organ of the State is in a position to fulfil the obligation, its non-fulfilment is not proved. Accordingly, the condition for the coming into being of such responsibility — namely, the evidence of non-fulfilment — does not exist.

It does not matter whether the question is one of direct or indirect fulfilment, since, so long as there is a possibility, under the internal law, of lodging a complaint against an act, we have fulfilment, if only fulfilment in the form of an equivalent.

Consequently, it is quite correct to say that responsibility itself comes into being only after it has become patent that there has been no fulfilment—*i.e.*, that the international requirement or obligation has not been met.

That is why, instead of M. Limburg's suggestion (which was supported by other distinguished delegates and ultimately by M. Giannini and was also, I believe, approved by the Rapporteur), I prefer the proposal of the Spanish and Egyptian delegates, supported by M. H. E. Politis, which says that responsibility comes effectively into being only after all internal remedies have been exhausted.

The formula proposed by the Rapporteur is calculated to harmonise these points of view, and I am able to agree to it, although undoubtedly international responsibility can only come into being in the case of undoubted failure to fulfil an obligation. So long as there is a possibility of its fulfilment by some internal means of redress, it cannot be said that the international obligation has not been fulfilled.

In what cases is responsibility incurred? In three possible instances. First, when all internal means of redress have been exhausted without the complainant obtaining satisfaction.

I refer to cases in which the national courts have refused to entertain the request for reparation. In such cases, the State is not freed from its responsibility ; it may be called upon to fulfil its obligation following on the acts of the judicial power, of the legislative power or of any other of its organs. M. Politis quoted an instance of this kind yesterday. When, on the strength of some internal law, the judge non-suits the plaintiff, it cannot be said that there has been fulfilment of the international obligation, and, in my opinion, the responsibility of the State has become involved through the action of its legislative organ.

Again, international responsibility arises when the injured party has no means of redress under the internal law.

Thirdly, there is international responsibility when a remedy does exist under the internal law but the injured foreigner is not allowed to avail himself of it.

The British delegation has proposed to add to these three cases an intermediate one, and our Rapporteur, in a spirit of conciliation, has accepted the proposal. The British delegation thinks it should be laid down that the courts must be capable of administering justice effectively. Being of opinion that it is not sufficient to state that international responsibility arises when no municipal means of redress is available, it wishes to add that there is international responsibility when the remedy at municipal law does not appear to be worthy of the name. For my part, I am absolutely opposed to this point of view.

The Chairman :

Translation : I must apologise for interrupting you, but what you are discussing is not a positive amendment submitted by the British delegation, it is merely a point put forward in the observations made by certain Governments. I therefore think that it is unnecessary to discuss it at present.

M. Sipsom (Roumania) :

Translation : I have a distinct impression, Sir, that yesterday, after an observation by the British delegation, the Rapporteur said that he agreed to insert this intermediate case.

The Chairman :

Translation : To the best of my belief no actual proposal has been put forward. I therefore think there is no need to discuss eventualities which have not yet arisen.

M. Sipsom (Roumania) :

Translation : I wish I could agree with you, Sir, but the British proposal has been made categorically.

M. Matter (France) :

Translation : It was made in connection with Article 5.

M. Sipsom (Roumania) :

Translation : This case is expressly contemplated in the replies to the League of Nations questionnaire.

The Chairman :

Translation : These are observations made by Governments. They do not constitute an amendment.

M. Sipsom (Roumania) :

Translation : If that is so, I will not press the point. I conclude, therefore, that the international responsibility of the State can be found to arise only in the three cases to

which I have referred and, in addition, only when no satisfaction has been obtained by judicial procedure.

M. Urrutia (Colombia):

Translation: I think this discussion is bound to be prolonged. The principle we are considering was, in fact, studied by the earliest writers on international law; controversy has centred round it for centuries; it has come before the international courts. As we are trying to deduce international law from generally recognised principles, it is natural that our discussion should be comprehensive. I think it would be better for us to reach agreement on certain general rules rather than to adopt detailed rules that may, perhaps, not be ratified.

I come now to the question itself. I agree with those delegates who think that it is at present our duty to decide, not the moment at which a State's responsibility comes into being, but the moment at which it may be invoked. I say "at present" because I do not agree with those delegates who think that this question lies outside the scope of our Conference. It is intimately connected with our work, and the replies to the League of Nations questionnaire show the importance attached to it by certain Governments.

I shall not attempt to controvert the opinion that M. Limburg expressed yesterday; but I would point out that it is contrary to the replies of several Governments. A State's international responsibility does not arise through the enactment of a law, but results from the fact which is the consequence of that law if the law constitutes an infringement of international law. That was the principle adopted by the Permanent Court of International Justice in its Judgment No. 7 concerning certain German interests in Upper Silesia. When we return to Basis No. 1, we shall have to consider this question again, for we have not given it sufficient attention hitherto.

As regards the Belgian proposal, I recognise the marked spirit of conciliation that prompted it. I must say, however, that it does not satisfy me. In giving reasons for my view, I would add that, when the time comes, I, too, will vote in a spirit of conciliation. This question of the exhaustion of remedies as a condition of international responsibility has been considered in several international arbitration cases. The following is the opinion now established: in order that a State may be internationally responsible for the acts of any of its organs, two legal conditions must be fulfilled — first, all municipal remedies must have been exhausted, and, secondly, those remedies must have failed to meet the needs of justice. In other words, there must be a denial of justice or the violation of an international law. Exhaustion of remedies is not sufficient reason for asserting international responsibility.

I have before me the sentence given on February 7th, 1856, by a Mixed International Commission in a memorable case against Portugal. This is an extract from it:

"The administrative authorities who dealt with the matter, the municipal Administrator in the first place, the district council in the second place and the Council of State in accordance with whose opinion the Royal Decree of December 4th, 1849, was issued, in the third place, gave decisions on a disputed question. In this exercise of their powers they did not merely act as executive organs and by order of the Government, but they gave decisions in the capacity of true judicial authorities such as, according to the Portuguese Constitution, exist to deal with administrative questions. When, in virtue of that Constitution and other provisions of a similar nature, a whole series of legal questions is removed from the jurisdiction of the ordinary courts and submitted to special courts set up for dealing with such questions whenever they arise with regard to administrative matters, the exercise of these judicial powers constitutes nothing other than a true exercise of the judicial power, since it depends solely on the free and independent interpretation of the law by persons duly appointed for the purpose, and does not merely amount to obedience to the orders of superior authorities. Consequently, it is impossible to hold the Government of the State responsible for the decisions given by such a judicial body."

This decision was accepted by all the parties, and proved that, if, in the case of a claim regarding acts of the organs of a State, there has been a decision by an independent administrative tribunal, an appeal may be lodged only (1) if all remedies have been exhausted, and (2) if there is infringement of an international law. Accordingly, I am sorry the American delegation has withdrawn its proposal. That proposal fully met my views, and we might have accepted it if we had considered it more thoroughly. The same theory has been confirmed in other international decisions to which reference may be made in the collections edited by M. Politis and M. de Lapradelle. This international theory has been confirmed by several decisions, and we cannot now look back. I am prepared to admit that there are exceptional cases, and for that reason I shall vote in favour of the words "in principle". The position is, in fact, different according to whether countries possess independent courts to deal with disputed questions or special courts that are not independent.

In conclusion, I think we have reached an important stage in our work. On the point under discussion, the Convention will express a tendency. The liberality of that tendency will, in my opinion, be proportionate to the degree in which it endeavours to assert the absolute independence of the courts of every country. I think, moreover, that, if it recognises and establishes confidence in the courts of all countries, allowance being made

for certain exceptions, the Conference, and consequently the Convention, will better express the spirit of mutual confidence and co-operation that exists between the nations.

M. Nagaoka (Japan) :

Translation : We have heard so many eloquent speeches that I think it is unnecessary for me to state my opinion, which would probably only be a repetition of the arguments already advanced. The Japanese delegation entirely agrees with the views put forward yesterday by M. Limburg and supported by several delegations.

Since the question of remedy has been raised, I must make one small observation, which I think necessary, and which refers to the case in which prescription, as laid down by law, has produced its effect. In this case I am of opinion that no reparation for damage ought to be admitted.

I need hardly add that, not only this observation, but all the provisions we are to prepare should refer to the conditions that we are generally entitled to expect in a civilised country.

That having been said, I would ask our Rapporteur what would be the scope of the remedy from the point of view of responsibility for acts attributable to administrative organs. It was agreed yesterday that administrative courts should be regarded in the same light as courts of justice. Outside these courts, however, I do not see to what tribunals recourse could be had.

M. De Visscher (Belgium), Rapporteur :

Translation : I will merely reply by stating that what we have in view are remedies in the absolutely general sense of the term, including applications both to the administrative tribunals and to the ordinary courts of justice.

M. Richter (Germany) :

Translation : To a large extent, the German delegation shares the views that have been expressed by other delegations, and I shall be able to vote for the Belgian amendment. Nevertheless, a suitable wording must be devised.

The matter with which we are now concerned is, however, so important that I desire to explain a little more fully the German delegation's point of view.

At yesterday's meeting it was very clearly laid down that a State's international responsibility must be regarded as dependent on the complete exhaustion of any remedies which the national law places at the disposal of the injured party.

The German delegation entirely agrees with that view.

It was further maintained that the rule concerning the exhaustion of remedies constitutes a general principle that applies not only to the cases covered by Basis No. 7, but to all cases involving a State's international responsibility, and that, therefore, it should be embodied in a separate article drawn up in general terms and relating not only to acts of the executive but, without distinction, to all acts of all State organs.

The German delegation supports that view also, but that is a point which I do not wish to press at present.

On the other hand, the German delegation can accept neither the amendment submitted by the Egyptian and Spanish delegates nor the theory expounded by the Greek delegate in favour of those amendments.

We cannot admit that a State's international responsibility — that is to say, its obligation to make reparation for damage caused by an act performed by one of its organs contrary to international law — comes into being only after municipal remedies have been exhausted.

In this connection a clear distinction must be drawn between questions of substance and questions of procedure. As to the question of substance, the German delegation thinks that the international responsibility of a State always arises from an act which causes damage, which is contrary to international obligations and which is done by any organ of the State. The international obligation to make reparation for the damage arises independently of the exhaustion of remedies.

As regards procedure, however — that is to say, as regards the determination of the moment when the international claim may be put forward — we consider, as I have just said, that the claim may not be put forward until municipal remedies have been exhausted.

The German delegation is bound to defend the view I have just stated, particularly as this is one of the principles underlying the Treaties of Arbitration and Conciliation that Germany has concluded with a large number of States.

In those treaties, the rule concerning the exhaustion of municipal remedies is laid down in two formulæ which differ slightly in their wording but the sense of which is the same. The first of these formulæ originated in the Treaty of Arbitration concluded with Switzerland. It is worded as follows (I give a translation) :

> " In regard to questions which, under the national laws of the party against which an action has been brought, are within the competence of judicial authorities, including administrative tribunals, the defendent party may require, on the one hand, that the dispute shall not be submitted to arbitral award until a final decision has been pronounced by these judicial authorities and on the other hand, that the matter shall be brought before the tribunal not later than six months after the date of such decision.
>
> " The above provisions shall not apply if justice has been refused by the courts and if this refusal has been brought before the competent authorities provided for by law. "

From that text it is obvious that the rule concerning the exhaustion of remedies does not constitute a fundamental principle, but is merely a rule of procedure.

The second formula occurs in the Treaty of Locarno. It is as follows :

> " In the case of a dispute, the occasion of which, according to the municipal law of one of the parties, falls within the competence of the national courts of such party, the matter in dispute shall not be submitted to the procedure laid down in the present Convention until a judgment with final effect has been pronounced, within a reasonable time, by the competent national judicial authority. "

Here, too, we have merely a rule of procedure and not a fundamental rule determining the moment when the international obligation comes into being.

In view of these texts, it would naturally be difficult for Germany to adopt an entirely different system. What separates us is not purely a point of theory. It is rather a question the importance of which is essentially practical from two points of view.

(1) It must be remembered that, throughout a large part of the world, States have not, through their municipal law, assumed the obligation to make reparation for damage resulting from unlawful acts committed by their officials in the exercise of public authority. In such countries a person whose rights are prejudiced by such an act has a remedy only against the official who is at fault. It may happen — and it almost always will happen in the case of damages of any considerable amount — that, when the victim has won his case, he will, in fact, fail to obtain the reparation that is lawfully due to him in respect of the damage, because the official will not be in a position to meet his obligation. Thus, the Spanish and Greek theory is not sufficient to provide a basis for an international system intended to ensure effective protection for the person and property of foreigners.

(2) The practical application of this theory would have another undesirable result.

According to it, an international claim must be based, not on the act of the official which caused the damage, but on the failure on the part of the State to fulfil its duty to provide the foreigner with an adequate and effective remedy.

It follows that, when the national courts have given a decision, the international court before which the claim is brought cannot grant that claim unless it is proved that the decision given by the Supreme Court of the country concerned is so defective as to amount to an international delict. In our view, it would be better to set up a system the practical application of which did not have that result. On the one hand this would tend to uphold the prestige of the national courts and, on the other hand, it would be in the international interest, for it is not desirable to impose upon an international court the duty, in certain circumstances, of disapproving the decision of a judicial body which is not subordinate to it.

Under the system adopted in the arbitration treaties concluded by Germany this result does not occur. The international court gives a decision only as regards the incompatibility of the act which causes the damage with the State's international obligations. It is not required to give a judgment as to the correctness of the judicial decision. It takes account of that decision only as constituting one of the conditions on which the claim may be preferred.

For these reasons the German delegation in the first place supports — subject to drafting, — the formula contained in Basis No. 27. We can also accept, subject to its final drafting the Belgian formula, provided that the words " may be invoked only " in that formula are interpreted so as not to prejudice any decision of the question as to the moment when international responsibility arises. It would, however, be advisable to devise a more exact formula, perhaps in the following terms :

> " This responsibility may, in principle, give rise to an international claim only after the parties concerned have completely exhausted the remedies allowed them under the internal law. "

In substance, the Belgian formula, if worded in that way, agrees with Basis No. 27 and with the corresponding provisions of our arbitration treaties. We think it might be acceptable to everyone. It says what is essential — namely, that a claim may not be preferred until the municipal remedies have been exhausted. In accordance with the proposal made by the Rapporteur and the British delegation, it in no way prejudices the decision of the controversial question as to the moment at which international responsibility comes into being.

M. Guerrero (Salvador) :

Translation : I think we are at present finding it hard to settle a question which is apparently very difficult, because all the proposals submitted, including M. de Visscher's, are meant to cover by one formula the general question of the direct and indirect responsibility of the State. My impression was confirmed when I heard M. Giannini state the case of the murder of an ambassador. He said that the State to which the ambassador belonged must wait until the criminal has been sentenced — that is to say, until the whole procedure has been completed — before it can start diplomatic action. I do not agree with that opinion. There is no need to wait until then, for the responsibility arises immediately, or at all events diplomatic action may be started immediately. The sentence that is to be pronounced matters little to the State to which the ambassador belongs. What it must do at once is to start diplomatic action. Naturally, it must give the other Government time to prove that it did not neglect to afford the ambassador who was murdered all the

guarantees it was obliged to provide. In any case, however, the responsibility arises immediately.

Let me give you another example of direct responsibility. Suppose a commercial treaty provides for certain treatment for specified goods of a certain country, whereas the Customs authorities impose different treatment in respect of those goods. There is no need for the Government to wait until its nationals complain that they have suffered damage. It starts diplomatic action at once, because the other State's responsibility is involved through the fact that it has violated a treaty or has not published that treaty.

There are also cases of the *indirect* responsibility of a State. Suppose a foreigner thinks he has been injured or has suffered damage and considers that the State's responsibility is involved. He must await the result of all remedies afforded to him by the municipal law in order to see whether he will secure compensation. There are two possible cases: (1) The courts may give the foreigner satisfaction. When he has been compensated there are no grounds for diplomatic action. (2) If the foreigner does not receive satisfaction, there can be no responsibility unless there has been a denial of justice. That is the case contemplated in the Egyptian delegate's proposal. If there has been a denial of justice, the international action must be started.

As I have already stated, I think the whole difficulty arises because, in the Rapporteur's proposal, an attempt is made to cover the entire range of a State's responsibility, both direct and indirect. I do not think that in such a Committee as this it will be easy to study this question or to find a formula concerning those acts which indirectly involve a State's responsibility and in respect of which all municipal remedies must be exhausted.

Accordingly, I propose the appointment of a sub-committee to find a formula that will satisfy everyone and avoid the vague words "in principle" or "ordinarily".

The Chairman:

Translation: The point of order submitted by M. Guerrero is to refer to a sub-committee the consideration of the question discussed yesterday and to-day, at the same time, of course, as the consideration of the amendments which have been put forward.

You will no doubt agree with me that it is now too late to discuss this proposal. We shall have to vote. Every member must have formed his views as to the desirability of the proposal to refer the matter to a sub-committee. I put the question to the vote.

The proposal for reference to a sub-committee was adopted.

I propose that you ask the Sub-Committee which we have already set up (international obligations) to prepare this text and that the authors of all the amendments we have just discussed should be added to the Sub-Committee.

The proposal was adopted.

The Sub-Committee will meet on Monday at 3 p.m., and the Committee at 4 p.m.

Before adjourning the meeting, I must state that, after a week's work, we have — I will be optimistic — passed two Bases of Discussion. A number of delegations intend, so we are told, to leave on the 11th or 12th. The Conference would therefore have to finish its work on the 10th.

If you glance at the calendar and bear in mind the rate at which we are working, you will see that we have no time to lose, even if we succeed in achieving very little. We must therefore all resolve to work actively and quickly, and carry our resolution into effect next week with the greatest possible zeal.

In saying this, I am in no way criticising what we have done this week. It was essential that the various points of view should be indicated at considerable length, as they have been, at the beginning of our work. Now we see matters much more clearly. We are better acquainted with the opinions of all the delegations. We can move forward quickly and reduce to a minimum the observations submitted in Committee, because there are many things that we now know and that it is unnecessary to repeat.

M. Giannini (Italy):

Translation: You have forgotten the Drafting Committee, which will be compelled to work less carefully than is desirable at the first Conference for the Codification of International Law. Its work is important, and it must be completed within the period to which you have referred.

I should like to add that every day we are overwhelmed with a mass of amendments. Could we not have before us at the beginning of the second week all the amendments that are to be submitted?

The Committee rose at 6.30 p.m.

SEVENTH MEETING

Monday, March 24th, 1930, at 4 p.m.

Chairman : M. BASDEVANT.

14. CONSIDERATION OF BASIS OF DISCUSSION No. 12.

The Chairman :

Translation : Following the order of the items on our agenda, we have now to examine Basis of Discussion No. 12. You referred to a Sub-Committee the supplementary Belgian proposal relating to Basis No. 7. This Sub-Committee has considered the matter, but it has not yet completed its work and is not in a position to report to you at present. We shall therefore continue our examination of the items on the agenda.

Basis No. 12 is as follows :

> " A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State."

The object of the basis is to lay down the principle that a State is responsible for the acts of its competent officials.

Next to Basis No. 12 we have Basis No. 13, which deals with acts of officials not authorised to perform them.

These are two separate questions which form the subject of two separate bases. The first basis is intended to determine the responsibility of the State in respect of acts performed by its competent officials. It must be dealt with as it stands. Supposing that it is accepted, no inference whatsoever can be deduced from it as regards a solution of Basis of Discussion No. 13. For the sake of greater clearness in our discussions, I think it desirable to state that, supposing we accept Basis No. 12 and omit Basis No. 13 without replacing it by any other article, the question whether — and, if so, to what extent — a State may become responsible as a result of the act of an official not authorised to perform the act would then be a question entirely unsettled. It would not be allowable to decide the matter by any sort of argument *a contrario* derived from Basis of Discussion No. 12.

This is a point which I have thought it desirable to indicate in order to mark out to some extent the ground of our present discussion.

A number of amendments aim at combining in a single clause the matters covered by Bases Nos. 12 and 13 regarding the act or omission of a competent official and the act of an official not authorised to perform it. In particular, we have the amendments of the United States of America, Spain, Greece, Switzerland, India and South Africa (See Annex II). There are two aspects to these amendments. First of all, they relate to Basis of Discussion No. 13 and, secondly, they refer to matters of wording. I think that, so far as wording is concerned, they should simply be referred to the Drafting Committee. Where the amendments touch upon Basis No. 13, they should be held over for consideration when we take up that basis.

We shall have to consider a few amendments dealing either with the wording or with the actual substance of Basis No. 12. These we shall discuss in connection with that basis. I refer here to an Austrian amendment and the Mexican amendment which you have before you.

The Austrian amendment is to substitute for the expression " within the limits ", the expression " within the general limits ".

The Mexican amendment is as follows :

> " A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its subaltern officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State, and the State has failed to discipline the official."

M. Richter (Germany) :

Translation : I think that Basis of Discussion No. 12 relates only to officials performing administrative duties. Magistrates and officials performing judicial duties are dealt with in Bases Nos. 5 and 6.

I think the discussion may be clearer if that point is borne in mind.

The Chairman :

Translation : That is so.

M. Suarez (Mexico) :

I have the honour to propose an amendment to the Basis of Discussion No. 12. This amendment refers to the essence of the responsibility that is implied in the basis. In the text proposed by the Preparatory Committee it is said that a State is responsible for the acts of officials when they are contrary to the international duties of the State.

As pointed out in our previous meeting, we agree that the responsibility of the State cannot arise except under two conditions,

that is to say, when the act is imputable to the State and when the latter has committed an act contrary to its international duties.

In my view, an act can be imputed to a State only when the official has acted within the limits of his competence and has complied with the municipal law. It can then be said that it is an act of the State and that the State is responsible, but when the official has acted outside the limit of his competence or when he has acted contrary to the municipal law of the State, then I do not think that the responsibility of the State is involved.

Let us suppose a case in which an official is acting within the scope of his functions but contrary to municipal law, can it be said then that the responsibility of the State is involved? I think that the great weight of authority supports the contrary view. I think that only when the State fails to discipline its official does it incur international responsibility. If it has disavowed the act committed by its official and has punished the official, the State has not, in my view, incurred international responsibility, and I repeat that the best authority supports this view, especially in the decisions of international tribunals.

For these reasons, I would ask the Committee to take account of this amendment and to approve the basis, but with this limitation: that a State is only responsible when it has failed to discipline or to punish an official who has acted in contravention of an international obligation of the State.

M. Sipsom (Roumania):

Translation: The Roumanian delegation approves of Basis of Discussion No. 12, subject to two reservations: the reservation concerning the exhaustion of remedies; the reservation concerning the definition of international obligations.

The Chairman:

Translation: These two points are being considered by a Sub-Committee.

M. Urrutia (Colombia):

Translation: I desire to propose a verbal amendment to Basis No. 12. That basis says: "A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials acting . . ." In the case of an omission, the official obviously does not act. The wording adopted by the Institute of International Law is more correct: "The State is responsible for the procedure adopted by . . ." That wording involves no contradiction.

The Chairman:

Translation: The Drafting Committee is at work and it may meet your wishes. Your observation, however, is very important.

I would remind the Committee that it has before it the text of Basis of Discussion No. 12, an amendment by the Austrian delegation to add a word to this basis ("acting within the *general* limits of their authority"), and finally an amendment by the Mexican delegation, the reasons for which have been stated to you orally.

You will see that the text of the Mexican amendment relates to the acts of subaltern officials. I am not sure what happens in the case of acts or omissions of higher officials. I assume, however, that I am interpreting the ideas of the Mexican delegation when I say that it regards these acts as covered by Basis of Discussion No. 7, which refers to acts or omissions on the part of the executive power.

I see that the Mexican delegate agrees with this and is of opinion that the acts of higher officials are covered by Basis No. 7.

The Mexican proposal is furthest from the Basis of Discussion. We must therefore examine the Mexican amendment first and, if no member asks to speak, I shall put the matter to the vote.

M. Sipsom (Roumania):

Translation: The Mexican delegate says that in his amendment he desires to avoid any distinction between higher officials, who represent the State, and subaltern officials who also, in his opinion, act in a representative capacity. I think that idea is implicitly contained in the text. If we emphasised this representative capacity, perhaps the Mexican delegate would withdraw his amendment.

M. De Visscher (Belgium), Rapporteur:

Translation: In reply to the Roumanian delegate, I would say that there is no need to add anything to the present text. An official who acts within the limits of his authority is an organ of the State; he speaks and acts on behalf of the State. He acts, therefore, in a representative capacity. There can be no difficulty in that respect.

M. de Berczelly (Hungary):

Translation: I beg to point out that the Hungarian delegation's amendment (see Fifth Meeting, No. 12) is further removed from the Basis of Discussion than is the Mexican delegate's proposal.

The Chairman:

Translation: The reason why I have not included the Hungarian delegation's amendment in our consideration of the present Basis of Discussion is, as you will understand, that it does not relate to precisely the same matter as the Basis of Discussion we have before us.

Basis No. 12 is designed to indicate the acts attributable to the State, and it reads that a State is responsible for the acts or omissions of its officials acting within the limits of their authority. The Mexican delegation submitted a slightly different formula.

The Hungarian proposal includes matters of a different character. It does not state directly that acts of officials are attributable

to the State. It merely indicates that the State is responsible if it has not afforded a foreigner the possibility of prosecuting his claims. This amendment, which applies to several Bases of Discussion, was referred for consideration the other day, with a good many other amendments, to a Sub-Committee. Accordingly, I think it is a question for the Sub-Committee and not for ourselves.

Unless the Hungarian delegation insists upon a vote being taken at once, the Sub-Committee will continue to deal with the amendment.

M. de Berczelly (Hungary) :

Translation : Provided the Sub-Committee considers this amendment, the Hungarian delegation will not press for it to be put to the vote.

M. Giannini (Italy) :

Translation : I desire to remind the Committee of a point on which we agreed at a previous meeting.

We said that we would consider the Bases of Discussion, but would hold over any decision as to their final form and the way in which they were to be co-ordinated. If, after adopting the general principle stated in Basis of Discussion No. 7, we proceed to consider Bases Nos. 12, 13, 14, and 15, we are entering upon special aspects of a general problem all of which relate to the State's responsibility as regards acts of the executive power.

For the moment, we ought to reach agreement on the principles contained in these Bases of Discussion. Afterwards, we shall have to co-ordinate the various formulas. We shall then be able to see whether it is possible to amalgamate two or three of these formulas, and in that way avoid a certain amount of duplication, to which some delegations object. If we considered the Bases of Discussion in that spirit, I am sure many observations would become unnecessary.

Accordingly, I would urge my Mexican colleague to withdraw his amendment. When the principal provisions of our Convention have been co-ordinated, he will be able to decide whether they are entirely satisfactory.

M. Suarez (Mexico) :

I am willing to accept the suggestion of the Italian delegate provided that we return to the point later on.

In my judgment, the Committee would make a very serious mistake if it approved the Basis of Discussion as it stands. I do not think that in general terms a State can be considered as responsible, without qualification, for the acts, contrary to international law, committed by its officials. If, for instance, a police official commits an act that can be considered as contrary to the international obligations of the State ; if, for instance, he arrests a foreigner, and the State disavows the act, I do not think the State can be deemed to be responsible, even though the foreigner may have suffered some damage through the acts of the official.

For this reason, and in a conciliatory spirit, I would agree to the request made by the delegate for Italy, and withdraw my amendment provided that we refer to this point later on. As I have said, I think it would be a mistake to approve the basis as it stands.

The Chairman :

Translation : As the Mexican delegation's amendment has been withdrawn we have now before us only a single amendment — that of the Austrian delegation — which proposes to add the word " general " before the word " limits ". No reasons have been submitted for this amendment.

M. Leitmaier (Austria) :

Translation : My proposal can be understood only in connection with the Austrian delegation's proposal to strike out the following Basis of Discussion. I do not know, Mr. Chairman, whether you would therefore like me to speak now or later.

The Chairman :

Translation : Basis of Discusion No. 13 will not be discussed until later, but we should like to know the object of your proposal at once.

M. Leitmaier (Austria) :

Translation : In principle, the State is represented by its organs only when they act within the limits of their authority, such limits being determined by the national law.

Consequently, the State is, in principle, responsible only for damage caused by its officials, acting within the limits of their authority. International practice, however, which is the source of customary law, has led to the evolution of a special rule according to which a State's responsibility goes farther and, in certain circumstances, covers damage caused by State officials who exceed their authority. We must therefore discover and define the special conditions governing such responsibility. From a consideration of international practice and of the Government replies to the questionnaire it would seem that, if the rule is accepted as stated in Basis No. 13, it would extend responsibility beyond the limits recognised by present-day law.

The formula adopted by the Preparatory Committee certainly excludes the acts of an official who exceeds his authority, in so far as they are acts of his private life. On the other hand, the formula covers those acts of an official which, although coming within the general limits of his authority, are contrary to the rules by which, in that special case, his right to exercise his authority is limited.

In both cases — the exclusion of acts of the official's private life and the extension of responsibility with regard to acts performed within the general limits of his authority — I agree entirely with the rule proposed, but

the wording chosen would seem to cover also damage caused by an official who exceeds the general limits of his authority provided the official purports to act within the scope of his authority.

The Institute's report in this connection gives the example of a fiscal agent, a State official, who proceeds to seize personal property. I admit that the juridical basis of such responsibility might be discussed *de lege ferenda.* It might, for instance, be argued that, as the State conferred on the official the authority which he has abused, its own responsibility for any damage caused is thereby involved. But I do not think that the law as it stands at present recognises so extensive a responsibility, and in my opinion it would be better to keep to the well-founded principle of present-day law, according to which the State is responsible for acts performed by its officials within the general limits of their authority.

The Chairman :

Translation : It appears from the explanations just given us by M. Leitmaier that he has no objection to Basis No. 12 in itself. The object of his amendment is to introduce into Basis No. 12 something taken from Basis No. 13. Accordingly, I think that in the interest of the orderly transaction of our business we should hold over his amendment and deal with it when we discuss Basis No. 13. We should take a decision for or against Basis No. 12, which is the only one at present under discussion and in regard to which no further amendments have been submitted.

I would therefore ask delegates who agree to Basis of Discussion No. 12 to raise their hands.

Basis of Discussion No. 12 was adopted.

The meeting was adjourned at 5.15 p.m. and was resumed at 5.40 p.m.

15. CONSIDERATION OF BASIS OF DISCUSSION No. 13.

The Chairman :

Translation : We now come to Basis of Discussion No. 13 : " A State is responsible for damage suffered by a foreigner as a result of acts of its officials, even if they were not authorised to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State."

I would remind you of the observations preceding Basis No. 13 which are found on page 78 of the Brown Book (Document C.75. M.69.1929.V.) :

> " Here the case is that of an act which the official was not authorised to perform but in performing which he purported to act within the scope of his authority — an official act, not one performed in a private capacity by a person who happened to be an official. The replies reveal differences of opinion. The prevailing view seems, however, to be that the act is to be regarded as the act of the State and is therefore of a nature to render the State internationally responsible. This view rests on the consideration that, since acts causing damage are frequently such as their authors were not authorised to perform, a rule restricting responsibility to the acts of officials acting within the scope of their authority would be inadequate."

The point in these observations which I desire to commend to your attention is that the replies as noted by the Preparatory Committee reveal differences of opinion. These differences of opinion have again come to light in the amendments to Basis No. 13. Certain amendments propose that it should be omitted; others suggest modification. Finally, the desire of members to indicate their views and possibly to criticise Basis No. 13, at least in certain of its aspects, is shown by the fact that several speakers wish to give oral explanations regarding this basis.

Mr. Lansdown (South Africa) :

Mr. Chairman — in this Basis No. 13 we have before us what I fear is a somewhat difficult problem. It is the problem of ascertaining and setting out what shall be the fundamental principle or principles of State responsibility in respect of an act performed by an official who was not authorised thereto.

When we were dealing with the matter of State responsibility for official acts within the competence of the performing official, we had a relatively much easier matter in hand, because we were able to import the universal principle of agency. But we can import no such principle here, where the act is beyond the competence of the official. What, then, is to be the ground of responsibility? This I take it is the problem which is before us in the consideration of Basis No. 13.

In Roman law, the system in which Grotius and Bynkershoek mostly worked, and in Roman-Dutch law, that local adaptation of the Roman law, for the systematising and clear exposition of which we are indebted to Grotius and Bynkershoek and other great jurists of this country of the Netherlands, the principle of liability in delict was very clear. Save for certain specific instances — certain extraordinary cases — responsibility to another in respect to an alleged wrongful act was dependent upon the existence of *dolus* or *culpa.* Unless it were possible to say that in the ingredients of the act there was fraud or something assimilated to fraud, or *culpa* in some degree — whether *culpa lata* or *culpa levissima* — there would be no liability.

That was a very clear and precisely defined basis of responsibility. Then there was the universal principle of agency which was

adopted in both systems and is accepted in all existing systems of civilised law: *qui facit per alium facit per se*; and also the principle of ratification, that, where you ratify an act done by another you are identified with it in the legal position of a prior mandator.

Those principles are perfectly clear, but I am afraid that *dolus* and *culpa*, which perhaps you will permit me to call the subjective tests, are not sufficient as a criterion for the existence of international responsibility, because doctrine and practice have revealed that State responsibility extends further.

What then is, and should be, the basis? It is necessary, it seems to me, to find some sort of objective test. Now, in Basis No. 13 as submitted, the only objective test is "if the officials purported to act within the scope of their authority". I am very much afraid that this is not sufficient, because there may be acts which clearly do involve the responsibility of the State where the official concerned has not purported to act within the scope of his authority; in fact, an official might be sufficiently astute to say, when committing such an act: "Be it known that I am not purporting to act within the scope of my authority". He might say to the foreigner: "I do not like you; I dislike your face; I hate your nationality; happily, the State has put within my hands the power to do this outrage, but understand that I am not purporting to do this by virtue of my office; expressly I disclaim that, and the circumstances will show that I am not purporting to act in the execution of my official functions." In that case, under this Basis No. 13 as now drafted, the State would escape responsibility, and that being so, it seems to me that the basis, in its present form, is signally defective.

Again, I venture to think that the basis is also defective in that it does not supply anything in the nature of what I may call a subjective test — the conduct of the State itself which might possibly have prevented the outrage which gives rise to a question.

A State has a definite duty to ensure a proper organisation of its affairs and to maintain a proper supervision over its officials. If the State is remiss in this duty, and, by reason of its laxity, an excess of authority has occurred, which has permitted an official to commit an outrage, then it seems to me that the State should be responsible, because in those circumstances the State itself is, constructively, a party to the act.

These principles should be embodied in the basis, and therefore I have ventured to submit for the consideration of the Committee the following amendment:

> "A State is responsible for damage suffered by a foreigner as the result of unauthorised acts of its officials incompatible with the international obligations of the State if the acts were committed under colour of authority or in the exercise of official power, or if the excess of authority might have been prevented by the State acting with such diligence in the administration of its affairs and the control of its officials as could be expected from a civilised State having regard to the circumstances."

Here, I venture to think, is a subjective test which might well be embodied as a principle for the determination of the question of the State's responsibility.

Then we come to the matter of the supplying of an objective test, which I confess is a very much more difficult one. I have already shown, I hope, that the words of Basis No. 13: "If he purported to act within the scope of his authority" are not sufficient, in that they would enable the State to escape responsibility in many instances where its responsibility is really involved. This difficulty of supplying an objective test has attracted the attention of the Swiss delegation, and in the very useful memorandum which it has prepared and which I commend to the consideration of the Committee it sets out this test: "If, however, the official is deemed to have acted outside the scope of his authority, the State will not incur responsibility if the official was obviously not authorised to perform the act or if the act committed by him had no connection with his office."

You will see that the formula suggested by the delegates for Switzerland is not adequate; it would admit of the State escaping responsibility in many cases in which its responsibility should really be involved.

It seems to me that there are two circumstances in which the responsibility of the State should be involved, and I have ventured to submit them in my proposal. Those cases are if the acts were committed: (1) under cover of authority, and (2) in the exercise of official power.

Those are the two objective tests which I venture to submit for the consideration of the Committee. I put them forward purely as a tentative proposal, because it may happen (I hope it will be so) that others will supply a basis of responsibility which will accord better with doctrine and practice on the subject and agree better with justice. Failing a better one, however, perhaps the Committee would consider this objective test of responsibility which I have submitted.

Sometimes the act of an official should involve the responsibility of the State even though it does not fall within the terms of the draft I have submitted or within Basis No. 12; in that case, the responsibility of the State should be involved only as in the case of any private individual, and, when we come to consider the responsibility of a State in respect to acts of private individuals, I shall have something to say in regard to those acts of an official which should be considered on the

basis of their having been committed by a private individual.

M. Richter (Germany) :

Translation : The problem contemplated in Basis of Discussion No. 13 is not entirely international in character. It arises also in special cases that are governed solely by municipal law. Hence it may be helpful to state how this problem has been dealt with in one particular national body of laws.

In Germany, by a law of 1910, the State assumed municipal responsibility for acts entailing damage committed by its officials, under the following conditions :

1. The act must be performed in the exercise of the public authority that the official derives from the State.

2. The act must be contrary to the obligations incumbent on the official, in virtue of his official capacity, with regard to the person who has suffered the damage.

The law contains no provision concerning acts performed by an official who exceeds his authority. The courts have, however, given a very wide interpretation to the fundamental provision I have just quoted. Thus, they have established the State's municipal responsibility in certain cases of excess of authority.

The German delegation thinks it impossible to state in any general formula the cases in which the State must be responsible for the acts of an official who exceeds his authority. We consider it the duty of the international judge to consider the circumstances in each particular case.

For these reasons, and in order not to extend the discussion, we propose that the Drafting Committee should be instructed to amalgamate Bases of Discussion Nos. 12 and 13 and to devise a somewhat elastic formula defining an act entailing damage so that the international courts will be able, in particular cases, to establish international responsibility for acts performed in excess of authority.

M. Nagaoka (Japan) :

Translation: The Japanese delegation is in favour of maintaining Basis of Discussion No. 13. But the expression "purported" seems to us to be rather obscure, because it is based to a certain extent on subjective considerations. The Japanese delegation would therefore propose "acting on the strength of" in order to make it quite clear that this provision applies solely to acts of officials carried out apparently within the scope of their authority.

Mr. Hackworth (United States of America) :

The delegation of the United States has suggested that Bases Nos. 12 and 13 should be combined as follows :

> "A State is responsible for damage suffered by a foreigner as the result of a wrongful act or omission of its legislative or executive authorities incompatible with its international obligations."

We still adhere to that suggestion.

There are several reasons why this change should be made and, particularly, why No. 13 in its present form should not be adopted. In the first place, the phrase "purported to act within the scope of their authority" is both too narrow and too broad. It is too narrow for the following reason : if the official acts within the general duties of his office, even though he does not purport so to act, and if the act contravenes an international obligation, the State would be responsible. If, on the other hand, he purports to act within the scope of his authority, and he performs an act entirely outside his jurisdiction, and one which would not ordinarily be included within the duties of such an official, the State would not ordinarily be responsible for such an act. The test in such a case is whether or not the act performed ordinarily falls within the scope of the office or function.

Our suggestion is that Basis No. 12 should be modified so as to provide that the State may be responsible for acts of officials within the scope of their office or functions where such acts or omissions are incompatible with the international obligations of the State.

I understand that the German delegation feels that Basis No. 13 should be omitted and that the phraseology of Basis No. 12 should be modified or that Bases Nos. 12 and 13 should be combined ; this is also the view of the Austrian delegate. It certainly is our view, and we feel that by this simple change in Basis No. 12 we can cover the whole situation and entirely eliminate Basis No. 13.

M. Guerrero (Salvador) :

Translation : In considering the question of responsibility we must not for one moment lose sight of one absolutely essential condition of that responsibility — namely, imputability.

Just as, with regard to Basis No. 12, we all agreed that this responsibility exists, so now we should agree that the State is not responsible when an official exceeds his authority. In the former case, the State is responsible because, in inflicting damage on a foreigner, the official is obeying an order of the State. His act may be quite lawful from the standpoint of municipal law but unlawful from the

standpoint of that international law which is infringed by the order given. When, however, an official exceeds his authority, he does not obey an order of the State ; his act is prompted by his personal will : he is guilty of an abuse of his position. It is he who is responsible and not the State.

To admit that the State is responsible for the acts of its officials, even when they exceed their authority, would be tantamount to considering the State as an insurance company covering all damage caused to foreigners. I do not think that is our view. In any case, the States would be unable to accept any such principle.

I do not ask that Basis No. 13 should be struck out. I think principles must indeed be stated in our Convention. I would ask merely that Basis No. 13 should be replaced by the following wording :

> " A State is not responsible for damage suffered by a foreigner as the result of acts of its officials, if they were not authorised to perform them, even if the officials purported to act within the scope of their authority."

I submit this proposal as a principle that should be asserted in the Convention.

M. Giannini (Italy) :

Translation : In view of the discussion on Basis No. 13, I wonder whether it would not be desirable to settle a certain preliminary question immediately. Should the Convention include a rule regarding the responsibility of States for damage suffered by a foreigner as the result of an act done by an official outside his official duties?

If we decide not to include any rule on this subject, the matter may be left over for another conference. If, however, we decide to insert a rule, we must try to discover a formula which will satisfy everybody.

I should say, moreover, that I understand — though I do not admit — certain of the scruples expressed by some of our colleagues. The formula contained in Basis No. 13 may be justified by saying that " the State is responsible *de culpa in eligendo* ". But it may be retorted : " No, because the State has chosen its officials with all due precautions, taking into account their talents, their physical and mental powers and their moral qualities." We shall consider only the risk run by the State. These problems are, it is stated, solved in each country in a different manner owing to the diversity of the various national laws. In several countries, the State considers that it cannot in any wise be held responsible for the aberrations of its officials.

If it is admitted that the State owes no reparation for damage suffered by its own nationals, foreigners would then be placed in a privileged position.

Obviously, the various national laws differ widely on this point. We should, therefore, have the courage to reply in the negative to the first question, without thereby espousing the proposal put forward by M. Guerrero, who has, with considerable elegance, turned the formula inside out, showing that what we thought to be white is really black.

The problem should be stated in no equivocal terms. Does the Committee think that a rule on this subject can be included in the Convention? If not, our Rapporteur should insert a few phrases stating that this question is reserved. As we shall be obliged to reserve our judgment on other questions as well, the fact that we are bound to do so in this case also does not cause me any undue anxiety.

The Chairman :

Translation : You have before you a point of order submitted by M. Giannini based on the fact that very divergent opinions have been expressed with regard to Basis No. 13 and proposing that the question should be reserved, the point being mentioned in the report.

M. Dinichert (Switzerland) :

Translation : I can assure M. Giannini that I fully share his anxiety. I desire to expedite the work of this Committee as much as possible, but I do not agree with his point of order, which I consider to be premature.

There are proposals before the Committee. I myself have one to defend, and I shall do it with all my conviction. I do not see why we should, at this moment, bring the discussion to an end. We cannot yet say whether unanimous agreement, or, at all events, general agreement, may not be reached upon this question. Accordingly, I shall vote against the motion.

M. Sipsom (Roumania) :

Translation : I take it that by connecting Basis No. 13 with Basis No. 14, M. Giannini wishes the former to be withdrawn.

M. Giannini (Italy) :

Translation : In addition to the statements made already, we have before us several amendments, proposals for substantial changes and even for the inversion of the formula. Before continuing the discussion, I think that, in order to expedite our work, it would be advisable to see whether we agree that the discussion should be continued and that a rule should be laid down on this subject. If such an agreement is reached, the discussion will be continued ; but, if it is seen that views differ so profoundly that no agreement can possibly be anticipated, this point should be reserved for another conference.

Personally, I have to state that the Italian delegation is prepared to accept Basis of Discussion No. 13.

M. Sipsom (Roumania) :

Translation : We understood that M. Giannini's proposal was to submit a more elegant formula in place of M. Guerrero's formula and so to evade any decision.

I now understand that you wish the discussion of this basis to be postponed.

M. Giannini (Italy) :

Translation : I wish to know whether we are to have any rule.

M. Sipsom (Roumania) :

Translation : You do not desire a discussion at once because Basis No. 14 relates to acts . . .

M. Giannini (Italy) :

Translation : I never mentioned Basis of Discussion No. 14.

M. Sipsom (Roumania) :

Translation : Basis No. 13 is therefore still before us, and must be discussed now, since differences of opinion have been revealed and amendments have been submitted. I agree with M. Dinichert that, as different points of view have been expressed and as others may yet be put forward, we must continue the discussion before taking any decision.

My own preference is for M. Guerrero's proposal, but other proposals may possibly seem to be better. I do not see why the discussion should be postponed merely because the present difference has been noted.

M. Giannini (Italy) :

Translation : I withdraw my motion on the point of order.

The Chairman :

Translation : M. Giannini has withdrawn his point of order. M. Richter now wishes to submit a point of order, and I call upon him to address the Committee.

M. Richter (Germany) :

Translation : As you are aware, the German delegation proposed that the scope of the Convention should be limited to those questions concerned with international responsibility in a restricted sense, to the exclusion of other questions relating to the law on the treatment of foreigners.

I do not think the time has yet come when we should decide whether to exclude certain Bases of Discussion from the text of the Convention. In order, however, to give the Drafting Committee time to prepare the texts I think that, to ensure the progress of our work, we must at once decide on an order which is rather different from that in which the Bases of Discussion are at present arranged.

After consulting certain delegates, I venture to propose that the discussion should at present be confined to the following bases : Nos. 2, 7, 12, 5, 6, 30 and 29. These bases lay down the fundamental principles of international responsibility. Other bases, which are of secondary importance, might be considered later.

If the Committee adopts this proposal, the discussion of Bases Nos. 2, 7, 12, 5, 6, 30 and 29 will be concluded before we decide whether certain questions that now appear in the bases should be excluded from the text of the Convention. The German delegation will then renew the proposal it has already made for the exclusion of certain questions from the text we are to frame.

The Chairman :

Translation : The discussion is now open on this point of order, and I would ask speakers to be brief.

M. Urrutia (Colombia) :

Translation : I think the German delegation's proposal is well worthy of consideration, but it will be difficult for us to vote until we have a written text showing exactly the Bases of Discussion to which M. Richter refers. In these circumstances, I would ask the Chairman to suspend the discussion and to circulate as soon as possible the text of the German delegation's proposal, so that we may vote at the beginning of the next meeting.

The Chairman :

Translation : We are dealing here, not with a new text, but merely with the question of determining the order of discussion. Following the order indicated by M. Richter we have Bases Nos. 2, 7 and 12, on which we have already voted. I would again remind you that we are merely dealing with the order of our work.

M. Richter (Germany) :

Translation : I said that the question of excluding certain Bases of Discussion from the final text would be considered later, after discussion of the fundamental bases we have not yet considered — namely, Bases Nos. 5 and 6 which relate to the courts and the final Bases Nos. 29 and 30.

My proposal is that, after discussing those four bases, we should decide what other bases we intend to consider.

The Chairman :

Translation : Before calling on the next speaker I should like to add something to the explanations already given. M. Richter's point of order refers solely to a method of work, to the order in which the subjects of discussion should be taken. Obviously, certain delegations may hesitate somewhat to adopt this order at once and without discussion, seeing that they are not accurately acquainted with the texts referred to. I think, however, that, if the Committee adopts this order, two points will have to be admitted.

First of all, any delegation should be free during the discussion to add to, or insert in, the list such provisions as it may think specially important. Accordingly, this order of work should be adopted without finally binding the Committee.

Secondly, M. Richter's motion was submitted during a discussion for which several speakers had already sent in their names. If the Committee adopts M. Richter's view, it will perhaps decide that it is not necessary immediately to postpone discussion of Basis No. 13 and that the speakers down on the list should be allowed to state their opinions — provided the discussion is not too protracted — on the point whether Basis No. 13 should be kept or reserved, as was suggested a moment ago.

I think that the Committee accordingly can accept M. Richter's point of order, modified or interpreted as I have indicated.

M. Limburg (Netherlands) :

Translation : I strongly support the German delegation's proposal. I really think we should do well, at all events during the early days of the Conference, to confine ourselves to the fundamental bases in the list before us.

The bases in question are Nos. 2, 7, 12, 5, 6, 30 and 29. To expedite our work, I think it is desirable — I would almost say necessary — to begin by confining ourselves to the bases mentioned by the German delegation. When we have finished discussing them, the Drafting Committee — in collaboration with the Sub-Committee or with some other sub-committee — will have to submit a definite wording. Meanwhile, we shall have time to consider other bases — that is to say, those previously left on one side.

Accordingly, I warmly support the German delegation's proposal, but I think we should first complete the verbal discussion of Basis No. 13.

M. Dinichert (Switzerland) :

Translation : I, too, support the idea that we should make a reasonable and logical selection amongst the Bases of Discussion — that is to say, I approve in principle the ideas just expressed by the German and Netherlands delegates.

I do so, however, with a slight difference. I do not think that Basis No. 12 is essential to the Convention.

The Chairman :

Translation : We have already voted on this basis and do not need to discuss it now.

M. Dinichert (Switzerland) :

Translation : I mentioned it only by way of illustration. I said that this basis is not essential as it is contained in Basis No. 7. The latter is essential, and is concerned with responsibility for the executive power, which, of course, includes officials. We are agreed on that point but, seeing that Basis No. 12 has been discussed and approved, I do not think it reasonable to separate from it Basis No. 13, which, in my opinion, forms an integral part of it. I should indeed find it hard to accept the vote on Basis No. 12 unless it were counterbalanced by Basis No. 13 ; otherwise, I should have to make reservations as to the conclusions to be drawn from the vote on Basis No. 12. If the latter had not been approved, I could have accepted the proposal that has been made to exclude from our work, for the moment, the section on officials. As, however, the consideration of that Chapter has been begun, I must again urge that the discussion of Basis No. 12 be followed by a discussion of Basis No. 13.

Mr. Beckett (Great Britain) :

I agree generally with the idea underlying the German proposal that it might be well for the progress of our work to make a selection from the different Bases of Discussion, to choose certain of them which we might discuss before the others and then consider the others if we have time. I also agree that amongst those which M. Richter has chosen Bases Nos. 5 and 6 are clearly of fundamental importance, and I agree that they should be taken early or at once.

As regards the others, I wish to make the following suggestion : Bases Nos. 5 and 6 will certainly take some time to discuss ; in the meanwhile, the Chairman might perhaps be able to find some means of ascertaining the general opinion as to the other Bases of Discussion which are considered to be most essential and of the greatest importance.

Could we take M. Richter's proposal in a slightly more limited sense for the moment — that is to say, adopt Bases Nos. 5 and 6 at once and then consider later, when there has been a little more time to think over this important question, what other bases should be included ?

As regards Bases Nos. 12 and 13, I feel somewhat in the same position as M. Dinichert ; it is rather difficult to treat these bases as being entirely separate.

M. Giannini (Italy) :

Translation : My friend M. Richter will forgive me if I venture to take him to task. Why did he not communicate his proposal at the beginning of the meeting ? Though I really do not know whether I ought to blame him, because I myself had a similar intention and would then have had to take myself to task !

In order to remove some of the misgivings of our Mexican colleague with regard to Basis No. 12, I would suggest that we should not allow ourselves to play with words ; it is quite possible that when we come to drafting Bases Nos. 12 and 7 will be examined together. Obviously, however, I do not know whether this will be the case or not.

I will now reply to our Swiss colleague. Clearly, if Bases Nos. 12, 13 and 14 cannot be harmonised, it may be necessary to consider some other solution for the drafting. For instance, we might combine Bases Nos. 12 and 7 into one article. We may, therefore, continue this discussion ; but we must see what still remains to be done.

With regard to M. Richter's proposal, I would draw the Committee's attention to the fact that, if we adopt the German proposal, we

shall have an article headed " General Principle of Responsibility ", on which we are all agreed. Then comes an article headed " Obligations " — that is to say, what we take an obligation to be within the meaning of the Convention. Thirdly comes a principle which covers the responsibility of the legislative and executive organs. The Sub-Committee has considered the advisability of suspending action until all internal remedies have been exhausted. There therefore remains a logical division : responsibility for the acts of the legislative, executive and judicial organs on the one hand, and the consequences of responsibility and, finally, jurisdiction on the other.

Thus, with the German proposal, we have the essential bases for the Convention. After agreeing on these bases of the Convention — bases without which no convention can be concluded — we could then consider at our ease whether other formulæ might be contemplated. That we can only do after we have established these points. We might then lay down other subsidiary rules. If we enter into details before we have laid down the general outlines, we shall be, I will not say wasting our time, but at any rate acting prematurely.

For all these reasons, I entirely approve M. Richter's proposal, while still agreeing with my Swiss colleague, who said that before we began to discuss the question of Bases Nos. 7, 12, 13 and 14, we should first settle the point now under consideration — a point which cannot be left in suspense. If we are unfortunately unable to agree on these four rules, it will obviously be for the Drafting Committee to discover a formula which may be inserted in the Convention to meet the demands and requirements of all the delegations.

M. Matter (France) :

Translation : I fully agree with the views expressed by my honourable colleagues, M. Richter and M. Giannini. I think, if I may judge from the friendly and, from the point of view of our Conference, very helpful conversations that take place in the corridors and at our places of residence, a certain thought is taking shape in our minds.

There can be no doubt, I think, that we all, without exception, most earnestly desire to achieve a definite result. We want this Conference to be a milestone on the road of progressive codification and we are bound, therefore, to make some progress every day.

Where do we now stand in our work? We are far from having accomplished nothing at all. On the contrary, I think that we have already accomplished much. In the first place, we have been here for ten days and have not heard one single unsuitable expresssion used, in spite of divergent views, and every delegate has been able to express his opinion calmly and with due respect for the opinions of others. That is a very satisfactory start.

But we have accomplished more than this. We have adopted a general principle, the comprehensiveness of which is not for me to vaunt, since I was myself responsible for its conception. Then, dealing with the application of this principle, we have already, in two of its three corollaries, reached a unanimous decision in keeping therewith.

There were, in fact, three fields in which the general principle could be applied : to legislative questions — this has been adopted, though the Committee has still to draft the text — in executive matters — this has been adopted — and we have now to examine the principle as it applies to jurisdictional matters. This is a difficult question which calls for careful consideration.

I therefore think it quite natural that we should now discuss this third field of application.

As M. Dinichert has pointed out, we have begun to discuss Basis No. 13, which — as its number itself shows — is a consequence, a corollary, of Basis No. 12, which has recently been adopted. True, but this also applies to Basis No. 14, to Basis No. 15 also, to Basis No. 16 as well, and, if the order indicated in the documents distributed to the Conference may be relied on, we shall subsequently have to consider Basis No. 23. Five bases! That would perhaps be a great deal — five troublesome bases, five bases on which there will certainly be some division of opinion. Attempts will then have to be made to harmonise the various points of view, but this may be a lengthy procedure entailing the reference of a number of points to the Committee.

Moreover, the general principle for which we are now seeking is laid down in Basis No. 12. Bases Nos. 13, 14, 15, 16 and 23 are only details of application or, if you prefer, methods of application. There is really, therefore, no reason why we should not enter the other domain of the general principle governing jurisdictional matters.

On what consideration is our German colleague's proposal founded? Simply on this, that we should lay down the general principles before examining the methods of application. As we have laid down the general principle of the responsibility of the legislative power — Basis No. 2 — and of the executive power — Basis No. 7 — it would seem to be logical now, before we consider the methods and details of the application of responsibility on account of the acts of officials, to endeavour to define the general principle (which I admit is a delicate task) of responsibility in matters of jurisdiction.

Then, to complete our study of the general principles, we shall only have two more points to consider. The first, which is perhaps not a very complicated one, is that of responsibility from the standpoint of methods of application ; and the other, on which we shall probably come to agreement without much difficulty — so great is our admiration for the Permanent Court at The Hague — the question of jurisdiction.

When this has been done, how much easier it will be for us to revert to the means of applying the various articles we have adopted! We

may not be able to deal with them all, but we may reasonably expect to have time to consider some of the methods of application. We shall thus be able to complete our work.

If my hopes are deceived, we shall nevertheless have accomplished something which constitutes one indivisible whole. Therefore I entirely agree with the proposal of our German colleague to begin forthwith the discussion of Bases Nos. 5 and 6. I do not think we can this evening terminate our discussion of Basis No. 13. The Chairman said some time ago that there were still speakers on the list. He was not counting on those who have not put their names down, and I know that there are some who wish to speak. The list will be a long one. We might therefore begin the general discussion of principle in connection with Bases Nos. 5 and 6 to-morrow.

The Chairman :

Translation : We have been discussing points of order for exactly fifty minutes now. It is time to end this discussion and to lay down our programme of work for to-morrow. I would propose that we first of all continue our discussion of Basis No. 13 and then possibly examine Basis No. 14, which is much less important.

When we have finished this discussion and the Committee has defined its position on this point, we will have to go on to Bases of Discussion Nos. 5 and 6 and decide provisionally on the following bases. Very important suggestions have been made and, so far as I can see at present, they are extremely wise. I would like to give all members the right of sending in other proposals. I would therefore ask delegations to hand in to the Bureau before the meeting, or at latest when the meeting begins, an indication of the Bases of Discussion which they think to be specially important and in regard to which they consider it possible to reach a wide measure of agreement.

Points on which there is little hope of finding agreement should be omitted. The Bureau will examine these proposals and will endeavour to appraise the possibilities they offer. It will then in due time propose a method of work. In that way we shall be able to discuss and to vote on what is of essential importance. The Drafting Committee may set to work and prepare the text of the articles which we shall have to consider in detail later. Meanwhile, we shall take up the articles which we have provisionally held over.

I should like to ask the two delegates whose names are down on the list not to address the meeting, as this will enable us to vote on the method of work we should adopt.

M. Guerrero (Salvador) :

Translation : I understand that we shall not consider the points of order that have been raised. To-morrow, we shall continue the discussion on Basis No. 13 and shall afterwards turn to Bases Nos. 5 and 6. Before the meeting, delegations will be able to submit their views on the method of work.

The Chairman :

Translation : They will not make suggestions, strictly speaking, on the method of work, for we are going to decide on that point this evening. Delegations, however, will inform the Bureau of the bases the examination of which they regard as being urgent. It is these proposals which the Bureau will consider. The Bureau will then state as early as possible the order of discussion it proposes. The Committee will then decide whether it will accept or modify the order proposed. For the present I am of opinion that we should discuss to-morrow Basis No. 13 and then go on to Bases Nos. 5 and 6.

M. Guerrero (Salvador) :

Translation : It is clearly understood that throughout our meetings we shall follow the programme submitted.

The Chairman :

Translation : We shall do that as far as we can.

I therefore propose that the Committee should adopt this method of working.

The proposal was adopted.

The Committee rose at 7.15 p.m.

EIGHTH MEETING

Tuesday, March 25th, 1930, at 4 p.m.

Chairman : M. BASDEVANT.

16. — CONSIDERATION OF BASIS OF DISCUSSION No. 13 (continued).

The Chairman :

Translation : We will resume, at the point where we broke off, the discussion on Basis No. 13, which relates to a State's responsibility for acts of an official who exceeds his authority.

M. Cohn (Denmark) :

Translation : All the speakers have in mind the point of order that was approved yesterday, and for my part I have no desire to prolong the discussion.

At the end of the amendment submitted by the South African delegation — which is not confined to Basis of Discussion No. 13 — we find this phrase : ". . . such diligence as could be expected from a civilised State ".

The expression occurs also in Bases of Discussion Nos. 17, 18, 22 *(a)* and elsewhere. For the following reasons I should like to propose that it be struck out from all those bases :

1. In the present-day world it is no longer possible to classify States into civilised and uncivilised nations. There are different forms of civilisation, but we cannot attribute to them a positive or negative character.

2. It would indeed be a very delicate matter for an international court to have to condemn a State — to give a decision on its procedure — if thereby it were compelled to give an opinion as to the level of civilisation of the State in question ; yet that would be the inevitable consequence of the present wording.

3. I do not see any necessary connection between a State's level of civilisation and the diligence it should show in protecting foreigners.

I venture therefore to propose that this expression should be struck out from all the bases in which it occurs. That could easily be done, for in most cases I think it is merely redundant.

M. d'Avila Lima (Portugal) :

Translation : Basis No. 13 is concerned with the extent of a State's responsibility. I cannot contemplate without hesitation proposals, such as that made by M. Guerrero, for the suppression of Basis No. 13. I agree with him that the State should not be an insurance company responsible for the acts or omissions of anyone within its borders, of the man in the street.

Closer consideration of what the authors of Basis No. 13 intended, however, shows, I think, that we are concerned not with a private individual but with an official who, although he exceeds his authority, still remains — unless he has been dismissed — an agent and representative of the State.

Obviously, the State's responsibility cannot be admitted in all cases on the ground that the fault is bound to be ascribed to the State : *culpa in eligendo*. Nevertheless, we cannot therefore conclude that the victim must always suffer the consequences of damage caused by the acts or omissions of State officials.

I admit that, in the words of the Preparatory Committee, the question is perhaps not ripe for inclusion in what may be called the first edition of the rules governing the international responsibility of States.

I think, therefore, it might perhaps be better merely to frame a recommendation. That would certainly be a better solution than the absolute deletion of the basis in question.

Mr. Latifi (India) :

Mr. Chairman — The very illuminating discussion we had yesterday and also the speech we have just heard from the delegate for Portugal have brought to light at least one thing — namely, that, in spite of what fell from some speakers at the earlier sitting of this Committee, the general principles of law, more particularly the principles of Roman law, are an integral part of international law and therefore one of the bases of international liability.

Yesterday, for example, my friend from South Africa founded his whole argument on a consideration of the principles of Roman law and wound up in despair with the confession that the liability he is so anxious to establish finds no justification in that system.

Roman law, however, is not the only source to which the community of nations can appeal. International law has, to an increasing measure, in the last two or three generations, been supplemented by the equally great system known to its followers as Common Law and to others as the Anglo-Saxon system of jurisprudence.

The responsibility of a State for the *ultra vires* acts of its officials, when such acts purport to be within the scope of the officials' functions, is based on the Anglo-Saxon doctrine, *respondeat superior*, a doctrine which is foreign to Roman law and has grown up in the latter half of the nineteenth century with the rise

of individualism and the consequent development of the State's duties and responsibilities towards its individual citizens. It is this doctrine that has inspired, for example, the Workmen's Compensation Acts, and other forms of social insurance which were not within the horizon of Grotius or of Bynkershoek.

This new doctrine of *respondeat superior* bases itself, as our colleague Professor Borchard has well explained in a recent publication, on objective risk rather than subjective responsibility. It is based on the desire to ensure that individual losses due to imperfect government machinery should not fall on the unfortunate individual concerned, but be evenly distributed over the community. The doctrine recognises two things: first, that individual relief against public officials is often illusory; and, secondly, that it is not in the public interest that officials in their private capacity should be made pecuniarily liable for purely official mistakes.

In Germany the same idea has been developed under the impulse of the somewhat metaphysical theory of Gierke, which regards the State as a corporation like any other, and therefore identified, like all corporations, with its organs or officials in the same manner, for example, as a man is identified with his hands or his mouth. According to this doctrine a corporation or a State is responsible for the *ultra vires* acts of its officials acting within the scope of their authority, in the same manner that an absent-minded man, for example, thinking of something quite different, is responsible for his hands if they unwittingly box your ears. But the delegate for Salvador objects: Why should a foreigner have greater rights than the State's own nationals? I quite agree that he should not have such special rights; but the remedy for the disparity between the rights of nationals and of foreigners, wherever it exists, is surely not to bring the foreigner's rights below the international minimum, but rather to work the national's rights up to that standard.

Surely in this year 1930 we ought not to think of whittling down the rights of the individual as against the State, but rather to aim at making the State less and less the sovereign of mediæval theory, and more and more a public servant and benefactor.

In conclusion, the Indian delegation desires to bring to the notice of this Committee that the Indian Code of Civil Procedure makes the State liable in the ordinary course to nationals and foreigners alike for damage caused by the acts of a State official, even if such acts are *ultra vires*, provided always that they purport to be within the scope of the official's authority.

The Indian delegation therefore considers the South African delegation's amendment unnecessary.

We adhere to Basis No. 13, subject to the slight verbal amendment we have proposed.

M. Dinichert (Switzerland):

Translation: The Swiss delegation desires to submit the following proposal concerning the responsibility of officials, which in reality covers the four Bases of Discussion devoted to this question in the Preparatory Committee's draft:

> "A State is responsible for damage suffered by a foreigner as the result of acts contrary to its international obligations done by its officials whether they were authorised to perform such acts or not; if, however, the official is deemed to have acted outside the scope of his authority, the State will not incur responsibility if the official was obviously not authorised to perform the act or if the act committed by him had no connection with his office.
>
> "The same rules shall apply to officials exercising their authority abroad."

Both yesterday and to-day we have heard very interesting speeches. Some speakers explained the scientific theories underlying the ideas developed in their speeches. I shall not presume to add anything in that direction. I should rather make it clear that the proposal we are submitting is really based on essentially practical considerations.

In Basis No. 12 you have already accepted the principle that the State is responsible for its officials when they act within the normal limits of their authority. I am glad to note that, athough indeed serious differences on that question were not possible, the decision was unanimous. The State is therefore responsible, but with this qualification: the act performed by the official must amount to an infringement of international law. Let us never forget that; it must be contrary to the State's international obligations and, moreover, it must be the direct cause of damage suffered by a foreigner.

In discussing this question we must always remember that there is no suggestion that the State is responsible for everything done by its officials that might entail damage. There are many acts performed by officials entailing damage to an individual, whether a national or a foreigner, for which no one would think of holding the State directly responsible. In the case of the foreigner there must be a clear violation of international law.

We need not attach too much importance to the question whether the foreigner finds himself, as compared with the national, in a privileged situation or not. Even if he is privileged, there is still an infringement of international law.

The question becomes rather more difficult — and we saw signs of this difficulty ysterday — when, in considering Basis No. 13, we enquire whether the State is also responsible when the act performed by the official exceeds the normal limits of his authority. Here, hesitation is natural. It should be noted, however, that a foreigner is admitted and tolerated in a State on the fundamental condition that he conforms in every respect with the laws and regulations of the country he has entered and that he obeys, as it were without protest, the orders given by the public authority and its agents.

I would further remind you that, when an official exceeds his authority and performs a blameworthy act, it is the duty of each State to provide for sanctions against this official and to offer means of remedy that are open to every inhabitant of the country, whether national or foreigner.

At a previous meeting we decided that, when municipal remedies are available, the foreigner must employ them. If an official exceeds his authority, it is the State's duty to provide the foreigner with such means of remedy against him as shall, if possible, ensure equitable reparation for any damage the foreigner has suffered. If such reparation is thus obtained, the State's responsibility, in principle, involves no further consequences. The reparation obtained through municipal remedies may, however, not prove satisfactory, and in that case a certain degree of State responsibility will still exist.

We think that the brief explanation given in support of the first paragraph of our proposal should overcome the most serious objection to the principle that the State is responsible for the damage caused by an official, in violation of its international obligations, whether or not that official acts within the limits of his authority.

Basis of Discussion No. 13, however, provides a limit, and we are agreed that this responsibility must be limited. According to that basis, responsibility is involved if the damage suffered is the result of acts by an official who exceeds his authority, provided the official purports to act within the scope of his authority.

I must confess that we did not think this safety valve sufficient. An official would, in fact, merely have to announce that he was acting within the scope of his authority in order to make the State responsible in any case. We therefore sought another test. We considered that, under the given conditions, the State should be responsible for the act of an official who exceeds his authority, provided it is not obvious that the official is exceeding his authority.

We start from the idea that a private individual, and especially a foreigner, cannot be expected to know the exact limits of an official's authority. It may be said that, so long as the official's excess of authority is not obvious, the State's responsibility is involved. But beyond those limits, that is to say, when an official's action is such that anyone could say, without hesitation, that he was not acting in conformity with the instructions he must have received, the State's responsibility would cease. It is of course assumed that the excess of authority which is obvious to the foreigner enables the latter, in one way or another, to avoid the damage resulting from the official's abuse of his authority.

This train of ideas is, I admit, somewhat indefinite, but I do not see how, or in what sufficiently brief wording, we could trace limits showing the exact consequences of every abuse of authority that any official might commit. Nevertheless, as limits are thus set it will be the duty of the competent national courts and, if need be, the international courts, to give a decision. We therefore propose that the State's responsibility on account of the acts of its officials should be settled in this way and within these limits. That is the object of the first paragraph of our proposal.

The second paragraph relates to the question contained in Basis of Discussion No. 14. It says that the same principle should apply to the officials of a State who exercise their authority abroad. I do not wish to dwell on this formula. We should be in favour of applying the same principle to these officials, for we see no conclusive reason for making any distinction. The officials concerned are, of course, diplomatic and consular representatives. I know that certain objections are raised in this connection. It may even be alleged that this question does not really come within the programme of our work at this Conference. However that may be, I should like to make it clear at once that, if at any stage of the discussion our proposal is put to the vote, we should be quite prepared to submit the paragraphs separately to your decision, as, in point of fact, they are concerned with quite different matters.

I shall say very little concerning Basis of Discussion No. 15. We propose that this basis should be struck out because, in our opinion, it is needless in so far as the act of an official involves the State's responsibility. An official may perform an act which causes injury without involving the international responsibility of the State. In such cases the principle contained in Basis No. 15 might be merged with that of Basis No. 20. We shall discuss this point later, but other delegations have already made the same observation.

I have already spoken at such length that I will not go deeply into a question we have touched on in the statement accompanying our proposal — namely, the question of fault on the part of the State. Without framing any proposal, I should like to point out that this question has been amply dealt with in

legal theory and in the science of law. In particular the Institut de Droit international made a practical proposal on this matter. Moreover, certain delegations — for example those of the United States of America and Greece — to some extent dealt with this question when they proposed that, notwithstanding the violation of an international obligation, a State should not be responsible unless the official's act was unjustifiable. In short, these are rather reflections on a question that the Committee might have considered if for the moment it were not occupied with other matters.

M. Matter (France) :

Translation : I asked to speak after the representative of Switzerland because the opinion of the French Government is so nearly identical with that of the Federal Government that I need only be very brief.

The French delegation willingly accepts the principle laid down in Basis No. 13, but with the slight change in the text just suggested by the Swiss representative.

The French Government, however, holds, as regards municipal law, a view different from that which has been so strenuously upheld by our Indian colleague, who regards the State as being something like a large company having responsibility similar to that laid down in Article 1384 of the Civil Code, which makes the principal responsible for any offence committed by a subordinate.

The practice followed by the Conseil d'Etat, however, — and, as you know, we have very few laws on this subject — draws a distinction between the personal act and what we sometimes, in our legal jargon, call " l'acte départi des fonctions " — the act done outside the function. Agreed that the act performed by the official within the limits of his official duties necessarily implies the responsibility of the State ; it is equally true that in the practice of the Conseil d'Etat the act done outside the function does not involve that responsibility. Moreover, in recent years, at all events, the Conseil d'Etat has tended to adopt an increasingly liberal view. It has continually widened the basis on which the responsibility of the State reposes, so that it now applies the law not on lines entirely similar to those suggested — since the juridical basis is different — but in such a way that almost identical juridical consequences ensue. Thus in the international sphere we accept what we do not possess in the national sphere. In international matters, indeed, it is essential to remember that the foreigner has had no hand in establishing the Government, so that he has no share in the responsibility or acts of that Government's officials and consequently is independent of the responsibilities which fall on the administration *qua* administration.

Going still further than we do in our municipal law, we consider, therefore, that in the international sphere we can, generally speaking, accept the responsibility of the State for acts done by officials even outside the scope of their authority.

Nevertheless, we think that the text is inadequate, as M. Dinichert has just pointed out. Base No. 13 entails the responsibility of the State for acts committed by officials even outside the scope of their authority when they have purported to act within their authority. This condition seems to me quite inadequate. When, on the basis of his official position, an agent of the State commits an act which is entirely outside the scope of his duties, the authority of the State must obviously also be left out of account. Such act cannot in any way be attributed to the State. We can imagine the case of an official — a subordinate official, naturally — of a State who, on the strength of his official title, engages in business transactions which have no connection with his duties. Such a case would have nothing to do with the responsibility of the State.

We have summarised this idea not in the form of an amendment, for it is a mere rectification — almost a corollary — of the Swiss amendment, in a sentence in which we say that, for the State to incur responsibility, the act done by the official outside the scope of his authority must have been done in circumstances such that the foreigner was entitled to believe that the official was acting within the scope of his authority or was employing means placed at his disposal as an official.

In short, the essential element in these cases is the fraud practised on the foreigner. It is essential that the foreigner, unacquainted with the habits, customs and administrative organisation of the country in which he lives, should have believed that the official was acting within the scope of his authority. If the foreigner's misconception is so absurd and obvious that any reasonable person must perceive it, I think that the State in no case incurs responsibility. Subject to this reservation, I venture on behalf of the French delegation to support the essential provisions of Base No. 13.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : When we consider the question of international responsibility, we are sorely tempted to transport into the international sphere the rules of municipal responsibility.

One speaker referred to the rule, generally admitted in municipal law, by which the State would be responsible for all the unauthorised acts even of its subordinate officials.

In point of fact, for reasons of internal public order and in application of one or other theory — sometimes the theory of principal and agent at other times that of administrative action — and generally with a marked tendency to extend the limits of responsibility, the municipal law might allow those concerned to claim damages from the State on account of

the acts of its officials, of whatever grade in the administrative system.

I think, however, that as regards international responsibility the position is somewhat different. Apart from the notion of fault, which I consider to be absolutely essential, we must in this connection consider particularly the representative character of the organ which involves the State's responsibility We have considered the position of the legislator, who is undoubtedly the highest representative of the State. Next we considered the position of the executive power in its highest form. Then we passed immediately to consideration of the position of officials.

In this connection we must always remember that any official organ which involves the international responsibility of the State must be capable of expressing the will of the State.

As I have always understood it, Basis No. 12 relates to officials who occupy a high rank in the administrative system. Instead of making a distinction between higher officials and subordinate officials, it was thought better to say " officials acting within the limits of their authority or exceeding those limits ". To my mind, these expressions really conceal the simple distinction between higher officials and subordinate officials. I readily admit that a higher official expresses the will of the State; but I find it very difficult to consider subordinate officials in the same way. We cannot say that any police officer is an organ capable of expressing the will of the State and of involving its international responsibility. In such a case it is only the municipal responsibility that may be invoked before the national courts. Damages may be claimed in those courts, but they could not be claimed in an international court.

In conclusion, I propose that Basis No. 13 should be struck out. The formula concerning the limits of authority cannot constitute a test for international responsibility. Indeed, it would seem to be most unsatisfactory as regard unlawful acts and infringements of obligations, because, by hypothesis, such acts cannot in general be described as coming within the limits of an official's authority. I therefore prefer the test proposed by the United States delegation — namely, " in the exercise of his functions ". But a distinction must be drawn between higher officials and subordinate officials. International responsibility may be admitted in respect of the former but not in respect of the latter.

M. Limburg (Netherlands):

Translation: May I express my opinion on Basis No. 13 and the amendments connected therewith?

I agreed with Basis No. 13 as drafted by the Committee of Experts. On examining the various amendments submitted I shall have a further opportunity of explaining my views with regard to the basis itself.

In the first place I see an amendment by the Japanese delegation to the effect that the words " purported to act within the scope of their authority " should be replaced by the words " acted in virtue of their authority ". I think that the original text is more suitable than the Japanese amendment. If we admitted the expression which the Japanese delegation suggests, we should seem to imply that a non-competent official may do whatever he does do, provided — if I may coin the adverb — he acts " non-competently ".

I therefore prefer the text of the original basis.

I hope that the South African delegation will be good enough to withdraw its amendment, because that amendment might give rise to misunderstanding and difficulty. I do not refer to the last words: " civilised State ". Although I agree with H. E. Mr. Cohn, I would nevertheless say to him, " Glissez, mortels n'appuyez pas."

I have another objection to this amendment. In the first sentence it is said that a State is responsible for damage, etc., as a result of acts of its officials, even if they were not authorised to perform them, if the officials purported to act, etc., and these acts contravened the international obligations of the State. Then comes the second sentence: " . . . *or* if the excess of authority might have been prevented, etc. "

When a sentence contains the word " or " it appears to contain an extension. When I began to read the South African amendment I thought that the first sentence was completed by the second and that the word " or " connoted an extension of the responsibility of States as expressed in the first sentence — namely, the idea of responsibility applied to cases not provided for in the first sentence. But on re-reading the second sentence I noticed that it was not an extension; indeed the idea set out in the second sentence is already to be found in Basis No. 13.

This sentence seems to me quite unacceptable for an even more cogent reason. It gives the impression that responsibility will not be incurred if the State was unable to prevent the excess of authority by acting, etc. It would therefore be distinctly retrograde as compared with the text of Basis No. 13 in the form submitted by the Committee of Experts.

For all these reasons, I would beg the South African delegation not to maintain an amendment which seems to me dangerous from many points of view.

I must now say a word regarding the amendment of the Swiss delegation. The scruples expressed therein are shared by the Netherlands Government. If you re-read the Netherlands Government's remarks in the volume of observations of Governments you will see that the Netherlands Government says that a State should certainly not be held

responsible when an official has obviously exceeded his powers.

We did not, however, submit an amendment because both the Netherlands Government and the delegation thought it unnecessary. Indeed, there is nothing obscure about the case: when an official has exceeded his powers there is no international obligation and consequently the State is not responsible. There are many judgments in support of this opinion.

I will quote a few examples. In 1914 the Anglo-American Claims Committee, presided over by M. Fromageot, in the Cadenhead case, did not admit that the death of an Englishwoman accidentally killed in United States territory by a shot intended for an escaping prisoner could involve the responsibility of the American Government. Obviously, the police officer or soldier who fired the unfortunate shot aimed at the fugitive had no "authority" to kill the Englishwoman. I should add, for the sake of historical verity, that the American Government voluntarily granted compensation, but as an act of grace only.

There is also the Tunstall case. An American official killed an Englishman whose property he was supposed to seize — he was in fact a bailiff executing an order of the Court for the seizure of goods — but against whom he acted out of personal hatred. The State was not responsible for this murder, which was committed absolutely outside the scope of the official's authority.

I have given these examples to show that it is not necessary to insert an amendment on the lines proposed by the Swiss delegation. We may leave the basis as it stands. That will not cause any inconvenience in the future.

Does that mean that I have a reason for opposing the Swiss delegation? My Swiss colleague might indeed reply: "You may think it superfluous, but, after all, *superflua non nocent*". If so, I would reply to him: "I am unable to agree to your amendment." My French colleague, M. Matter, has already drawn attention to a point with which I will conclude my observations.

You say in this amendment: "If, however, the official is deemed to have acted outside the scope of his authority, the State will not incur responsibility if the official was obviously not authorised to perform the act or if the act committed by him had no connection with his office." Your criterion is too objective. We must take the subjective element into account. We must ask whether the foreigner who has been misled by the official could possibly have known that the official was acting in excess of his authority.

I will take an example. I do not know what, in a Swiss village for instance, is the degree of respect in which a police inspector is held. I can well believe that a police inspector would be very highly respected — indeed, more or less feared. He might commit an act regarding which we here would immediately say: "Whatever the law may be, this act can never be regarded as one coming within the competence of a police inspector."

But could the village population which has been brought up to respect the authorities draw such a distinction with regard to the acts of its police inspector?

In the way in which it has been submitted I cannot accept the Swiss amendment. I might not experience such difficulty if the Swiss delegation were prepared to modify its amendment as follows: "If, however, the official is deemed to have acted outside the scope of his authority, the State can not incur responsibility if the foreigner ought to have understood that the official's lack of authority was obvious or that the act accomplished by him was quite unconnected with his office".

I have only two more remarks to make. The first is that I am not referring to the last paragraph of the Swiss amendment, because it is connected with Basis No. 14, which is not now under discussion. The second is to note that although we are all lawyers, no one has yet spoken on the difficult question of *fault*. I shall not do so either. I think that previous speakers have avoided this point because, while avoiding it, we can still take a decision with regard to Basis No. 13. In this connection there is an important article written by that highly qualified jurist, Professor De Visscher, which will be found in Vol. II, pages 91 and 92, of the collection "Bibliotheca Visseriana". He also is of opinion that this question of fault is not conclusive. The eminent jurisconsult Strupp arrives at the same result in his work "Das Völkerrechtliche Delikt" (International Delicts), in which he rejects such theoretical constructions as the concept of *culpa in eligendo*, but, nevertheless, concludes in favour of responsibility, using the rather unusual word "*Erfolgshaftung*".

M. Nagaoka (Japan):

Translation: In order to remove M. Limburg's doubt as to the amendment I submitted, I propose to add thereto the word "apparently" so that it will read "apparently in virtue of their authority".

M. De Visscher (Belgium), Rapporteur:

Translation: I desire to speak in favour both of Basis No. 13 and of the two amendments thereto proposed by our Swiss colleague. I support the principle of responsibility embodied in Basis No. 13. As reference has been made to something I previously wrote, I shall explain as simply as possible the way in which I view this question.

We are not here concerned with a State's responsibility for the act of one of its organs. An official who exceeds his authority is not an organ of the State. There is here no question of fault on the part of the State; that is agreed.

Nevertheless, in the case before us, it is the duty of the State to make reparation for the damage caused by an official who exceeds his authority and who acts under cover of his official position. I think this idea should be

based chiefly on what I would call the need for making international relations secure. From the international standpoint, which we should adopt, we are not concerned with the division of powers, for, as was very rightly observed yesterday, that is a question of internal organisation. Our German colleague stressed that point. The State's duty to make reparation for damage thus caused is based on the official connection which continues to exist as between the official and the State who appointed him, notwithstanding the fact that the official has exceeded his authority. That, in my opinion, is the basis of responsibility.

Setting aside these theoretical considerations, over which we have spent rather too much time, I should like to deal with a question that is essentially practical in nature. Let us not forget that many acts entailing damage are performed by officials who exceed their authority, and that, if we were to limit the State's international responsibility to those acts which are performed by its officials within the limits of their authority, we should run the risk of not ensuring any adequate reparation in many cases where reparation is justly due. That would be a serious defect.

I would add that this proposal is in harmony with the present state of international law. It accurately reflects the decisions of the Courts, particularly those of mixed commissions and arbitral tribunals. So much for Basis No. 13.

I said that I supported also the two amendments submitted by M. Dinichert. They, too, are in harmony with the decisions of international Courts. M. Dinichert makes a reservation with regard to cases in which it is obvious that an official has exceeded his authority. I agree with this restriction, which I think is well founded.

The test proposed by M. Dinichert was said to be purely objective and M. Matter stated that a subjective element must be added. I think there has been some misunderstanding. When it is obvious that an official has exceeded his authority, there can hardly be any confusion.

In some cases, he may be fully aware that the official was exceeding his authority; therefore he must, *a fortiori*, suffer the consequences of his conduct if he seeks to take advantage of the situation and, perhaps, turn it to his own profit. I think the first restriction indicated by M. Dinichert provides a perfectly subjective test. There can be no confusion when an official obviously exceeds his authority.

In the second place, I agree that international responsibility does not arise when the act, considered in itself and objectively, is an act that has no connection with the activities of the State. Here the objective, intrinsic nature of the act is sufficient to separate the official's act from the activities of the State by which he is appointed.

Accordingly, I support the two amendments proposed by our Swiss colleague, and also the principle itself, which is included in Basis No. 13.

M. Sipsom (Roumania):

Translation: Our indecision — I might even say confusion — on the question whether an official who exceeds his authority can involve the international responsibility of the State is, I think, due to the fact that we have neglected the two fundamental points underlying this question.

In the first place, before there can be any international responsibility on the part of the State, the act must cause damage to a foreigner and must be the act of the State through the agency of its representative organs. In the second place, it must be contrary to the international obligations of the State, not merely any act which causes damage: it must therefore be an act contrary to a pre-existent international obligation. Those are our two starting-points.

What, then, happens when an official who exceeds his authority commits an act which causes damage? By definition, the official who exceeds his authority does not represent the State as far as that act is concerned. He does not perform that act as the delegate or representative of the State. As, therefore, he does not represent the State, he cannot involve its responsibility and therefore cannot make it responsible for the non-fulfilment of an international obligation which it was not his duty to discharge.

What is the position of the official who exceeds his authority with regard to such an act? He is simply a private individual. Is the State responsible towards other States for damage caused by a private individual? That is a question to be discussed, but we are not considering it now.

It is always the official acting within the limits of his authority who is entitled to act and whose act may involve the State's responsibility. To consider the act of the person who, by definition, is neither qualified nor authorised to represent the State, and to say that a State is responsible for an act committed by such an individual, is incomprehensible unless we are prepared to adopt a different point of view — namely, that supported by M. de Visscher or the Anglo-Saxon point of view put forward by Mr. Latifi.

From the standpoint we have adopted in this discussion, can an act entailing damage, not amounting to the non-fulfilment of a pre-existent international obligation, committed to the prejudice of a foreigner by a private individual who is also a State official, involve the responsibility of the State? Unhesitatingly, I say that, from the point of view we are considering, it cannot.

Let us first consider the Anglo-Saxon view as explained by Mr. Latifi. It is that the State is responsible for all persons in its territory. As M. Guerrero said, the State would be an enormous insurance company. Any act entailing damage committed by an official or a private individual, no matter whom, to the detriment of a foreigner would involve the State's responsibility in accordance with the theory of the risks that have to be borne. The State bears all risks; accordingly, these

risks must be spread over the whole community.

This view is still in course of development; it is only a tendency. It is not recognised law. It is a very wide view — too wide, I think. Where shall we stop if we go so far as to confuse the theory of responsibility with the theory of risk, and admit that the State must cover all risks arising on its territory through the action of its officials or of private individuals? Indeed, if we adopted this view, the State would be responsible for everything, even for bad hygienic conditions. Suppose a foreigner enters a country and falls ill from a contagious disease, he might make a claim against the State because it had not taken the necessary measures. In short, every annoyance from which a foreigner suffers would involve the responsibility of the State in whose territory he happens to be. That is a theory which goes much too far and with which I cannot agree.

Let us now consider M. de Visscher's view, which was supported by M. Dinichert in his amendment, and which the Netherlands and Japanese delegations also approved. In this connection, M. Matter said that, though this view was not recognised in French law, it might nevertheless be admitted in regard to foreigners, because a foreigner ought not to share in the risks that have to be borne by the nationals of the country. That is a view with which we cannot possibly agree.

In my opinion, when a person lives in a foreign country, he assumes the risks of the community to which he has chosen to belong. He cannot subsequently complain and say that he will not share the risks to which nationals of that country are exposed. If he did so, he might indeed be asked: "Why did you come here at all?" We cannot allow rights greater than those accorded to nationals of the country to be established in favour of foreigners.

On what are the amendments based? There are some which say that a State is not responsible for the acts of a person not authorised to perform them. I approve that view. The fact that an official is exceeding his authority may, however, be obscured. An official may pretend to be acting within the limits of his authority and may thus deceive a foreigner. There is a kind of fraud on his part. It is asserted that as a result of this deception, this error, the State's responsibility is involved, whether there is fraud or not.

I cannot see how such a view can be supported. If you recognise the principle that a State is not responsible for an act committed by a person who is not qualified to represent the State, I cannot see how you can hold a State responsible because such a person assumes a position that is not his and thereby deceives a foreigner.

The first example given by M. Limburg was that of an official's fault, the second was an isolated material fact. He spoke of the pleasure, I might even say the joy, of an official who killed a person after seizing his property. The other example was that of a foreigner killed by a shot intended for an escaping prisoner.

In these two cases we cannot assert that the international obligations of the State were infringed.

The Japanese amendment says that responsibility exists if the official ostensibly acts within the scope of his authority. What does that mean?

Even if we admit that view, how can responsibility attach to an unauthorised organ? Moreover, there can be no responsibility of the State on the grounds of common error.

Hence, leaving aside all the amendments which are intended merely to palliate the obvious solution, that is to say, non-responsibility — for responsibility can be incurred only through those who are authorised representatives — I feel bound to support the suggestion that Basis of Discussion No. 13 should be omitted. That would imply that the State is not responsible when an official exceeds his authority.

Mr. Beckett (Great Britain):

There seem to me to be two questions involved, and one of them comes essentially before the other.

The first and fundamental question is this: Do we require Basis No. 13 at all? Is it a fact that Basis No. 12 is enough? If we do require Basis No. 13, then there follows a whole series of smaller questions as to the exact way in which it should be drafted. On the big question whether we require Basis No. 13 at all, my delegation is of the opinion that we certainly do require such a basis. I shall not go into any theory on which such responsibility or otherwise is based; for me it is sufficient that we are here to codify the law, and I think the great weight of the arbitral decisions is clearly in favour of some principle on the lines of Basis No. 13, and that, for me, is enough.

I think it would assist us very much if we could first ascertain the opinion of the Committee as to whether we should have a Basis No. 13 or not; if the decision is in favour of having some such basis, some smaller Committee might be appointed to prepare a text.

So many small amendments with slight shades of difference have been suggested to Basis No. 13 that it would be somewhat difficult at the moment to vote for one or the other.

M. Giannini (Italy):

Translation: We must obtain a clear view of the usefulness of this discussion. That is why I agree with Mr. Beckett's proposal that we should ask the Committee to decide whether the principle of Basis No. 13 should be included. In other words, Mr. Beckett has repeated the proposal I put forward yesterday.

I have already said that my delegation is favourable to this proposal, and would add that it agrees with the amendments submitted by the Swiss delegation, subject to certain minor modifications resulting from our discussion. I would even say that we regard this principle, which has been very fully worked out in Italian doctrine and by M. Anzilotti — to whom M. de Visscher has paid tribute in his book — as a fundamental one.

I think that, if we agree to insert a principle similar to that contained in Basis No. 13, we should refer the matter for drafting to the Sub-Committee and not to a special committee, for I think we should avoid setting up too many sub-committees.

The Chairman :

Translation : I think it may be helpful if, confining myself to the essential points, I sum up the discussion. Basis No. 13 has given rise to a very large number of proposals. Some delegates would strike out the basis ; another — M. Guerrero — would turn it upside down ; and there is a whole series of amendments which admit the principle but introduce modifications of greater or less importance.

It has just been stated that, with a view to the progress of our work, the Committee should first decide whether the text we are framing should include any principle corresponding to that contained in Basis No. 13. I propose to put that question first to the vote. If you decide that no such provision is necessary, the matter will be settled ; otherwise, I shall ask you to vote again on the question whether the principle of Basis No. 13 should be admitted together with the amendments relating thereto, in particular, that submitted by the Swiss delegation, with which the amendments of the French and Netherlands delegations are closely connected.

If you adopt the principle of Basis No. 13, together with the amendments I have just mentioned, I shall ask you whether you agree to refer the whole of the basis and the amendments — including those of South Africa and India — to the Sub-Committee, which will frame a text that may very quickly be either accepted or rejected.

M. Suarez (Mexico) :

If we vote to send the basis to the Sub-Committee I would ask whether that Sub-Committee will take into account also the suggestion made by M. Guerrero to reverse the basis as originally proposed.

The Chairman :

Translation : M. Guerrero's proposal is in no way an amendment that can be referred to the Sub-Committee. Those who support that proposal have merely to vote against Basis No. 13. I think that is quite clear. The first vote will decide whether you desire to include either in one sense or in the other — positively or negatively — any provision covering the points dealt with in Basis No. 13. Those in favour of M. Guerrero's amendment are free to vote as they will.

M. Guerrero (Salvador) :

Translation : There is a proposal to omit the basis. I think that, according to the Rules of Procedure, that proposal should be put to the vote first.

The Chairman :

Translation : I am not yet asking you to vote on the basis itself. We shall first decide whether the Committee desires to insert any text covering the points dealt with in Basis No. 13. Afterwards, we shall vote on the proposal to omit the basis.

M. Guerrero (Salvador) :

Translation : My view of the Rules of Procedure is quite different. If there is a proposal to delete a clause, that is the proposal on which the vote must first be taken.

The Chairman :

Translation : Here is Rule 18 of the Rules of Procedure :

> " If an amendment striking out part of a proposal is moved, the Assembly shall first vote on whether the words in question shall stand part of the proposal. If the decision is in the negative, the amendment shall then be put to the vote. "

In my view an " amendment striking out " is an amendment which would strike out part of a provision.

If the whole provision is objected to, that is an opinion opposed to the provision. It is not an amendment.

M. Guerrero (Salvador) :

Translation : I have always understood that whenever there is a proposal to delete, that proposal is voted on first. This is the proposal farthest removed from the original text.

M. Giannini (Italy) :

Translation : You explained your proposal so gracefully that I venture to ask you to make a graceful gesture in regard to this vote.

M. Guerrero (Salvador) :

Translation : If it were merely a question of graceful gestures I should be quite prepared to do so. When, however, the Rules of Procedure are in question, I always support the Rules.

The Chairman :

Translation : I thought I was correct in interpreting the proposals made in the

following way. In order to keep the discussion clear, it was desirable to decide first whether we should retain a provision covering the question now under discussion. Afterwards, we should decide as to the sense of that provision. M. Guerrero urges that his proposal should be put to the vote first, and cites the Rules of Procedure, with which he is well acquainted, since they are the Rules of Procedure of the Assembly. I will adopt his suggestion.

M. Guerrero (Salvador) :

Translation : Mr. Chairman — There is some misunderstanding. I did not ask that my proposal should be put to the vote first. I asked that we should vote first on the proposal to strike out the basis. That is quite a different matter. Several delegates have asked that Basis No. 13 should be omitted. Thus, it is not my own cause I am pleading, but that of my colleagues who asked that the basis should be omitted.

The Chairman :

Translation : The deletion of this basis is proposed in a document submitted on behalf of the Mexican delegation. The Roumanian delegation supported this proposal orally, but did not submit a written amendment. I would ask the Mexican delegation whether I am to understand the document is submitted as a proposal to strike out Basis No. 13 and whether it desires that that proposal should be voted on immediately.

M. Suarez (Mexico) :

I moved the suppression of the Basis of Discussion now under consideration, because I think that we are considering international law, and therefore, if the basis is suppressed, it will be thought that it is not to be taken into consideration and does not make a rule of international law. If, however, we say this, the rules which we approved yesterday remain and stand in our code ; that would mean that an officer who acts without responsibility does not bind the State. Such is the meaning which I give to my proposal.

If that is the understanding of the whole Committee, I would ask the Chairman to put this proposal to the vote.

M. Sipsom (Roumania) :

Translation : The delegations of Austria and the United States of America also asked that this basis should be omitted.

The Chairman :

Translation : In point of fact, the Austrian delegation proposed an amendment. The deletion of the basis, however, is, in its view, merely the consequence of the amendment to Basis No. 12, and when Basis No. 12 was under discussion, that delegation agreed that the idea it expressed was connected with Basis No. 13.

It therefore proposes the amendment of the basis and not its deletion.

The United States, too, proposed an amendment to Basis No. 13.

I asked M. Suarez whether he desired that the proposal to strike out Basis No. 13 should be put to the vote. He explained how he regards Basis No. 12 but gave no clear answer to my question. I venture therefore to ask him again whether he desires that the proposal to strike out Basis No. 13 should be put to the vote.

M. Suarez (Mexico) :

As I have made a proposal, I should like to have the opinion of the Committee upon it.

The Chairman :

Translation : I put to the vote the proposal to strike out Basis No. 13.

The proposal to strike out Basis No. 13 was defeated by 19 votes to 13.

M. Buero (Uruguay) :

Translation : As I did not take part in the discussion, I should like it to be recorded in the Minutes that I voted for the deletion of this basis.

The Chairman :

Translation : In consequence of the vote just taken, the Committee must now decide for or against M. Guerrero's proposal, which is as follows :

> " A State is not responsible for damage suffered by a foreigner as the result of acts of its officials if they were not authorised to perform them, even if the officials purported to act within the scope of their authority."

That proposal is the clearest possible contradiction of Basis No. 13, and therefore I now put it to the vote.

M. Guerrero (Salvador) :

Translation : In view of the vote just taken, I withdraw my proposal.

The Chairman :

Translation : You have heard M. Guerrero's statement.

In accordance with the suggestion made just now, I now ask you to vote on Basis No. 13 as amended by the Swiss delegation. It is understood that, if you accept this basis thus amended, the various amendments relating to it and in conformity with its principle, will be considered by the Sub-Committee.

Basis of Discussion No. 13 as amended by the Swiss delegation was put to the vote and adopted by 20 votes to 6.

The Chairman :

Translation : This Basis of Discussion and the amendments relating thereto will therefore be referred to the Sub-Committee for consideration.

The Committee rose at 7.15 p.m.

NINTH MEETING

Wednesday, March 26th, 1930, at 4 p.m.

Chairman : M. BASDEVANT.

17. CONSIDERATION OF BASES OF DISCUSSION Nos. 5 AND 6.

The Chairman :

Translation : To-day we have to take up the consideration of Bases of Discussion Nos. 5 and 6. They are as follows :

BASIS OF DISCUSSION No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that :

1. He is refused access to the courts to defend his rights ;
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State ;
3. There has been unconscionable delay on the part of the courts ;
4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

BASIS OF DISCUSSION No. 6.

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.

If you refer to the observations contained in the Brown Book, (Document C.75.M.69.1929.V) you will notice that the Preparatory Committee, when it drew up Basis No. 6, intended particularly to provoke a discussion, as it noted that, on the points covered by this basis and on other points more or less related thereto, there were great divergences between the replies submitted by the various Governments. That is not surprising, since this problem of the State's responsibility arising out of acts of the judicial authorities is so complex.

I would remind you of the principles this Committee has adopted by decisions that were unanimous, save perhaps for a few abstentions which were rather in the nature of temporary reservations.

Those principles are that international responsibility presupposes three essential factors : first, damage ; second, an act or omission imputable to the State ; third, an act contrary to international law.

As regards the second factor, there is no difficulty : the Courts are obviously organs of the State.

As to the damage, when we consider the problem of the State's responsibility on account of the procedure, acts, decisions or possible negligence of its judicial authorities, it should be noted that damage may occur in two ways. Damage may be caused by a private individual to a foreigner. In that case naturally there is, in principle, no responsibility on the part of the State ; but it is the State's duty to ensure foreigners remedies such as may rightly be expected from it. If, by chance, the State has in any particular case failed to ensure such remedies, its responsibility is involved. That is clearly seen in the elementary case of a refusal to judge.

There is, however, another possibility. The damage may, if I may so put it, be caused directly by the Courts. Suppose, for instance, that either in a criminal or in a civil case, a judge, in giving a decision, exceeds his authority according to international law. That was the position in the *Costa Rica Packet* case. In those circumstances there is no denial of justice, but solely an infringement of international law which involves the State's responsibility.

The third factor, if there is to be any responsibility at international law, is the performance of an act which is unlawful according to that law. We must be quite clear on that point. Everybody agrees that an error on the part of a judge is not enough to involve a State's responsibility. That view is in harmony with practice and with the decision of international courts. International responsibility can arise only if in the operation of the Courts there is shown to be some failure to comply with the State's international obligations. Thus when, as the result of a claim, a case of this kind happens to come before an international judge, the latter — and this point must not be overlooked — is not at all in the same position as a judge of appeal. He does not consider the case from the same point of view. He has to consider one point only : was there, on the part of the national judge, any infringement of the State's international obligations ?

That is how the problem should be stated. It is more complex and more delicate than the problems we have hitherto considered. I shall not consider it more deeply. I wish merely to remind you of principles on which there can

be no hesitation. I think I have classified the questions rather than tried to solve them. I declare open the discussion of Bases Nos. 5 and 6.

Abd el Hamid Badaoui Pacha (Egypt):

Translation: The special position of the judicial power seems to have made it somewhat of a residuary power. When an act cannot be ascribed to any other organ, it is ascribed to the judicial power. I would, in particular, point out that, under the name of denial of justice or something more or less similar to denial of justice, there is a tendency to consider a judicial decision which correctly interprets a legislative provision that is itself incompatible with international obligations as an act imputable to the judicial power. In my view, the decision of the judicial power is merely the occasion which demonstrates the legislator's infringement of his international obligations.

Further, the fact that the judicial organisation does not offer sufficient guarantees has also been held to be imputable to the judicial power. Here again the failure is merely on the part of the legislator, whose duty and responsibility it is to enact laws laying down the principles of that organisation and providing for its mechanism.

I pass over other infringements, which are often wrongly imputed to the judicial power, and I come to paragraph (2) of Basis No. 5 by which the State is made responsible for a judicial decision which is final and without appeal and is incompatible with the treaty obligations or other obligations of the State.

This paragraph is, as it were, inserted between two forms of denial of justice. On the one hand there is the refusal to allow a foreigner access to the courts and, on the other hand, there is unconscionable delay on the part of the courts, which is assimilated to denial of justice. In their different forms these two cases represent the idea of denial of justice. They should therefore be connected with each other in order to bring out the fact that denial of justice is an infringement of an international obligation.

But is the judicial power under any international obligation whatever, apart from the obligation not to commit a denial of justice? In my opinion there is no other obligation. The obligation to ensure an effective administration of justice or the prohibition of a denial of justice is an obligation which is essentially international in character. It is the only obligation incumbent upon the judicial power. Whether denial of justice be understood in a narrow sense or in an extremely wide sense, it is in point of fact the only infringement that can be ascribed to the judicial power.

As to other obligations, let me take the typical example afforded by the question of the treatment of foreigners. In the subject with which we are concerned, this really constitutes the very basis of all international obligations incumbent upon the legislature, the judicial power and the executive power. This question of the treatment of foreigners was to have been the subject of a Convention at the Paris Conference, which, however, did not achieve its purpose.

But suppose the question had, in fact, been embodied in a Convention laying down the State's obligations in this respect. Suppose, further, that a final judicial decision, in a case in which a particualr foreigner was concerned, had involved an interpretation, of one of the provisions of that Convention. The State to which that foreigner belongs does not accept the interpretation which it thinks to be entirely wrong. If the basis be accepted as it stands, it would in such a case be possible to bring the question before an international court. But, if the judicial power has any well-recognised prerogative, it has surely the right to make a mistake.

This right to give a mistaken judgment is removed by paragraph (2), since that paragraph would make it possible for one of the States concerned to invoke the responsibility of the other on the ground of an interpretation which, though mistaken, was merely an interpretation or appreciation of facts. Yet the matter at stake would be solely a question of false interpretation or violation of interpretation and in no sense a question of denial of justice in the strict sense of the term.

The objection may be raised: "But will you leave international treaties and international conventions at the mercy of national courts, which may make as many mistakes as they like and may distort and misconstrue them?" I say: "No, I do not leave them in that position, but I do not make them a matter for judicial responsibility. I make them the cause of direct responsibility and of direct discussion between States."

According to the Statute of the Permanent Court, one of the matters that may be submitted to international arbitration is the interpretation of a treaty. If, on any particular point in an international convention prescribing the State's obligations, the judicial power gave an interpretation that other States did not accept, that very fact would be a reason for international proceedings. This would, however, be quite independent of the fact which gave rise to that final decision. The decision given by the international court will be law, but it will be so from the time at which it is given, and not retrospectively, with regard to the matter which led to the international proceedings.

If paragraph (2) of this basis is to be retained, I do not see any reason for speaking of denial of justice, since, in accordance with its international obligations, a State is necessarily bound never to deny justice to foreigners. If paragraph (2) is to be understood in its most general sense, I really wonder whether there is any need to mention the special case of denial of justice. Why should we waste time over the meaning and scope of denial of justice, since, even in its widest sense, it is always an infringement of an international obligation?

Thus, denial of justice could be the only reason for that indirect international responsibility which is designed to ensure compensation to a State for acts of the judicial power. A wrongful interpretation which violates an international obligation can never be the cause of international responsibility from the standpoint we are now considering; otherwise, we should definitely take away the judicial power's right to make a mistake, its right to deliver sovereign decisions on questions of interpretation.

All judicial decisions concerning foreigners would, if the States to which those foreigners belonged did not accept them, be liable to be taken before an international court. This view of the matter in no way deprives the State concerned of its means of rectifying the results of an erroneous judicial decision, because it might simply start proceedings with regard to any other obligation or the interpretation of any other provision of an international convention. As, in a disputed question, the attitude of both parties may be justified, it is from the time when the international court decides the law that the law is determined and is binding on the State. Once the point of law has been settled, there would clearly be a case of infringement of an international obligation if the courts continued in their error, or if the State did not take precautions to confirm the judicial interpretation by a legislative interpretation which its courts would be bound to apply. Such a legislative interpretation would be the surest means, if the State feared that its courts might persist in their error even after the international decision.

If ever national judicial decisions in the same sense were repeated after a contrary international decision, there would be an infringement of a well-defined international obligation. Thus, if the question be considered from this standpoint, we should avoid many causes of friction between States which would certainly disturb international relations and impede the proper application of any ultimate convention on the question of international responsibility.

The question of denial of justice itself will have to be considered during this discussion. It involves two ideas that are absolutely different. First there is the *formal* idea, the scope of which is limited to the simple fact of the refusal to give justice, or, in more precise terms, the refusal to allow access to the courts. If need be, we may add the somewhat similar idea of unconscionable delay. Secondly, there is the extremely wide *material* idea that there is a denial of justice whenever a decision is manifestly unjust. That is the theory adopted and supported by the United States of America. This Basis of Discussion seems to some extent to acquiesce in this view, for paragraph (4) speaks of a judicial decision prompted by ill-will towards foreigners as such, or as subjects of a particular State. Basis No. 6, too, applies this idea in very vague terms.

Personally, I should not think we were unreasonable if we decided to direct the progressive codification of international law towards making the formal idea of denial of justice wider and more elastic. Accordingly I should readily admit the case where a decision was manifestly prompted by ill-will towards foreigners. The very grounds of the decision would, I assume, clearly reveal that ill-will.

I should, however, hesitate to adopt Basis No. 6, as on the one hand that basis would make a State responsible, not on the ground of any act or decision by its judicial power, but on the ground of the judicial organisation itself, and that would be a repetition of Basis No. 2; while on the other hand I should hesitate because this basis might imply that, whenever any State considers that a decision affecting the interests of its nationals is incorrect, that the procedure followed has not been satisfactory, or that the decision shows a tendency to partiality (even though that tendency cannot be described as definite ill-will), the State may put forward a claim or may invoke the responsibility of the State whose courts have given the decision in question.

I think the course it is proposed to follow would be a very dangerous one. It is very difficult to trace any line of demarcation between errors or differences in appreciation and what is called a manifestly unjust judicial decision. In this connection we are concerned particularly with independent organs which receive no instructions or recommendations from any quarter, whose authority and prestige depend on the respect with which their verdicts are regarded and the finality of their decisions. Accordingly, I think it is very dangerous to open any way that might mean that decisions affecting the interests of foreigners would from time to time, and at the will of the States to which those foreigners belong, be submitted to an international judicial body, apart from those formal or material considerations such as a refusal of access to the courts or unconscionable delay (a question merely of computing time, which is a simple matter), or, finally, direct ill-will, revealed by the very grounds of the decision. Beyond those limits I see no safety. All decisions affecting foreign interests might, on the pretext of manifest injustice, be subjected to supervision or review.

The conciliation conventions and the particular arbitration conventions that were invoked when Bases Nos. 5 and 6 were drawn up are in no way contrary to the interpretation I have just given of infringements of international obligations in general.

In conclusion, I should like to ask the Committee to consider the following question. Many systems of law provide municipal remedies in the case of denial of justice. What will happen when there is in fact a denial of justice and when some State, acting on the

grounds of the damage suffered by its national, takes proceedings with a view to invoking international responsibility? Should a foreigner not be compelled to exhaust the municipal remedies for denial of justice, and should not the possibility of invoking international responsibility be strictly limited to the case in which the municipal remedy for denial of justice — in other words the proceedings themselves—has failed to give satisfaction? I assume, of course, that the claimant State will argue that the rejection of the appeal is itself a denial of justice and therefore confirms the former denial of justice which led to the appeal. In any case the remedy must be employed, but it need be employed only once, for there must be an end, sooner or later, and there can be no obligation to continue to employ remedies which have become useless or impossible.

I had one last observation to make concerning the judicial power. It relates to the Capitulations. As, however, this observation goes beyond the limits of the special case of the judicial power, and as it refers equally to the legislative and the executive powers, I shall deal with it in connection with Basis of Discussion No. 1 and shall explain my views on this matter when that basis comes under discussion.

Mr. Beckett (Great Britain):

In giving as shortly as I can our views on the questions raised by Bases Nos. 5 and 6, I should just like to refer to the substitute texts submitted by my delegation:

"Basis No. 5.

"A State is responsible for damage suffered by a foreigner as a result of a decision of its courts which, being final and without appeal, is incompatible with a treaty obligation or other rule of international law; provided that, in so far as questions of fact are concerned, the decisions of the court can only be questioned on the grounds set out in Basis No. 6.

"Basis No. 6.

"A State is responsible for damage suffered by a foreigner as the result of the fact that by reason of defects in its laws of procedure or in the action of its courts in applying them:

"1. He is not afforded in the courts a reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals.

"2. A procedure is followed, or a judgment final and without appeal is rendered, vitiated by faults so gross as to be incompatible with the obligation of the State to provide a reasonably efficient judiciary and the guarantees indispensable for the proper administration of justice.

"3. A decision is given which has manifestly been prompted by ill-will towards foreigners as such or as nationals of a particular State, or was due to corruption or pressure from the executive organs of the Government.

"4. There has been unconscionable delay on the part of the Courts."

These texts are not presented as a final draft but merely as a means of helping to make clear the views which I am about to express.

First of all, as I understand it, not only the ordinary courts in the strict sense of the word are covered by Bases Nos. 5 and 6, but also administrative tribunals and any persons who, under the various constitutional arrangements in a country, are entrusted with functions of a judicial nature.

In our proposal you will find a rearrangement of Bases Nos. 5 and 6 as presented by the Preparatory Committeee rather than any change. We have taken paragraph (2) of Basis No. 5 of the Preparatory Committee's text and placed it by itself as Basis No. 5, and all the rest we have included in Basis No. 6. We have done this because there seems to be a very essential distinction between the two classes of cases.

All the matters dealt with in Basis No. 6 — and I am referring now to the basis my delegation has proposed — deal with the responsibility of a State for a failure to fulfil the general fundamental obligation to provide means for the protection and enforcement of rights, to provide a law of procedure and tribunals which come up to that very general — indeed, not very exacting — international standard of justice and efficiency.

The term "denial of justice" is often used to cover the whole of that conception. Whether it is rightly so used, as a matter of terminology, I do not stop to consider. From the point of view of terminology, one may very easily criticise the use of the term in such a wide sense. Still, it is often used merely for convenience to cover all the cases included in this broad idea, that is to say, the cases where, in a given instance, the result shows that, either by the fault of the law of procedure, or it may be the fault of the judge — it may be one or the other — in that particular case the State has not come up to that minimum standard. Therefore, if we use for convenience the expression "denial of justice" in that very broad sense, my Basis No. 6 is an attempt to explain or amplify the cases covered by that conception.

Now I would like to turn to what is contained in Basis No. 5 of our draft.

It sometimes happens that a municipal court has to deal, even in a matter between private persons, with a question of public international law. It is not the usual case; speaking generally, it is comparatively rare,

but sometimes it does happen. It may happen, for instance, in at least three types of cases. The court may be in effect interpreting a treaty.

Let us take as an example, say, a copyright convention, where a State has undertaken to give certain protection to copyright under certain conditions in its country. Of course, such protection has to be exercised through the courts, and in a given case, the court gives an interpretation, either a direct interpretation of the treaty (or the legislation implementing the treaty — this point is immaterial) which is in conflict with the convention.

Another case is that in which some question of immunity from the jurisdiction arises. It may be diplomatic immunity; it may be immunity which one sovereign State always has from the jurisdiction of another; or it may be a case of excess of jurisdiction, the exercise of jurisdiction in a case where the State does not possess any. We all remember, for instance, the *Lotus* case. Actually, it was held that in that case there was jurisdiction. But supposing the decision on the question of law had been the other way: there would then have been responsibility for the exercise of jurisdiction by the courts in a case where the State had no jurisdiction.
Another case of this kind is that in which an act has been committed against a foreigner, by an official or an organ of the State, which is contrary to international law, and the foreigner is pursuing his municipal remedy, as he must, and the municipal remedy fails to give him any redress.

It seems to me that in these cases, where the municipal court is in effect deciding some question of public international law, the responsibility of the State is engaged if the decision is contrary to international law, and not, as in all the other cases, where there has been a denial of justice in the broad sense of the word. It seems to me that there is a clear distinction between all the other cases and the cases where the actual point, the issue which arises before the tribunal, is an issue turning directly on public international law. Where you have a question of public international law no State can set up its own opinion, or the opinion of its courts, as being final against anybody else. It is a question of international law, and therefore on such questions the decision of the international court must be the final one.

Now, in these cases, where a question of public international law is involved, it generally happens that it is only involved as one of the issues. First of all, there is the appreciation of the facts and, it may be, an appreciation of municipal law as well. Therefore, I maintain that, so far as the court is merely giving a decision appreciating the facts and coming to a decision on a question of fact, then of course you can only attack that decision on the very general grounds set out in Basis No. 6. It is only so far as the actual question of international law is concerned that the international court can virtually act as a court of appeal to the municipal court. The other qualification which is also important is that such a decision to create responsibility must be final and without further appeal being possible. All means of appeal must have been exhausted right up to the last court to which an appeal can be brought.

Now the cases in Basis No. 6 to my mind are absolutely and entirely different. Here you have the court applying its own municipal law, or fulfilling its ordinary duty of appreciating and coming to conclusions on questions of fact, or, it may be, applying private international law; it is all the same. In those cases there is certainly no international responsibility merely on the grounds that the court has come to a wrong conclusion, whether a wrong conclusion on a question of law or a wrong conclusion on a question of fact. No international tribunal can presume to say whether the final court of appeal in any country has or has not rightly interpreted its own law. Indeed, in a recent interesting case, that of the Serbian bonds, before the Permanent Court of International Justice, the Court said most clearly that it would not presume or attempt to do that. It did not consider that to be within its functions, because it thought it was its duty as an international court, to hold that to be the municipal law which the final court of the country in question had proclaimed. If the final court of a country declared the law of that country, then the international tribunal must accept that as the law.

In all the cases covered by Basis No. 6, the responsibility of the State is only engaged if there has been, in the broad sense of the term, a denial of justice. Responsibility only arises if it can be shown that the result of the proceedings is so clearly contrary to the elementary principles of justice that it constitutes an instance of the failure of the State to comply with the general fundamental obligation to provide a certain measure of justice and law within its territory.

It is a very difficult allegation to prove and one which cannot be lightly made. Still, there are cases where it happens. I will only give one instance which occurred a long while ago and which I recently read. A ship was coming into a port of a certain country and, when entering the harbour, it upset a little boat containing a couple of people rowing in the harbour. It was a pure accident and the navigating officer of the ship may or may not have been negligent, but that officer was arrested when he came on shore and prosecuted for murder; that is to say, he was prosecuted for the deliberate intention of killing two people in a boat which he never saw, never had seen and could have had no possible intention of harming at all. He was

tried and ultimately the supreme court quashed the charge, but on that disgraceful accusation he remained for many months in prison under trying conditions.

These are very exceptional instances, but I hold that the State is liable in such cases under the grounds set out in Basis No. 6. You may call it, if you like, denial of justice, or you may give it another name.

Taking the formulation of Basis No. 6 as we have put it here, I should like, if I may, just to say a word about it, emphasising all the time that I by no means attach any particular weight to the wording at all. We have put it in this way :

> " A State is responsible for damage suffered by a foreigner as the result of the fact that by reason of defects in its laws of procedure or in the action of its courts in applying them . . . "

It is necessary to make one point clear. It is not always the judge who is at fault, as Badaoui Pacha has said ; it may be the legislature in laying down a faulty procedure under which justice cannot be had. But, from the point of view of responsibility, ultimately it is immaterial which of the two is responsible. Now here is No. 1 :

> " He is not afforded in the courts a reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals. "

We deliberately say : " less adequate ", instead of " being the same " because there may be minor differences. The point is not that they should be exactly the same but that in their efficiency they should be not less adequate.

Then comes No. 2, which follows really the Preparatory Committee's draft :

> " A procedure is followed, or a judgment final and without appeal is rendered, vitiated by faults so gross as to be incompatible with the obligation of the State to provide a reasonably efficient judiciary and the guarantees indispensable for the proper administration of justice. "

And Nos. 3 and 4 are as follows :

> " A decision is given which has manifestly been prompted by ill-will towards foreigners as such or as nationals of a particular State, or was due to corruption or pressure from the executive organs of the Government.
>
> " There has been unconscionable delay on the part of the courts. "

Therefore, to conclude, there do appear to me to be these two entirely different classes of cases. Or course, you might include them all in one short sentence, if you like. You might include them all in a sentence saying that a procedure is followed or a decision is given which is contrary to the international obligations of the State. I fully realise that such a formula would cover everything, because even in the cases covered by Basis No. 6 the ground there is a failure to fulfil an international obligation — namely, the general international obligation to provide justice coming up to the general minimum standard.

M. Nagaoka (Japan) :

Translation : In principle, the Japanese delegation approves of Basis of Discussion No. 5. It has, however, proposed certain modifications, for the sole purpose of making the text clearer. I shall not take up the Committee's time by entering into any long explanation. With regard to paragraph (1) of this basis, however, I desire to make the following statement :

I understand that the provisions of this basis are not incompatible with the Imperial Procurator's right to decide, in accordance with paragraph 279 of the Japanese Code of Penal Procedure, not to sanction a prosecution. The paragraph in question says :

> " If, in view of the character, age and position of the accused person and also of the circumstances connected with the delict and circumstances arising after the delict, the Imperial Procurator considers that prosecution is not necessary, he may refuse to sanction such prosecution. "

Further, if a court rejects a request for a prosecution which is directly addressed to it by a foreigner (because, in Japan, a private individual is not entitled to prosecute), such action on the part of the court shall not be deemed to come within the terms of paragraph (1) of Basis of Discussion No. 5.

I request that this statement should be recorded *in extenso* in the Minutes.

M. d'Avila Lima (Portugal) :

Translation : The underlying principle of Basis No. 5, and particularly its earlier paragraphs, raises one of the clearest and, at the same time, most delicate problems concerning the judicial organisation both from an internal and external point of view.

On the one hand, judicial equality rather than juridical equality has been accepted by the international community. But, on the other hand, we must determine how far and on what grounds foreigners are entitled to protest against the municipal judicial organisation of any State. Notwithstanding the claims made by certain schools of political reformers,

who would abandon the old theory that the general structure of the State depends on the separation of the public powers, one postulate is still admitted — namely, that of the independence of the judicial power.

But (and here we begin to see the first compromise — quite a legitimate one — with the supreme requirements of the international community) the necessary conditions for the independence of any judicial system and the respect paid to such a system are directly dependent on the guarantees it furnishes for impartial, well-founded and just decisions. There must be equal justice for nationals and foreigners. There can be no doubt as to that principle, the means by which and the purposes for which it is applied. Hence, we may rightly and formally condemn any evasion and any form of denial of justice, for that would be a flagrant transgression of the most elementary demands of that legal heritage which, as it belongs to the family of nations, belongs also to any civilised society.

When may it be claimed that there has been denial of justice and when may a sovereign State be held responsible therefor? In our opinion, the first condition for any such claim must be the proof by the party concerned that he has appealed to all stages of the judicial organisation and that he has neither renounced nor overlooked any possibilities for securing redress. In the second place, we must distinguish between judicial decisions which merely disregard the elementary principles of justice and those which imply an infringement of international rules. It is only in this latter case that we hold that the State's responsibility clearly exists (Article 36 of the Statute of the Permanent Court).

It is more difficult to recognise and to lay down rules regarding cases of *error juris* and *mala fides*. All judicial systems in the world worthy of the name "progressive" provide remedies and means for claiming and proving that there have been formal errors.

Apart from quite exceptional cases — such, for instance, as proved ill-will towards foreigners and particularly towards the nationals of individual States — we think it dangerous and even wrong to adopt any clause which, in a general way, satisfies the claims mentioned above.

In conclusion, the State's responsibility for its judicial organisation is governed particularly by the following consideration: A State must be deemed to have fulfilled its duty when its courts offer all the necessary guarantees for impartiality and independence and when it grants to foreigners the right to take action and brings guilty parties before the judicial authorities.

M. Cavaglieri (Italy):

Translation: As the Italian delegation desires to expedite the Committee's work as much as possible, it will limit itself to some very simple statements which are prompted by its spirit of conciliation and which seem likely to secure the greatest measure of agreement concerning Bases of Discussion Nos. 5 and 6.

The Italian delegation definitely supports the fundamental principle underlying these two bases — namely, that a State is responsible for the acts of its judicial power. The bases we have already considered referred to acts of the legislative power and of the executive power.

We must now consider acts of the judicial power.

In this connection, we cannot accept the idea expressed by several authors that a State is not responsible for acts of the judicial power owing to the independence which is a feature of that power. The independence of the judicial power is a fundamental principle in municipal law and in constitutional law, but is irrelevant in international law. According to international law, the acts of a State's judicial power are on the same footing as those of its legislative power or those which are simply administrative acts. Consequently, they involve the State's responsibility when they are contrary to the international obligations undertaken by the State.

The difficulty is to determine the cases in which a State is responsible for wrongful acts of the judicial authorities.

Of all the amendments submitted, the Italian delegation prefers the proposal of the Austrian delegation both for its clearness and for its conciliatory spirit. We think that proposal gives the solution of the problem before us in its simplest and clearest terms. It distinguishes clearly between the two cases in which a State is responsible for the acts of its judicial power. It says:

> "A State is responsible for damage suffered by a foreigner as the result of the fact that:
>
> "1. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;
>
> "2. There has been a denial of justice."

In the first case, that is to say, a judicial decision which is final and without appeal and is incompatible with the State's international obligations, we think there can be no doubt. If a final decision is contrary to a State's international obligations, whether they result from a treaty, from a principle of customary law, or from any other source, the State is certainly responsible.

The State is not bound to ensure to foreigners that the terms of a judicial decision shall be applied. Its duty is merely to provide them

with regular and equitable judicial means of enforcing their rights.

The situation is different, however, in the exceptional case where the terms of a final judicial decision are contrary to the obligations of the State concerned.

We could without difficulty give a large number of examples of this principle which, in our view, admit of no doubt. Suppose, for instance, that a final judicial decision denied to an ambassador or foreign diplomatic official the privileges that are ensured to him by the best-known and most widely recognised principles of international law. That would be a case in which the State is responsible, since the final judicial decision would be incompatible with the State's international obligations.

Other cases might easily be imagined. Suppose, for instance, that a State has undertaken by treaty to ensure certain rights to foreigners and that those rights are denied by a final judicial decision. That final decision on the part of the judicial organs of the State would be contrary to the State's international obligations.

I will give one more example before passing to the next point. Suppose that a State has recognised another Government. That recognition implies certain consequences. Suppose, further, that a final judicial decision in that State is at variance with that recognition as regards one of its consequences — for instance, as regards the laws of the Government recognised.

Those are cases in which a final judicial decision is certainly incompatible with the State's international obligations. We do not think there can be any doubt on that point.

A much more difficult case is mentioned in point 2 of the Austrian amendment, which the Italian delegation supports. It is the case of denial of justice. The Austrian delegation stops there. Indeed, if we think of all the arguments and all the disputes that may arise with regard to the definition of denial of justice, we shall perhaps think it wiser to stop there.

Nevertheless, we consider that there are certain cases of denial of justice on which no doubt is possible. The first of these cases is that referred to in paragraph (1) of Basis No. 5 — the case in which a foreigner is refused access to the courts to defend his rights. We know how difficult it is to define a State's obligations towards foreigners, but if, amongst the few principles already recognised in this connection, there is one which seems absolutely certain and indisputable, it is, I think, the foreigner's right to judicial protection. Any State which denied that right would undoubtedly be infringing an obligation imposed by international law.

In a spirit of compromise, the Italian delegation would be prepared to abandon paragraphs (3) and (4) of Basis No. 5, which refer to "unconscionable delay on the part of the courts", and "the substance of a judicial decision manifestly prompted by ill-will toward foreigners as such or as subjects of a particular State". These two principles clearly contain much that is true, but we are bound to admit that they may lead to very divergent interpretations and to barely justifiable claims.

The Italian delegation could not, however, abandon the fundamental principle contained in Basis No. 6. We know how difficult it is to prove that the damage suffered by a foreigner is the result of the fact that the court has not offered all the guarantees indispensable for the proper administration of justice. We are almost bound to judge each case on its merits. Nevertheless, we think the principle is indisputable. If, through the composition of its courts or through its procedure, a State makes possible a decision which does not offer the minimum guarantees for the proper administration of justice which are inseparable from the idea of civilisation, we consider that it is guilty of a denial of justice and must be held responsible therefor.

In conclusion, the Italian delegation supports the fundamental idea that a State's responsibility may be involved by certain acts of its judicial power. It thinks that, when a final judicial decision is incompatible with a State's international obligations, the State is undoubtedly responsible. It thinks, further, that a State is responsible in the case of denial of justice, and that there is undoubtedly a denial of justice when a foreigner is refused access to the courts to defend his rights. It thinks, finally, that there is denial of justice when a court does not offer the guarantees for the proper administration of justice which are inseparable from the very idea of civilisation.

18. PROGRAMME OF WORK AND APPOINTMENT OF SUB-COMMITTEES.

The Chairman:

Translation: I would remind you that at a late hour yesterday we adopted Basis No. 13, but decided that the drafting of that basis, with special reference to the amendment proposed by the Swiss delegation, should be undertaken later and subsequently submitted to this Committee. I propose that the Drafting Committee, to which naturally it would be advisable to add M. Dinichert, should be asked to draw up a text corresponding to Basis No. 13. If there is no objection, I shall regard this proposal as adopted.

The proposal was adopted.

Order of Work.

The Chairman:

Translation: I should also like to ask you to settle a few points relating to the method of work. The Bureau has considered the suggestions submitted by various delegations concerning the order that should be followed in the consideration of the bases we still

have to discuss. Naturally, the Bureau cannot adopt every suggestion made, and it has tried to follow a middle course. After considering Bases Nos. 5 and 6 and, when the First Sub-Committee has completed its work, the texts that it is preparing, the Bureau proposes that the remaining bases should be considered in the following order :

Bases Nos. 1, 29 and 19, concerning compensation for damages ;
Basis No. 30, concerning jurisdiction ;
Basis No. 24, concerning exceptions on the ground of legitimate defence :
Bases Nos. 10, 17, 18, 20 and 15, concerning insufficient police protection and obstacles — amnesties for instance — in the way of reparation for damages.
Bases Nos. 16, 23, 14, 11, 25 and 26 ;
Finally, the remaining bases in their order.

I would point out that, according to this order, the bases concerning contracts, concessions, debts and damages resulting from disturbances or revolutions, would be considered at the very end of our work.

In order to expedite our work, the Bureau proposes that you should ask a sub-committee, which would become Sub-Committee No. 2, to consider Bases Nos. 10, 17, 18, 20 and 15, which relate to insufficient police protection and obstacles in the way of reparation for damages. This Sub-Committee would be asked to consider these bases, to put them in order, to study the amendments submitted, to make any necessary modifications therein, and to submit to this Committee draft articles on those points.

A third sub-committee would be asked to do the same work with regard to Bases Nos. 29 and 19, which relate to compensation for damages.

If there is no objection, I shall regard these proposals as adopted.

The proposals were adopted.

APPOINTMENT OF THE SECOND AND THIRD SUB-COMMITTEES.

The Chairman :

Translation : The Bureau proposes that the Second Sub-Committee, dealing with Bases Nos. 10, 17, 18, 20 and 15, should be constituted as follows :

M. LEITMAIER, Mr. LATIFI,
Mr. HACKWORTH, M. CASTBERG,
Mr. BECKETT, M. GIANNINI,
M. URRUTIA, M. SUAREZ,
M. ERICH, M. DINICHERT,

and M. DE VISSCHER (Rapporteur), who will act as Chairman of the Sub-Committee.

M. Urrutia (Colombia) :

Translation : I thank the Bureau for proposing me as a member of this Sub-Committee, but I must beg to be excused as, owing to the delay in the arrival of one of our delegates and the forthcoming departure of another delegate, who was a member of the Committee on Territorial Waters, I am compelled to follow the work of all three Committees. I therefore could not possibly act on this Sub-Committee, and I must ask you to accept my regrets and my apologies.

The Chairman :

Translation : The Committee will, I am sure, regret it even more than yourself.

Apart from M. Urrutia's withdrawal, may I regard the proposal as adopted?

The proposal was adopted.

The Third Sub-Committee, which will deal with Bases Nos. 29 and 19 concerning compensation for damages, will consist of the following :

Mr. LANSDOWN, M. DE ADLERCREUTZ,
M. BORCHARD, M. MATTER,
M. CRUSEN M. CALOYANNI,
BADAOUI PACHA, M. SIPSOM,
M. CAVAGLIERI,

and M. de VIANNA KELSCH, who will act as chairman of the Third Sub-Committee.

M. de Vianna Kelsch (Brazil) :

Translation : I should have great pleasure in being a member of this Sub-Committee, but I do not consider myself competent to act as its Chairman. Moreover, excess of work would prevent my acceptance of that honour, for which, however, I thank you.

Mr. Lansdown (Union of South Africa) :

I am very grateful for the honour you have done me in suggesting my name as a member of this Sub-Committee, but I am afraid I shall be unable to accept. I am the sole delegate of the Union of South Africa, and am obliged to attend two of the main Committees — I try to attend three — and in these circumstances I am afraid I could not do justice to the work. I beg, therefore, that you will excuse me.

The Chairman :

Translation : The Committee much appreciates your collaboration in its work and much regrets your withdraval.

Subject to the foregoing remarks, I propose that this Committee should leave it to the Sub-Committee to appoint its own Chairman and that Mr. McNeill (Canada) should replace Mr. Lansdown.

The proposal was adopted.

It is understood that any delegations which desire to submit observations connected with the work of either Sub-Committee may do so ether in writing or verbally.

TENTH MEETING

Thursday, March 27th, 1930, at 4 p.m.

Chairman : M. BASDEVANT.

19. INTERNATIONAL OBLIGATIONS : REPORT OF THE FIRST SUB-COMMITTEE. (Annex III, No .1, (b))

The Chairman :

Translation : Before resuming the discussion of Bases Nos. 5 and 6, I think I should inform you of the successful result of the work, or rather part of the work, of the First Sub-Committee. I will call upon the Rapporteur to acquaint you with the results of that Sub-Committee's work on the question of international obligations.

M. De Visscher (Belgium), Rapporteur :

Translation : I am glad to be able to give you the best possible news at the beginning of this meeting. Your Sub-Committee reached unanimous agreement as regards the text which it had to frame concerning the definition of international obligations.

As you know, we had been considering this question for some time. Unanimity has now been reached, and the Sub-Committee submits the following text :

> " The expression 'international obligations' in the present Convention means obligations resulting from treaty, custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations. "

I hope you will allow me to add a tribute to my colleagues, who showed the fullest spirit of conciliation on this question, and so enabled our task to be brought to a successful conclusion. You will also, I am sure, agree to thank M. Matter, who exerted himself unsparingly in order to reconcile the different points of view. This Committee is much indebted to him, and I should like this expression of our gratitude to be recorded during the present meeting.

The Chairman :

Translation : The text that has just been read will be circulated shortly. As it is not yet before you, I cannot put it to the vote but, if there is no objection, I intend to take a vote on it after the usual adjournment. We shall now resume the discussion of Bases Nos. 5 and 6.

20. CONSIDERATION OF BASES OF DISCUSSION Nos. 5 AND 6. (Continued.)

M. Leitmaier (Austria) :

Translation : I had, I confess, prepared a lengthy speech in support of the Austrian proposal ; but since the Italian delegate has been good enough to explain the meaning of that proposal and to give reasons for it much more clearly and much more eloquently than I myself could have done, I have only to thank him for the valuable support he has kindly given us.

M. Sipsom (Roumania) :

Translation : Can the judicial power, in the performance of its jurisdictional functions, involve the responsibility of the State through its decisions ? That is the question we have to consider with regard to Bases Nos. 5 and 6, which are now before us.

In principle, the judicial power cannot, through its acts, involve the responsibility of the State, for the judicial power is not an organ for the fulfilment of obligations. In its function, which is to enunciate the law, it does not represent the State. All that can happen is that this jurisdiction may decide wrongly : it may give what is called an erroneous judgment.

Can a State, on the ground of such an erroneous judgment, invoke another State's responsibility for the non-fulfilment of international obligations ? No. What can happen then ? Undoubtedly, when the judge's decision fails to recognise a law which has nevertheless been recognised by international undertakings, those obligations remain unfulfilled. The State is undoubtedly responsible for the non-fulfilment of an obligation, but not on the grounds of its judge's decision.

Consequently an erroneous decision is not of itself a cause of responsibility. Even if it is admitted, it is solely a municipal matter. It does not affect the rules of international law, as, in general, the courts are not asked to appreciate or deduce the rules of international law or the international obligations of States. The international relations between States do not theoretically come within the jurisdiction of municipal courts. There are, indeed, systems of law (our own, for instance) in which the judge is not asked to decide — is not allowed to decide, in fact — what is involved by the

execution of an interpretation of a treaty. This, as in French law, constitutes a governmental act, which the judge is not allowed to criticise.

Hence it is incorrect to say that the State can incur any responsibility through acts of the judicial power in its jurisdictional capacity. The State is sometimes responsible through the non-fulfilment of its international obligations, but not through the judge's decision.

The only remedy against an erroneous judgment is afforded by the higher courts of the State, and is therefore identical with the remedy granted to a national of the country. The courts cannot treat foreigners differently from nationals.

This principle is admitted in the Roumanian Constitution; that is why I refer to it. From the standpoint of jurisdiction and of civil rights, foreigners are granted the same rights, under the same conditions, as nationals, but no more. That is the limit beyond which we cannot go.

Accordingly, if a national has no remedy against a decision of the municipal courts other than that offered by the higher courts, we cannot conceive of any further remedy being granted to foreigners.

That is my view, and I think it represents the maximum concession we can or ought to make to the equivalence of rights as between foreigners and nationals.

Accordingly, we cannot understand how anyone can claim that the State may incur responsibility through its jurisdictional function.

I come now to the second point. The courts sometimes exercise the right to give orders. Some of their acts do not come within their jurisdictional capacity. Those acts may give rise to damage. Is there any responsibility ?

Suppose an examining magistrate or a public prosecutor takes certain measures against a foreigner. The courts act thus in pursuance of their right to give orders. If a foreigner suffers damage, can the State be held responsible ?

The question must be solved, I think, by applying the idea of correlation in the responsibility for the actions of the courts towards nationals and towards foreigners. If there is any municipal remedy against abuse or error, I agree that it should be granted equally to the foreigner, but I cannot agree that more should be granted to him than to the national.

The theory of risks may again be invoked, and it may be claimed that the State ought to insure the foreigner against all the risks he is likely to incur within its territory. Thus, any mistaken, irregular or wrongful act on the part of the courts would entail damage, for which reparation should be made.

I think this theory of risk goes somewhat too far. I can understand that a person who starts an enterprise should bear the risk. He undertakes certain things: he must bear the risks.

I can understand, too, that the person who profits by anything should bear the risk. An employer, the head of a great industry, employs many workers. He profits by their work; he ought therefore to bear the risks incurred by all his workers.

But, if we admit the kind of risk which is associated with an enterprise, which is inherent in the idea of profit, can we go farther and contemplate a risk that is imposed upon someone, that is to say, a risk without any corresponding profit ?

Why should the State be bound to assume this obligation to insure any foreigner who cares to come within its territory when the foreigner knows perfectly well the extent of the guarantees offered by that State ? Such a foreigner runs a risk; he derives advantage and profit. He ought to run the risk of being treated differently from the way in which he thinks he would be treated under a system of ideal justice.

There have already been many attempts to frame new theories of the judicial system, but they are not yet definitely accepted. An attempt has been made to construct a theory of insurance, of State responsibility based not on imputability but on risk. Such a view might, at most be approved at municipal law, but never at international law.

We must try to follow the evolutionary process and adapt ourselves to it. There are indeed, new theories to explain the ultimate nature of the State. They say it is a congeries of public services with an obligation to conduct the undertaking in a fitting manner. Accordingly, any public damage suffered by an individual should be made good by the whole of the taxpayers, that is to say, from the proceeds of taxation. The charges to be borne by the society are collected from members of the society. That could be understood as a division of public burdens between the individuals composing the same State, provided we accept this theory, which I think a bold one. But to extend this theory to foreigners, or rather to create it for their benefit, goes, I think, beyond the bounds of any possible legal theory. The reason for which such rights might be granted to the members of a community is that they share in all the burdens of that community. They pay taxes; it is their activity which constitutes the capital from which compensation may be paid to the person who has run a risk. But for a person to claim that he is insured whereas he makes no contribution seems to me inadmissible. Accordingly, I do not think we can consider this second principle, and consequently I do not see how the State can have any responsibility towards foreigners on account of the way in which the judicial power operates, provided that power shows no partiality as between nationals and foreigners.

I turn now to Basis No. 5, and I can readily support the Italian proposal to accept the following part of that basis:

> "A State is responsible for damage suffered by a foreigner as the result of the fact that

he is refused access to the courts to defend his rights. "

Such a refusal would undoubtedly be a denial of justice. The State's international responsibility may be involved through that fact, provided the same right is accorded to nationals. But if the right to bring a certain case before the courts is not granted to nationals, it would be unreasonable for a foreigner to claim that he has been the victim of a denial of justice through the application of the common rule.

The State is also responsible for damage suffered by a foreigner as the result of the fact that a judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State. I accept that principle, but not as the direct consequence of the decision given by the judicial power. I accept it on the ground that the State has not fulfilled its international obligation, but the non-fulfilment of the obligation cannot be attributed to the courts, for it is not the duty of the judiciary to define or fulfil the State's international obligations.

As to paragraphs (3) and (4) of Basis of Discussion No. 5, we think they should be omitted. Paragraph (3) refers to " unconscionable delay on the part of the courts ". That would lead us to enter upon investigations that we should not undertake. I might go so far as to admit that, if such delay were only a cloak for a denial of justice, if it were absolutely tantamount to a denial of justice — and that would be a very serious matter and would require to be clearly proved and never merely presumed — we might accept this principle ; nevertheless I should prefer this case to be omitted.

Finally, I think paragraph (4) is quite unacceptable, for it would have the effect of allowing an enquiry, not only as to the correctness or otherwise of any particular judicial decision, but also as to the good or bad faith of the judges.

I come now to Basis No. 6, and I regret that on this point I am unable to support the Italian delegation. That delegation accepts Basis No. 6 on certain conditions. In my view it is unacceptable in principle. It says :

> " A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice."

That is a very serious proposal, and I do not think any State could accept it. What do these conditions mean if not the right to examine the way in which justice is organised and administered in any particular State? And who is to examine, inspect and investigate? The other States. If the administration of justice is effectively organised in any country, or if, according to the euphemism employed by the British delegation, it is adequately organised, can other States be allowed the right to criticise and investigate? If so, where would the investigation stop? Would it be a formal investigation? Could it be said that justice was badly administered because there were three judges instead of five or on account of the particular method of appointing the judges? Would it be an investigation into a judge's capacity and honesty? How could we describe such a procedure? There is only one name for it ; let us say it — it is investigation into the organisation of the judicial system of a country, an investigation carried out by one or more other countries. But what countries can claim to be the sole depositories of a form of civilisation which entitles them to enquire whether justice is well or badly organised?

If we go as far as that, we shall scrap the principle of sovereignty in so far as it implies independence. You cannot claim to be independent if you are subject to investigation. I adopt the spirit of the League of Nations, the spirit that guides modern evolution, and I can understand the limitation of sovereignty; but I adhere to the formula which is generally accepted, the only one that can be accepted — namely, self-limitation of sovereignty. That is the only formula that any independent State can accept. But I cannot understand any self-limitation imposed by others. That goes beyond my comprehension, whether from the legal or from the moral standpoint.

Consequently, we cannot allow any indirect responsibility, any investigation which would be tantamount to a limitation of sovereignty. For that reason I do not think we can retain Basis No. 6, since, in my opinion, it is out of harmony with the general principles by which we are bound together.

I have just received the French delegation's proposal, which reads as follows :

> " A State is responsible for damage suffered by a foreigner as the result of the fact that :
>
> 1. He has wrongfully been refused access to the courts or there has been on the part of the courts wilful and unjustifiable delay such as to be equivalent to a denial of justice."

That is, in point of fact, a definition of a denial of justice. It implies a kind of investigation against which I protested but which, in these terms, might be accepted.

> " 2. A judicial decision which is final, every process of appeal having been exhausted, is incompatible with the international obligations of the State."

In reality, those obligations would not be fulfilled, since a judicial decision cannot constitute the fulfilment of an international obligation on the part of the State.

This proposal suggests that Basis of Discussion No. 6 should be omitted, and I agree with it.

M. Matter (France) :

Translation : I imagine that, when calmly studying this interesting brown volume con-

taining the Bases of Discussion, each of us must have felt a certain uneasiness and anxiety on reading Bases Nos. 5 and 6. There was a double thread of argument which it was very difficult to reconcile.

On the one hand, there were the arguments which were so forcibly submitted, both yesterday and to-day, by our Egyptian, Portuguese and Roumanian colleagues, to the effect that in this connection we have to consider the independence of the judiciary. No one who has the honour to sit here respects the judiciary more than I.

On the other hand, they showed that if a foreigner enters a country he is entitled to share in all its advantages, but he cannot have rights that are not enjoyed by nationals of the country. We could not fail, however, to be struck by the weighty arguments advanced by the British delegation and eloquently urged yesterday by Mr. Beckett. There is one international duty above all others — the duty to ensure in every country impartial justice, equal for all, for foreigners as for nationals. This difficulty is perhaps still further increased by the way in which the Bases of Discussion have been drafted. It was pointed out yesterday that they are merely Bases of Discussion, drafts which make possible the consideration of the question in substance.

The Bases of Discussion follow a plan quite different from that adopted as regards the other failures to comply with international obligations for which the State may be responsible. In the case of failures on the part of the legislature and the executive and on the part of officials *qua* officials, mention is made only of the State's international obligations in general. The same principle is laid down in paragraph (2) of Basis No. 5, but there is in addition a list of cases, and we have that most unsatisfactory system which consists of stating a general principle and then giving a number of examples without any indication as to whether the list is exhaustive or merely illustrative.

The difficulty is still further increased when, on considering all the amendments submitted, we observe that, though they all assert the same principle — namely, the necessity for the State to ensure a satisfactory administration of justice, each one gives examples. Why these particular examples and not others ? Who can say whether, after a few years, other examples not given in the list may not be added, and once more the great difficulty arises as to the nature of the examples ? Are they given simply as illustrations or are they exhaustive ?

I was very glad to read the amendments, and yesterday I was pleased to hear one of the speeches delivered in this Committee. I was delighted to find the formula, submitted by M. Leitmaier, which we shall shortly adopt, as it gives us entire satisfaction. There was no need for me to propose any amendment ; I had merely to make a slight correction which seems very much like an act of plagiarism.

I also had the pleasure yesterday of hearing my friend M. Cavaglieri make a speech which was admirable from every point of view. There was no need for me to make a speech.

Thus I had no text to frame, no speech to deliver. That is an ideal position for the head of a delegation.

Accordingly, I merely refer you to the explanations that have been given. As M. Cavaglieri rightly said, all the cases mentioned both in the brown book and in the various amendments — and also all those given by Mr. Beckett — are covered by the general formula submitted by M. Leitmaier.

So we have a solid basis, a basis for conciliation and compromise, and I was not at all surprised when my friend, M. Sipsom, accepted it. I was, indeed, particularly anxious that the French proposal should be handed to him before he concluded his speech.

Nevertheless, I have made slight textual changes for two reasons. First, I thought that the order of the cases mentioned by the Austrian delegate was perhaps not strictly logical. Before we can claim that the law has been broken, we must know whether the court is prepared to give a decision in the ordinary course of procedure. Denial of justice comes before the violation of the law, since the court can violate the law only by applying it.

What is meant by " denial of justice " ? At Paris I consulted a series of texts from different codes of civil procedure which all give a very precise definition of denial of justice. All these codes, both of criminal procedure and of civil procedure, the Italian, Roumanian and German Codes, agree that there is a denial of justice when judges refuse to reply to applications or neglect to decide cases awaiting judgment.

There is another meaning to the words " denial of justice ". It is the common meaning. After losing a case, on returning broken-hearted from the law courts, the first cry of the unfortunate applicant is : " It is a denial of justice ! " Often he means to accuse the judge of ill-will. Here we come within the terms of paragraph (4) of Basis No. 5.

Which of these two extremes shall we choose? Obviously the legal definition. But I think that in international law denial of justice has a wider meaning than in municipal law, although theorists do not absolutely agree on the definition of denial of justice.

A little precision is necessary. There must be a very clear definition. I have tried to give one in paragraph (1) of the proposal before you.

You may ask why I use the word " wrongfully ". I do so because a court may rightly refuse to hear a case. There may be good reason for its claim that it has no jurisdiction either *ratione loci* or *ratione personæ*. It would not be acting contrary to the law. It would merely be applying the municipal law.

As regards paragraph (3) of the Basis of Discussion, we have tried to make it a little

more definite by adding " or there has been on the part of the courts wilful and unjustifiable delay such as to be equivalent to a denial of justice ". I think that, *strictissimo sensu*, that is what denial of justice means in international law. Anything else that may be included in that definition and described as denial of justice will be found in paragraph (2) of the proposal before you.

Thus, this text covers all the cases mentioned, both in Bases of Discussion Nos. 5 and 6 and in Mr. Beckett's speech.

At the end of his illuminating remarks, Mr. Beckett said that it is the duty of every State to organise and administer justice satisfactorily, and any failures on the part of the State are covered by this formula. That is precisely what I have tried to say in rather general terms. This general formula covers all cases. You have, perhaps, noticed my great anxiety to find a solid basis for discussion, agreement and compromise. This formula, for which I give all the credit to M. Leitmaier and M. Cavaglieri (I would remind you of M. Cavaglieri's remarkable speech yesterday) seems to be acceptable by all. That is why I propose it.

As to the meaning of " international obligations ", if I had spoken a few hours ago, I should perhaps have said that this definition was still disputed but, after the statement made by our Rapporteur, M. de Visscher, you know that I can now refer to the Sub-Committee which you appointed. The legal basis of its text is undeniable, its legal consequences incontestable. I think everyone will be able to accept it. I attach no special importance to the wording of the French delegation's proposal which you have just received. I am prepared to accept any verbal modification, but I think the principle underlying this formula is one with which all those present must concur.

The meeting was adjourned at 5.30 p.m., and resumed at 6 p.m.

21. INTERNATIONAL OBLIGATIONS: REPORT OF THE FIRST SUB-COMMITTEE: ADJOURNMENT OF THE VOTE.

The Chairman :

Translation : I informed you that, on resuming the meeting, I should ask the Committee to vote on the text prepared by the First Sub-Committee concerning international obligations. I said, however, that this procedure would be adopted only if no delegation objected to an immediate vote. Such an objection has been raised by the Czechoslovak and other delegations. Consequently, the vote on the text proposed by the First Sub-Committee will be postponed until the beginning of to morrow's meeting.

22. CONSIDERATION OF BASES OF DISCUSSION Nos. 5 AND 6. (CONTINUED).

We will continue the discussion of Bases Nos. 5 and 6.

Before resuming this discussion, I would mention that eleven speakers have sent in their names. During the first part of this meeting we heard three of them, one of whom abandoned his right to speak. I point this out merely in order to invite speakers to confine their remarks to what is strictly necessary.

M. Ants Piip (Estonia) :

Mr. Chairman — The Estonian delegation desires to support the proposal made by the head of the French delegation, M. Matter, to combine Bases Nos. 5 and 6 in a single one as previously suggested by the Austrian and United States delegations.

The formula presented covers in a precise and clear form, if not all, the majority of the cases foreseen in Bases Nos. 5 and 6 as drafted by the Preparatory Committee, to which a reference was made by the British delegate, Mr. Beckett. Indeed, the first paragraph is self-explanatory and contains a rule recognised at present by every nation.

There seems to be no such general agreement regarding the second paragraph because, up to this time, as was said here yesterday, very many writers and States have considered that the international responsibility of the State for the damage done to foreigners does not arise at all if the foreigners have access to the properly constituted courts. A decision of the national jurisdiction releases the State of its further responsibility towards foreigners. Accordingly, the second paragraph of the French proposal constitutes a certain innovation in international law; it is, we may say, *lex ferenda*. But this innovation is not very far-reaching, because it does not question the decisive value of the judgments of the national supreme courts, which will *in se* remain final also in the future.

No attempt has been made to introduce an appeal from the decisions of the national supreme courts to an international court to control or revise the municipal jurisdiction. Such an attempt was made, as you all know, regarding the decisions of the national prize-courts in the very progressive Twelfth Convention of the Second Peace Conference in this City, in 1907, but that Convention remains unratified at present. The real innovation consists in fixing the State's responsibility for the acts of the judicial branch of the Government, which principle has been already accepted by the Committee for the acts of the legislative and executive branches of Government in order to guarantee a minimum international standard of rights in the modern world.

Furthermore, since, according to Article 4 of our Constitution the rules of international law, universally recognised, are in force in Estonia as integral parts of Estonian law, we are also in favour of the principle of the international responsibility of States for the final acts of the judicial power in the same way as such responsibility arises for the acts of the legislative or executive powers.

M. Sieczkowski (Poland) :

Translation : Gentlemen — I do not wish to enter into any details, as the Polish Government's reply to the questionnaire addressed to it clearly explains our point of view on the questions now under discussion.

I must admit that, when the Polish delegation framed its amendment, it was not aware of the French proposal, but it notes with pleasure that there is a certain similarity between the two.

There is, however, a difference between our proposal and that of the French delegation. This difference is the outcome of our view that responsibility in regard to the judicial power must be limited.

The State's responsibility for acts or omissions on the part of its legislative and executive powers cannot be assimilated to its responsibility on account of acts of the courts.

We must, in the first place, consider the independence of the courts. This is a general principle which must be admitted as a principle of international law. Responsibility in this connection must be limited.

That is the object of our amendment, which reads as follows :

> " A State is responsible for damage suffered by a foreigner as the result of the fact that :
>
> 1. The judicial authorities illegally resist the foreigner's exercising his rights (denial of justice). "

As you see, we also refer to denial of justice, but our formula follows the proposal made to the Pan-American Union by the American Institute of International Law.

The French proposal mentions access to the courts and wilful and unjustifiable delay. Our proposal states that, if the judicial authorities illegally resist a foreigner's exercising his rights, the State is responsible. Fundamentally, our proposal is entirely in agreement with that of the French delegation.

The Polish delegation proposes that paragraph 2 should read as follows :

> " 2. A judicial decision not subject to appeal constitutes an evident breach of a precisely determined obligation of international law."

We think this wording obviates certain disadvantages attaching to the Austrian proposal, which refers merely to a final decision. We must, however, consider the case in which a judicial decision becomes final without all remedies being exhausted. That is the case when a decision by a court of first instance becomes final, because no appeal has been lodged.

The French proposal would correct this inaccuracy by introducing the principle of the exhaustion of remedies, and in that respect it is similar to the Polish proposal which, however, suggests a greater limitation by stipulating that a judicial decision must have been given by the highest court. That is not the same thing. The wording of the Polish proposal emphasises this difference. It is a fundamental condition, and, if it is not fulfilled, any intervention would be out of place.

If we wish to emphasise the independence of the courts, we must admit the State's responsibility only in extraordinary cases ; for instance, when there is " an evident breach " of obligation. I have borrowed this argument from the Japanese delegation, which desired to insert the word " manifestly " in Basis of Discussion No. 5.

As regards the " breach of a precisely determined obligation of international law ", I have taken this argument from the observations submitted by Belgium (Document C.75.M.69.1929.V., page 43).

Basis of Discussion No. 6 has already been mentioned, and I think there is not much more to be said. I should, however, like to point out that this basis covers two cases : first, the non-existence of such courts as are essential to a satisfactory administration of justice ; secondly, the existence of such courts but with an unsatisfactory administration of justice.

If the organisation of the courts reveals certain defects and certain shortcomings, the fault cannot be laid to their charge, as such an organisation always depends upon a law. If a State has not organised its courts and has not passed a law providing for that organisation it is the legislative power which must be blamed, and which will involve the State's responsibility.

But if the courts are badly administered, that is another matter. If there are judges who are incapable of performing their duties, or who are guilty of corruption, they should be punished in some way, but then it was the duty of the executive power not to appoint such judges. We thus come back to the terms of our Basis No. 5. Basis No. 6 should be omitted, purely and simply.

M. Vidal (Spain) :

Translation : On this important question of a State's infringement of an international obligation through the act of its judicial organs, the Spanish delegation desires to express its

view in such a way that the meaning and purpose of its vote may be quite clear.

We think that a State is undoubtedly responsible in the case of a decision by its judicial power which is final and without appeal if that decision is contrary to an international obligation. We cannot borrow from municipal public law the argument as to the independence of the judicial power and apply it against this fundamental principle. That argument can be employed only to stop any intervention, by the State of which the injured person is a national, so long as the matter is pending before the courts of the State in the territory of which that person lives. But when those courts have given their decision and, contrary to pre-existing international obligations, have by that very decision caused damage to foreigners, the judicial organ — like the executive organ and the legislative organ — involves the responsibility of that State towards the other States concerned.

Having thus laid down the principle, we might sum up its consequences under the general heading " denial of justice ". But when is there a denial of justice? If these words had any clear and undisputed meaning, the question would not arise. Unfortunately that is not the case, and the more opinions we hear, the more points of view that are expressed, the more we realise the difficulty of reaching the agreement desired.

In these circumstances there are two possibilities. We might try to define " denial of justice " so as to leave no doubt as to its meaning, or we might evade the difficulty, without solving it, by stating the principle and leaving the courts in each particular case, taking into account the circumstances involved, to determine whether or not there was any denial of justice.

In my opinion the first course would be the better. It is also the more difficult to follow. In the present state of the problem I fear the result of our work must be almost negative. Accordingly, in view of the real difficulty of this question, the Spanish delegation, though regretting that it is not possible at present to adopt any definite formula expressing the idea in all its implications, supports those who favour a limited notion of denial of justice.

From this standpoint I must say that, if a foreigner is refused access to the courts to defend his rights, that case clearly comes within the strictest and most limited conception of denial of justice, and the State is responsible *ipso facto*. The same is true of a judicial decision which is incompatible with international obligations, but the position is different in the cases mentioned in paragraphs (3) and (4) of Basis No. 5. I admit that delay in the administration of justice on the part of the courts, if it really amounts to unconscionable delay, should involve the responsibility of the State. But that raises a question of fact which is extremely difficult to prove and the consequences of which in practice might be most regrettable.

If this formula cannot be made more precise, it would perhaps be better to agree to this slight sacrifice and omit this paragraph in the interest of the general principle. I find that the French delegation's proposal is somewhat more definite and marks such progress that we should most seriously consider accepting it. But in the case of a judicial decision which is manifestly prompted by ill-will towards foreigners — however difficult that ill-will may be to prove — I think we are bound to admit the possibility and to say that, if the fact is proved, the State is responsible. I regret that the French proposal omits that point.

We come now to the most delicate question, that of Basis No. 6. Here, as in many other cases, it is much easier to lay down the principle than to frame rules for its application. It is certain that, if the courts of any country do not offer the guarantees indispensable for the proper administration of justice, the State must be held responsible for the defects in its judicial organ. But on what grounds can we judge the guarantees in question? What, indeed, are the minimum guarantees which are indispensable for the proper administration of justice? Who shall decide that the judicial organ is not capable of discharging its duties ? This matter is particularly delicate because here we are not concerned with the actual judicial decision, but with the organ itself, the suitability of which is contested and its capacity called into question. The claimant State can hardly be qualified to settle the question on its own authority and, though there still remains the international jurisdiction which we accept in the last resort, yet the question raises great difficulties and the solution proposed has very serious implications.

Accordingly, the Spanish delegation thinks it would be better to omit this basis unless it can be made so clear as to lessen the possibility of more or less disguised abuses.

In a spirit of compromise and caution we desired the omission, if possible, of paragraph (3) of Basis No. 5. In the same spirit of caution — although I recognise the soundness of the principle — I specifically ask for the omission of Basis No. 6, in view of the numerous difficulties involved by its application. As drafted, this basis would lead to more serious consequences than paragraph (3) of Basis No. 5. The idea underlying Basis No. 6 is not included in the restricted notion of denial of justice, and it is that restricted notion alone which seems to have reached the stage at which codification becomes possible.

We might, if necessary, admit only the case of clearly proved prevarication on the part of the judge. But even in that case no further remedy against the decision must be possible under the municipal law. In its present form, in which a refusal on the part of the organ entrusted with the administration

of justice is envisaged, we think that the text of this basis is unacceptable and that its contents are dangerous for the sovereignty of States, and we ought to remember that that sovereignty also constitutes a fundamental principle of international law.

23. REFERENCE OF BASES OF DISCUSSION Nos. 5 AND 6 TO THE FIRST SUB-COMMITTEE.

The Chairman:

Translation: There are still eight names on my list of speakers, but M. Giannini wishes to submit a point of order. I must therefore ask him to speak first.

M. Giannini (Italy):

Translation: We have heard several speakers and we now have before us eight proposed amendments. The Committee cannot agree to the proposals of the British and Indian delegations. The Portuguese delegation has submitted a radical proposal to strike out these bases. The addition proposed by our distinguished Danish colleague is, I think, based on treaties of arbitration and conciliation. There is also a Japanese amendment.

Apart from these proposals, there are four amendments submitted respectively by the delegations of Austria, France, Poland and the United States of America. These are more or less on similar lines.

For the reasons of expediency advanced by our Spanish colleague, the Italian delegation supports the proposal to omit Basis No. 6.

Apart from the divergences between the other delegations, the discussion has brought out one principle on which I think we all agree. The only question left for consideration is that of form. We must have some basis or other and we must take account of the first paragraph of the Austrian proposal.

Further, it seems that a certain measure of agreement has been reached concerning "denial of justice".

There are still some differences as to the form to be given to the text. I have no wording to propose. The French proposal, after mentioning a final decision, says: "every process of appeal having been exhausted". But, if a decision is final, it is obvious that every process of appeal has been exhausted. Again, our Polish colleague employs the expression: "not subject to appeal". If I do not observe the time-limit laid down for appeal, I have not come before the final court; nevertheless, the decision is again final.

All these questions are very difficult to settle in full committee. As our points of view have been brought into line and as time presses, we might refer this problem to the First Sub-Committee, to which would be added those delegates who intimated their desire to speak on this question and whom we have not yet heard, together with any other delegates who still wish to submit observations.

That Sub-Committee will be able to agree on a formula that will satisfy everyone. When it submits a text for our consideration, we shall still be able to amend it, but we shall have a definite text for discussion., It is very difficult to say "I accept this or that formula", when there are several before us.

The agreement which apparently has been nearly achieved will easily be reached in the Sub-Committee, and we shall thus save time. The Sub-Committee might meet on Monday, and to-morrow afternoon we could continue our discussion of the other questions on the agenda.

M. Guerrero (Salvador):

Translation: I support M. Giannini's proposal. I think that, apart from questions of drafting, agreement has almost been reached in the interesting discussion that has taken place. The Sub-Committee, which will be asked to consider the various amendments, will probably be able to submit a text. We shall perhaps find it easier to consider and adopt that draft.

Mr. Hackworth (United States of America):

I desire on behalf of the delegation of the United States to give my wholehearted support to the suggestion of the Italian delegate. We might go on debating these bases indefinitely in full committee, but I think the Sub-Committee could handle the matter more expeditiously and probably more efficiently.

M. Urrutia (Colombia):

Translation: I was one of those who intended to take part in this discussion. I support M. Giannini's proposal; but I would ask the Chairman to allow me to circulate in writing the speech that I intended to deliver. I do not think he will raise any objection.

I am glad to see how the situation has improved during the discussion. We have received fresh proposals almost every minute, each one, I think, better than the last. I hope that other proposals to be submitted will make it possible for us to reach agreement.

M. Matter (France):

Translation: I support the proposal to refer this question to the Sub-Committee. I hope that, in view of the general tendency which has been revealed in this discussion, there will be no difficulty in framing a text.

The Chairman:

Translation: You have before you a proposal to refer to the First Sub-Committee the consideration of Bases Nos. 5 and 6, together with the amendments relating thereto. It is understood that speakers who have not been heard in the present discussion will be entitled to

submit their observations to the Sub-Committee. M. Cohn, who had not sent in his name, but who desires to make some observations regarding the addition proposed in his amendment, will also be able to address his remarks to the Sub-Committee.

A vote was taken on the proposal to refer the matter to the Sub-Committee.

The proposal was adopted.

M. Giannini (Italy) :

Translation : I think that some of the delegations which have submitted amendments are not represented on the First Sub-Committee. It might be desirable for them to send representatives. Is that agreed ?

The Chairman :

Translation : Agreed.

The Committee rose at 7 p.m.

ELEVENTH MEETING

Friday, March 28th, 1930, at 3 p.m.

Chairman : M. BASDEVANT.

24. CONSIDERATION OF BASIS OF DISCUSSION No. 1.

The Chairman :

Translation : To-day we shall start our consideration of Basis of Discussion No. 1, which reads as follows :

" A State cannot escape its responsibility under international law by invoking the provisions of its municipal law. "

Mr. Hackworth (Unites States of America) :

The delegation of the United States recommended in proposals submitted on March 17 (Annex II), that this basis should appear at the beginning of the draft immediately following a definition of " responsibility ", which we also suggested in the same document. The suggested formula for Basis No. 1, which we designated Basis No. 1 *(a)*, reads as follows :

" A State cannot justify its failure to comply with an international obligation or escape responsibility incurred under international law or treaty by invoking the provisions of its municipal law incompatible therewith. "

It is believed that this statement, which is an elaboration of Basis of Discussion No. 1, is preferable to that basis, because the latter, which is confined to responsibility under international law, is too narrow. A State may have obligations which do not arise under international law in the strict sense of that term, as, for example, obligations arising under treaty or convention which may not be declaratory of principles of international law. These obligations are, nevertheless, binding on the contracting State and, if violated by the State, create responsibility.

I recognise that the view is held in certain quarters that the term " international law " includes treaties. This view, however, is not universally accepted, and whether it may or may not be a sound view, there would appear to be no reason why treaties should not be specially mentioned in Basis No. 1, in order that there may be no doubt in any quarter that obligations arising under treaties are intended to be covered by the basis.

To the provision that the State cannot escape responsibility incurred under international law or treaty by invoking the provisions of its " municipal law " might be added " the decisions of its municipal courts ". By this addition, original paragraph 2 of Basis No. 5 becomes unnecessary. The exhaustion of the judicial remedy implied in paragraph 2 of Basis No. 5 is adequately covered by the local remedy rule, which is to be given a separate place in the Convention. It may be said that the term " municipal law " also includes decisions of municipal courts, but there may be an advantage in making this entirely clear.

M. d'Avila Lima (Portugal) :

Translation : The point which the Preparatory Committee in its wisdom offers for our consideration under Basis No. 1 raises an interesting question as to the " distinction between the responsibility of the State under municipal law and its responsibility under international law ", or rather as to the legitimacy of making that distinction.

We think, indeed, that once the distinction has been admitted, the second and final part of the postulate, which implies a possible conflict between the different provisions of the law (we think the word " droit " is preferable to the word " loi " in the French text) loses its force and is more or less inconsequent.

In our view, this question comprises a series of international problems which have to

a large extent been satisfactorily solved by the development of international law.

Apart from the judgment of history, so many pages of which clearly demonstrate this responsibility (which I shall call political responsibility) on the part of nations and their leaders, is there any international juridical order over and above the municipal juridical order proper to each State ?

Such an order obviously exists, unless we refuse to admit the evidence of social facts — in this case the community of nations itself. If we admit the existence of this super-aggregation, which is already many centuries old, we must also, as a deduction from the old aphorism *ubi societas, ibi jus*, admit that — as a fundamental condition of its existence — it is governed by a body of customary or conventional rules which constitute its particular juridical statute.

Against the recognition of this body of traditional and written rules we cannot nowadays adduce the argument that its provisions are inadequate, particularly as regards their binding force. The binding force of international law is fully recognised to-day, just as the theory that the State is not responsible, since all powers are vested in it, was long ago discarded, as we are opportunely reminded in the interesting reply of the French Government.

Once we admit the full force of international rules, we must deduce the conclusion of the syllogism — namely, responsibility, a responsibility *sui generis*, which follows the infringement of the said body of rules. How does each State, each member of the community of nations, contract this responsibility ? By its very entry into the *comitas gentium* which not only confers rights, but also implies duties. But, it may be asked, can a State, ought a State to be held responsible towards third parties to the same extent as towards its own nationals ? This aspect of the question is very closely related to a somewhat delicate political and legal problem — namely, that of the rights and limits attaching to the sovereignty of any State, considered, not in isolation, but as a fellow member of the family of Nations. We think that, at all events for the moment, that problem lies outside the limits of our discussion.

We may assert that, in its strictly legal aspect, the community of nations is governed by two classes of rules. The first are generic in nature ; we venture to say that, above all, they are essentially moral and humanitarian. As such, they are common to all bodies of law. The others are conventional in character and are sometimes merely regional. As regards the former, their unanimous acceptance by all States leads directly to the consequent responsibility. As to the others, we think the wisest commentary is that given in the Swiss Government's reply —namely :

"A State should not — as still quite frequently happens — ratify an international convention or accede thereto without possessing the means to ensure its effective application."

In conclusion, the State's international responsibility is an independent and well-founded legal consequence. As to the wording proposed by the Preparatory Committee, we desire to submit two remarks, or rather recommendations : (1) In the French text, the word "loi" which has a restricted technical meaning should be replaced by the word "droit" ; (2) Contrary to the authoritative opinion of the Preparatory Committee, the future convention should contain a brief reference to the distinction that is admitted between a State's municipal responsibility and its international responsibility.

M. Suarez (Mexico) :

I should like to ask the Committee to suppress Basis No. 1 as altogether unnecessary. What is the exact meaning of this basis ? It means that, if a State has adopted legislation which is incompatible with its international obligations, it cannot invoke the provisions of such legislation to evade responsibility. But, if a State has adopted such legislation, it would be responsible under Basis No. 2, and therefore it seems altogether unnecessary to repeat the same responsibility under Basis No. 1.

If we adopt, with a different wording, the same provision in Basis No. 2, there would be no reason to refuse the request of the American delegation to repeat Bases Nos. 5 and 6 in a negative form, and perhaps another delegation would ask that another provision should be added to the effect that the State cannot escape responsibility by invoking a decision of its executive power.

It is, of course, against good technique to repeat the same thing in different words in a code, and for this reason I would make an appeal to the juridical sense of the experts assembled here, in order that the same provision may not be so repeated.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : In an amendment which it has proposed to this basis, the Egyptian delegation has raised the question of the Capitulations. The amendment is as follows :

"Add to Basis of Discussion No. 1 the two following paragraphs :

"A State shall not, however, be held responsible under the preceding provision if its internal law includes special guarantees established by treaty or custom to the advantage of certain Powers with a view to ensuring adequate protection for the person and property of the nationals of these Powers.

"This shall also apply to the cases in which, even without any treaty, these guarantees are in actual practice extended to other Powers."

The Egyptian delegation does not ignore the political character of the question of the Capitulations. To arrive at any solution, actual negotiations are necessary. Accordingly I shall not plead this cause with the object of obtaining any definite decision by this Conference. The most the Egyptian delegation hopes for is to obtain from Conferences considering questions more or less directly related to the question of the Capitulations an opinion which would have a moral value and which would condemn the system of Capitulations as archaic and out of harmony with the conditions of modern life, and particularly with the institutions and general organisation of the Egyptian State.

I do not intend to stress this aspect of the question. If the Conference accepts the amendment we propose, we should be satisfied if the report contained a short statement to the effect that the system of Capitulations is out of date. The Egyptian delegation adopted the same attitude at the Conference on the Treatment of Foreigners.

I am concerned particularly with the standpoint of positive law. We are now considering means for ensuring to foreigners protection of their property and person in the territory of the State where they happen to be. In this connection the question arises whether a foreigner may have the same rights as a national. Sometimes, but not often, the foreigner has less rights than the national; but in no case can foreigners enjoy rights greater than those enjoyed by nationals.

The system of the Capitulations rests on another basis. It is not my duty to explain to members of this Committee the origin or evolution of that system. By conventions which were freely entered into, foreigners were given the rights we are now trying to ensure to them, but they were given these rights at municipal law. Usage has added to these rights and has often made them more burdensome. Social conditions are now, however, very different from what they were when those rights were granted. Legal conceptions have changed, too. Accordingly, the system has necessarily undergone profound changes. But even in its present form it is extremely burdensome, and constitutes a great limitation on the sovereignty of the State. There are constant interferences in all the State activities of the Government. It is true, however, that the organisation which has developed from this change now ensures to foreigners an indefinite amount of protection in respect of their person and property.

From the legislative point of view, apart from the different codes which were adopted in full agreement with the Capitulatory Powers, it was stipulated that additions to, and changes in, those codes must also be made with the approval of the Capitulatory Powers. At one time such additions and changes had to be made with the individual approval of each of the Capitulatory Powers. Hence there were delays and complications which, *inter alia*, were harmful to the interests of the foreigners themselves. For reasons of expediency, therefore, a local organisation was created — namely, the General Assembly of the Mixed Court, which, on behalf of the Powers, approves any amending provisions. After this Assembly's vote, the Capitulatory Powers may exercise the right of veto and, on the expiration of a certain period of time, the laws become final.

In this way the Capitulatory Powers are intimately connected with the enactment of those laws, for they cannot exist without the consent, or at all events the implied consent, of those Powers. At one time preambles to laws used to contain the words: "With the authorisation of the Powers". It is now sufficient to mention that the law has been approved by the Mixed Court and that the prescribed period of time has elapsed. A more or less similar system has been established for administrative and police regulations.

As regards taxation, the Egyptian Government has always maintained that foreigners enjoy no immunity; but the Mixed Courts, through their interpretation of the Capitulations, took the opposite view. The Egyptian Government's action has therefore been influenced by this situation. The Government thought that its standpoint would be compromised if it applied to the Powers in the hopes of obtaining satisfaction, which it was exceedingly unlikely to obtain. On the other hand, it considered that, if it taxed foreigners as it thought they should be taxed, it was more than probable that, through the attitude of the Mixed Courts, they would always be able to evade the Government's action. In order to avoid a set-back, therefore, the Government has thought it better to refrain from imposing taxation except in certain very special cases, or it has sought the approval of the Powers — not on the question of taxation but on questions related thereto.

As regards the action of the executive power, the regulations for the judicial organisation of the Mixed Courts state:

> "The Courts cannot give decisions affecting public property.
>
> "They cannot give decisions concerning sovereign acts or measures taken by the Government in execution of the laws or rules of public administration and in conformity therewith.
>
> "Nevertheless, although they cannot give a decision concerning an administrative act, or suspend the execution thereof, they shall be competent to give a decision concerning any infringement, through such an act, of the acquired rights of a foreigner as recognised by treaty or by law or by convention."

As you see, a foreigner who protests against any act is given an opportunity of remedy which is extremely wide and, indeed, greater than could be expected. Everything has been subject to this procedure, even sovereign acts and parliamentary resolutions concerning public debts.

A foreigner may always put forward a claim concerning any act of the executive even in its highest form — that is to say, with regard to decrees or Cabinet decisions. In these circumstances we may ask whether, when a foreigner has had recourse to a Mixed Court, there can be any possibility of invoking international responsibility. The Mixed Courts have been described as national courts, because they are set up within the country and because they owe their existence to a decree or law enacted by the Egyptian Government. In reality, however, they are courts of a very special kind. The Mixed Courts might, without exaggeration, be described as international courts on the same ground as any court of arbitration. In point of fact, courts of arbitration deal with specific questions, whereas the Mixed Courts deal with all disputes of a certain class. There is, of course, a difference as to the extent and variety of the matters that come within the jurisdiction of the Mixed Courts, but, from the standpoint of their organisation, they might even be said to give foreigners greater satisfaction than courts of arbitration.

These Mixed Courts are, in fact, so constituted that there is always a majority in the foreigner's favour. When there is only one judge, he is always a foreigner. When there are three, there are two foreigners; and when there are five, there are three foreigners. Although each Capitulatory State is actually represented by one counsellor or judge, all counsellors and judges are, in virtue of the general instructions they receive from their respective States, deemed to represent the foreign element in general as against the national element. Accordingly, unless a foreigner can claim that he is not validly represented by a foreigner of another nationality, we do not see how he can complain if his case is considered by a Mixed Court, for such a court is practically a national court of his own.

In these circumstances, if any law infringes the acquired rights of a foreigner or fails to protect his person and property, there can be no question of the international responsibility of the Egyptian State from the legislative point of view. The same is true with regard to administrative acts. They are all subject to consideration and indirect remedy, since reparation can always be obtained in respect of any damage caused to a foreigner. Accordingly, the question of international responsibility cannot arise with regard either to legislative acts or to executive acts.

Further, the question of denial of justice, even from the judicial standpoint, cannot arise. There might be reason to complain that the national judicial authorities of any particular State had been guilty of a denial of justice, but such a complaint could never be made with regard to an international court of arbitration. If such a court rejected an application or declared that it was not receivable, its decision would be regarded as final, and there could be no remedy against it.

Consequently, the amendment I have submitted is intended to state the view that whenever, by means of an organisation which is international in kind but which through the evolution of things is incorporated in the municipal law of a country, a foreigner has within that country all essential guarantees of justice — not only as to substance but also as to form, since any claim by a foreigner would necessarily take the form of an action in the courts — in respect of all kinds of acts by the executive power, the administrative power and so on, then the system of international responsibility cannot apply.

The two systems are really parallel. When States enter into relations one with another and live in a certain community based on the fundamental ideas of liberty and equality, abuses resulting from the use of that liberty or the application of the principle of that equality which is essential to the international community may naturally be redressed by an adequate system such as that of international responsibility. If, however, there is any preventive action — that is to say, if such abuses or errors never come into being — are killed on the spot, as it were — if abuses are always brought in some way before an international court, we cannot conceive of such a system overlapping that of responsibility. This is particularly the case when we secure the advantages of arbitration without that complex machinery which is very difficult to set in motion and which puts States in opposition one to another.

We might borrow certain English phrases and say that a system " after the fact " cannot be combined with a system " before the fact ". The Capitulatory system prevents international disputes. Accordingly, there is no need to combine it with a system for settling such disputes.

After these observations, I would ask the Committee to express its disapproval of the Capitulatory system as being out of harmony with the present state of affairs. I do not ask the Conference for any formal decision. Apart from this declaration, which is of a purely moral character, I submit my proposal as an amendment from the strictly legal point of view. It is positive and concrete in nature. Its object is to prevent the system of international responsibility from overlapping the Capitulatory system as applicable to foreigners under the Capitulations.

I make this reference to foreigners under the Capitulations because there are two classes of foreigners in Egypt — those who come under the Capitulations and those who do not. In the case of the latter, the Egyptian State discusses the question of responsibility on the same footing as all other States, because it is interested, as they are, in fixing and codifying the rules of international law on this subject. It will, I hope, accept the Committee's conclusions concerning the rules governing this

responsibility, and in the case of Egypt this responsibility will apply in respect of all classes of foreigners who do not benefit by the Capitulatory system. But whatever form these rules may assume, they cannot and ought not to apply to, or benefit, foreigners under the Capitulations.

The Chairman :

Translation : I must point out to Badaoui Pacha that this Committee is not qualified to pass any kind of moral judgment on the system of Capitulation. As to his amendment the Committee will consider and vote on it.

M. Novakovitch (Yugoslavia) :

Translation : If the object of Basis No. 1 was to express the same thing as Basis No. 2, that is to say, if it dealt with the State's responsibility for acts of the legislature, I should consider that the objections raised by the Mexican delegate were well founded. But I do not think that this is quite the object of Basis No. 1. We all know that the problem of the relationship between international law and municipal law has been very thoroughly dealt with in legal theory. I am inclined to think that Basis No. 1 is concerned with that problem and is meant to express the idea that the laws of a State must conform to the rules of international law which are incontestable and are admitted by all States. In that case Basis No. 1 would certainly be useful as a statement of principle, and we should have to consider the form in which that principle is to be asserted.

M. Sipsom (Roumania) :

Translation : I should be quite willing to support the Mexican delegate's argument if Basis No. 1 merely repeated the simple truth that international obligations are not governed by municipal law and that municipal law does not show the extent of an international obligation, or the consequent responsibility. That principle is so clear as to transcend discussion. If Basis No. 1 meant no more than that it would be useless.

I think, however, that this provision serves another purpose ; but it is badly expressed. It is not clear, and it might even be considered somewhat offensive, as it implies a desire to escape from an obligation by invoking municipal law contrary to international law. If that is the meaning of the text, it should be drafted differently. What is the case that is covered by this Basis of Discussion ? In my view, it is the following : First, a State has undertaken an undeniable international obligation. In the second place, this obligation is not contrary to the notion of the reserved domain of municipal sovereignty. Thirdly, the State has not incorporated this obligation in the provisions of its municipal law. Those are the three conditions governing the case. If, and only if, they are fulfilled, the State is undoubtedly responsible for failure to comply with its international obligations.

What is the meaning of the second condition which I have introduced into the analysis of the idea covered by this text ? It is that certain international obligations are undoutedly undertaken outside the municipal law. It is, however, quite possible that such international obligations may themselves recognise the existence of domains reserved for the municipal law.

What are they ? As an example, I refer you to Article 15, paragraph 8, of the Covenant of the League of Nations, which mentions the possibility of a domain reserved for the municipal sovereignty of States notwithstanding all international obligations. No one is allowed to make investigations in that domain. It is reserved for municipal law. Everything relating to the actual organisation of the State and the system of property-holding must be considered as within the domain reserved for municipal sovereignty.

That is what I meant when, in stating these conditions, I said that every international obligation which does not come within the province of municipal law must be considered from the point of view of its fulfilment or non-fulfilment, not in accordance with the rules of municipal law, but in accordance with the international obligation itself.

Consequently, I venture to submit the following wording : " A State's international responsibility is determined in accordance with its indisputable international obligations, which recognise the existence of a domain reserved for municipal sovereignty, and, subject to that reservation, it is not determined in accordance with the provisions of its municipal law ".

Such a statement would take account of that essential factor — namely, the domain reserved for municipal sovereignty.

Mr. Lansdown (Union of South Africa) :

My remarks will be very brief, because there is only one point which I have to submit for the consideration of the Committee. Touching the amendment which has just been suggested by the delegate for Roumania, I am rather afraid that it would unduly complicate the question and substitute something different from the basis as drafted by the Preparatory Committee. I agree with the view that the general statement of responsibility which we have in Basis No. 2 is not sufficient, but that we must have a short, simple statement of the principle of responsibility indicated in Basis No. 1, because I do not think you can escape from the fact that there is a temptation in many cases to resort to municipal law as an excuse for not carrying out international obligations. There is frequently the temptation to say : " We are very sorry, but our Constitution or national law prevents us from doing this. " We propose to lay down in this basis that such a defence shall not be sufficient.

The delegate for Portugal, showed us the foundation on which this matter rested.

The point I want to bring to the attention of the Committee, which I want the Committee to consider, is this : I want you to consider

the case in which a State does not excuse itself by referring to the provisions of its municipal law, but seeks to excuse itself by saying: "We have no law or we have no means." Do you see the difference? The State does not refer to provisions of its law, but to the case where it has no law or, if that law exists, no means of carrying it out — no executive machinery.

Take the case of extradition. A State may have entered into an extradition treaty and may be under an obligation to do certain things for the surrender of an offender. It comes forward and says: "We are very sorry, but we have not the police or judicial machinery." That is not a reference to the provisions of its law, it is an excuse on another ground, it seems to me.

Or, take the case of a copyright convention. A State has entered into a copyright convention, but fails to take any steps to create the necessary machinery. It merely says as an excuse: "We are very sorry, there is nothing in our law against the matter, but we simply have not got the executive or (it might say) the legislative machinery."

The point is whether there should not be something added to this basis in order to provide against such excuses.

Our Swiss friends in their reply to the questionnaire, with their usual foresight, did apprehend and touch upon this difficulty, and they rightly said that a State should not enter into an international convention unless it had, or intended to create, the necessary legislative and administrative means of carrying it out; but unfortunately you do find, and will find, instances of States entering into conventions without realising the absolute necessity for taking steps to create the necessary machinery.

It therefore seems to me that in this basis there should be some sort of addition to provide for that contingency. I have drafted a rough text, which will, of course, be examined by the Drafting Committee later. I would propose to add something on the following lines: "or the absence of legislative or administrative means to enable it to comply with its international obligations". These words would be added at the end of the basis as now printed. It seems to me that neither the basis as now printed, nor the amendment suggested by the delegate for the United States, meets the point I have raised.

M. De Visscher (Belgium), Rapporteur:

Translation: We can easily satisfy Mr. Lansdown. The first case covered by this Basis of Discussion is that in which the provisions of the municipal law are contrary to a State's international obligations. Basis of Discussion No. 1 says that a State cannot escape its responsibility under international law by invoking the provisions of its municipal law. That idea is very simple and can hardly give rise to controversy. Mr. Lansdown pointed out that there are cases in which a State may invoke the absence of legislation. Such cases might be covered by amending the text as follows:

> "A State cannot escape its responsibility under international law by invoking the provisions or deficiencies of its municipal law."

M. Urrutia (Colombia):

Translation: I support the view expressed by the Mexican delegation. This article seems to be quite unnecessary. We have already adopted a text which says that the State is responsible for the acts or omissions of its legislative power. Why, then, should we add that the State cannot escape its responsibility under international law by invoking the provisions of its municipal law, that is to say, the acts of its legislative power? Such a repetition is useless. It even, in my opinion, introduces into the Convention an article which gives an impression of mistrust through the use of the words: "cannot escape its responsibility".

Further, I think this basis is badly worded. We are all agreed on the principle, and we have expressed it in Basis No. 2; but Basis No. 1, as drafted, may lead to certain disputes, since it is concerned not with the actual principles of responsibility but with the procedure relating thereto. In its reply to the questionnaire the French Government said:

> "The decisions of the French courts concerning the responsibility of the State for damage caused to foreigners are based not on international, but on municipal law."

Cases may thus arise in which a State accepts responsibility, but makes a reservation as to the procedure for repairing the damage, and asks that account should be taken of its municipal law. Hence Basis No. 1 may be the cause of difficulty, and that is one of the reasons why I cannot accept this basis in its present form.

In conclusion, I would quote the Preparatory Committee's observations on the replies from the Governments:

> "The Government replies show unanimous acceptance of the idea that the responsibility of a State under international law for damage caused on its territory to the person or the property of foreigners is distinct from its responsibility under its own laws."

I would accept a basis worded as follows: "International responsibility is different from responsibility under municipal law". But I cannot accept the text submitted to us. Not only is it unnecessary and likely to lead to difficulties, but it is contrary to certain

articles in the Convention wherein we have recognised that, in certain cases, the municipal law may be invoked.

The Chairman :

Translation : As the discussion is now exhausted we shall proceed to vote. The Mexican delegation, seconded by the Colombian delegation, has submitted a proposal to omit this basis. I must put that to the vote first. Those who think that Basis No. 1, together with the amendments relating thereto, should be omitted purely and simply, are therefore asked to raise their hands.

The proposal to omit Basis No. 1 was rejected by 19 votes to 13.

We shall now proceed to consider the amendments, and shall start with that which seems furthest removed from the original proposal. It is the amendment proposed by the Roumanian delegation, and reads as follows:

> " A State's international responsibility is determined in accordance with its indisputable international obligations, which recognise the existence of a domain reserved for municipal sovereignty and, subject to this reservation, not in accordance with the provisions of its municipal law. "

M. Politis (Greece) :

Translation : I should like to explain briefly why I shall vote against this amendment, and I hope that, after hearing my statement the Roumanian delegate will be prepared to, withdraw it. My reason is that there can be no international responsibility when there is no infringement of an international obligation. Now, in the reserved domain, there can by definition be no international obligation. There is no need to say that international responsibility for failure to fulfil an international obligation applies to obligations which do not come within the reserved domain. When we speak of a reserved domain, we imply that there can be no international obligation. The Roumanian delegation's proposal is quite unnecessary ; the point it expresses is self-evident. That is the reason why I shall vote against this amendment if it is maintained.

M. Sipsom (Roumania) :

Translation : I fully agree with M. Politis's admirable observation. This idea does not, however, seem to be covered by Basis No. 1. Indeed it appears to be entirely overlooked. I shall be prepared to withdraw my amendment if the Committee decides to insert what M. Politis has said in the report.

The Chairman :

Translation : M. Politis's remarks will certainly be recorded in the Minutes. The question of inserting them in the report is more delicate. It is difficult to say here and now what will be included in the report submitted to the Conference on behalf of this Committee or to decide what explanations shall be given therein. No undertaking can be given on that point. I feel bound to make the point quite clear, so that the Roumanian delegate may decide whether to press his amendment.

M. Sipsom (Roumania) :

Translation : We need only ask the Committee to decide whether or not this should appear in the report.

The Chairman :

Translation : I think it is difficult to decide in advance what will appear in the report.

M. Politis (Greece) :

Translation : May I remind you briefly of the usual practice in such matters ? The discussion is free. The Minutes report it. The Rapporteur, when drawing up his report, considers, as he has understood it, the trend of the discussions as recorded in the Minutes. He submits his report to the Committee for its approval. If your delegation thinks any passage in the report inadequate, it will be entitled to propose an amendment. The Committee will then decide whether an additional passage should be inserted.

M. Sipsom (Roumania) :

Translation : According to M. Politis's explanation, I shall have the right to propose my amendment when the report is submitted. I therefore withdraw it. I may, however, ask that Basis of Discussion No. 1 should be differently worded and referred to a drafting committee, as it certainly does not express the exact meaning that was intended. It is not sufficiently clear. Several other delegations are of the same opinion.

The Chairman :

Translation : The Roumanian amendment has been withdrawn. Everything that we adopt will be referred to the Drafting Committee, whose duty it will be to express these provisions in their final form, subject, of course, to a further vote by this Committee.

We pass now to the consideration of the amendments in which the principle of Basis No. 1 is accepted. The amendment submitted by the United States delegation and that of the South African delegation refer to points of detail. They propose additions to the text on which I shall ask you to vote in succession.

The amendment proposed by the United States of America consists in adding after " under international law ", the words " or treaty ".

M. Cavaglieri (Italy) :

Translation : It might be possible to satisfy everyone if we used the phrase which has already been employed on several occasions — namely : " responsibility for the infringement of international obligations ".

M. Limburg (Netherlands) :

Translation : I would ask the American delegation to withdraw its amendment, for the following simple reason. We have before us — though we have not yet voted on it — a proposal concerning the sources of international obligations. The First Sub-Committee, of which Mr. Borchard is a member, accepted this proposal unanimously.

The wording of that proposal is contrary to that of the amendment submitted by the United States delegation.

The Sub-Committee, with which Mr. Borchard collaborated says :

> " The expression 'international obligations' in the present Convention means obligations resulting from treaty, custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations. "

If in Basis No. 1 we say : " A State cannot justify its failure to comply with an international obligation or escape responsibility incurred under international law or treaty. . .", we shall upset everything that the Sub-Committee accepted. The proposal has not yet been accepted by the full Committee, but I have no doubt that it will be so accepted. Accordingly, we ought not to upset what has been achieved at the cost of so much effort.

For those reasons I think it would be better if this amendment were withdrawn, or at all events set aside until we have voted on the proposal submitted by the Sub-Committee concerning the sources of international law.

M. Politis (Greece) :

Translation : I think I may claim to have found a very short wording which should satisfy all the points of view that have been expressed.

My friend M. Urrutia, in the first place, pointed out that the expression " a State cannot escape... " is somewhat offensive. As this text appears in the Chapter concerning the circumstances under which States can decline their responsibility, I propose that we should substitute the word " decline " for the word " escape ". That would meet the first objection.

I think we can also meet the wishes of the American delegation and avoid defining responsibility. It is defined in the preceding text. There is no need to say " responsibility incurred under international law ". We are speaking solely of international responsibility, and that responsibility has already been defined.

Finally, as regards the Portuguese delegation's proposal to substitute the word " droit " for the word " loi " in the French text and also, if I understand it aright, the proposal submitted by the South African delegate whereby we should contemplate the possibility of a State declining its responsibility by invoking not merely defective provisions but the absence of provisions, I think all these suggestions would be adequately met by the following wording :

> "A State cannot decline its responsibility by invoking the state of its municipal law."

"The state of its municipal law" covers what there is and what there is not in that law.

If these suggestions satisfy the various delegations concerned, I hope this text may be adopted without discussion.

Mr. Lansdown (Union of South Africa) :

I thank the delegate of Greece for his suggestion, but I am sorry to say that it does not quite meet my position, because I want the basis to cover not only the case of absence of legislative provisions, but also the case of absence of administrative or executive machinery, which is something quite distinct from legislative provisions. Might I suggest that we adopt the principle that there is a signal omission in this basis, which ought to be supplemented accordingly, and then refer the matter to the Drafting Committee to put the basis into final shape?

M. Politis (Greece) :

Translation : I do not know exactly how the phrase I suggested should be translated in English, but in French *" l'état du droit "* covers everything — legislative provisions and the absence of legislative provisions ; administrative provisions and the absence of administrative provisions ; provisions in the form of regulations and the absence of provisions in that form — in a word, everything that goes to make up the municipal law in all its various aspects.

M. Nagaoka (Japan) :

Translation : If we omit the words " under international law " I think the basis would be vague, and I therefore propose the words " resulting from international obligations " in place of " under international law ".

The Chairman :

Translation : I think the Japanese delegate's view would be comprehensible if the text stood alone, but as this text will be part of a whole which will show that we are concerned with responsibility under international law and responsibility for failures to comply with international obligations, I think M. Nagaoka will be satisfied, and I would ask him to hold over his amendment until we have a definite text before us.

Further, I entirely confirm what M. Politis said. The French text of the amendment fully meets the views of the South African delegate. If such a text is adopted, his remarks will have to be considered only in connection with the English wording.

Mr. Lansdown (Union of South Africa):

If that is so, then I am quite prepared to agree, and I thank the delegate for Greece for his suggestion; but I have in mind the case where a perfect law is entered on the Statute book — everything so far as the written law is concerned is beautiful — but no means exist for carrying out the law; there is nothing but a chapter or page of the Statute book, and no executive machinery at all. I do not want a State to be in a position to say, "We are very sorry; we have the law, the law is perfectly all right, but we have no means of carrying it out."

The Chairman:

Translation: We can now vote on the amendment to Basis No. 1 submitted by M. Politis. It reads as follows:

"A State cannot decline its responsibility by invoking the state of its municipal law."

The amendment was adopted.

The Chairman:

Translation: The provision we have adopted therefore becomes Basis No. 1, but we have not yet finished with that basis, for we now come to the amendment submitted by the Egyptian delegation.

M. Politis (Greece):

Translation: I cannot vote for this amendment. I fully sympathise with the wishes of the Egyptian delegate but, for the reasons explained by the Chairman, I think that this amendment goes beyond the limits of this Committee's work. We cannot take up a definite position on such a question. It will be sufficient if the Minutes record the discussion that has taken place. I would ask the Egyptian delegate not to press his amendment: if it is maintained, I shall vote against it.

Mr. Beckett (Great Britain):

I would rather hear first what the delegate of Egypt has to say in reply to what M. Politis has just said.

Abd el Hamid Badaoui Pacha (Egypt):

Translation: I do not wish to raise questions of a political nature, nor do I seek decisions of that nature. I desire merely to lay down a definite rule of law.

The Convention which will fix the rules of responsibility will determine the excuses or reasons that may be invoked in order to escape that responsibility. The object of Basis of Discussion No. 1 is to do away with any excuse founded on the state of municipal law. My view was that whilst admitting the rule in a general way, there might be an excuse in the fact that special guarantees are ensured for the benefit of foreigners in a particular State.

If such guarantees are provided and operate satisfactorily, they ought necessarily to exclude responsibility. The question whether the Capitulations do in fact constitute such special guarantees or not will still remain open. I mentioned the Capitulations as a specific illustration of this kind of excuse, and I pointed out that the Egyptian State might invoke them in application of this paragraph, with a view to excluding any idea of international responsibility. But I do not wish to raise the question of the Capitulations themselves directly. Nevertheless, this question formerly concerned several countries, though now, unfortunately, it concerns Egypt alone, which is practically the only country where the system of Capitulations is in force.

I do not ask the Committee to give a decision on that system, but I will point out that, if a system of special guarantees operates within a country, it must bar international responsibility. I should like that principle to be so expressed that it could be applied to the Capitulations.

The Chairman:

Translation: I should like to point out to Badaoui Pacha the very special nature of the question which he has raised, and which he explained so well that the Committee followed his argument with the keenest interest.

The following are the special features of the question. In the first place, he considers that, in the case of countries with Capitulations, there is, from our point of view, a special cause for the non-existence of responsibility. But we have not yet considered the causes for the non-existence of responsibility, except in connection with a negative provision. Accordingly, the proposal which our colleague would like to add to our agenda might perhaps be premature at present. To consider the cause of non-responsibility to which he refers, in connection with the special features of the municipal law of his own country, is, I think, going somewhat too far. The system of which he spoke was not set up by the municipal law of his country.

Moreover, I would emphasise the fact that he said that the situation to which he drew the Committee's attention was a special situation. That is true. But what are we doing here? We are engaged in codification. In that work we must seek fundamental provisions and essential principles. Only when we have solidly established the principles, shall we be able to discuss special situations, if we have time to do so. Without expressing any opinion as to the substance of the question, I would therefore ask whether an article such as is proposed would be appropriate in a work of codification, particularly at the present stage.

I hope and believe that our colleague will give a further proof of his valuable collaboration in the work of the Committee by withdrawing his amendment, or, if he thinks that is too much to ask, by postponing it so that the Committee may proceed with its agenda, which is still very heavy.

Abd el Hamid Badaoui Pacha (Egypt):

Translation: I do not ask the Conference to take any immediate decision. I was led to speak of the Capitulations in connection with Basis No. 1, because we are dealing here with special cases. This basis appears under the title: "Circumstances under which States can decline their responsibility".

The Chairman said that this is not a municipal law of the country. I regret to have to say that it is so in Egypt. Although the system of Capitulations is international in origin, it has been so grafted on to the municipal law as to have become an integral part of it.

We realise this clearly, since the question is continually arising in our daily life, in connection with all the State's activities and all its sovereign acts.

Hence I thought the question might best be raised in connection with this basis. Nevertheless, if certain delegates hesitate to give a decision on this subject, for fear of compromising the general question of the Capitulations, or of committing themselves in regard to that question, I should be quite prepared to postpone the matter until a more appropriate time. I shall then explain the purely legal scope of my amendment. If the Chairman and the Committee agree, we might postpone the question until our work is drawing to a close.

I have as yet heard no opposition to the proposal. Even M. Politis, who said that he would vote against the amendment, gave no opinion as to its subtance; nor did the Chairman. Accordingly, I agree that my proposal should be held over until a more appropriate time.

The Chairman:

Translation: I thank Badaoui Pacha for not pressing for the immediate discussion of his amendment.

The Committee rose at 5.40 p.m.

TWELFTH MEETING

Tuesday, April 1st, 1930, at 3 p.m.

Chairman: M. DIAZ DE VILLAR.

M. Diaz de Villar, Vice-Chairman:

Translation: Gentlemen — As the Chairman of this Committee is absent, the heavy duty of presiding over to-day's meeting falls on me. I shall be glad to count on your support and assistance, as I feel that my incompetence is equalled only by my impartiality.

25. BASES OF DISCUSSION Nos. 19 AND 29: REPORT OF THE THIRD SUB-COMMITTEE.

Mr. Borchard (United States of America):

I have to report that the Third Sub-Committee has unanimously agreed on the suppression of Basis No. 19. You have before you the printed report of the Sub-Committee (Annex III, No. 2), and therefore I shall not take up your time by reading it. The reasons for the suppression of Basis No. 19 were various — six or seven in number — but the death sentence was unanimous.

With regard to Basis No. 29, the Sub-Committee agreed to strike out everything after the first sentence, which provides that responsibility implies an obligation to repair the damage suffered.

The penultimate paragraph of this basis (see Annex I) provides that "a State which is responsible for the action of other States is bound to see that they execute the measures which responsibility entails . . .". It was thought by some members of our Sub-Committee that that paragraph might be considered in connection with Basis No. 23, which deals with responsibility for the acts of other States with which there is some political connection. The last paragraph, which says "in principle any indemnity to be accorded is to be put at the disposal of the injured State" was deemed to be inherent in international responsibility. The very word "international" indicates that the responsibility is from one State to another State.

The second sentence of the first paragraph, dealing with reparation in the form of an apology, was believed unanimously by the Sub-Committee to involve political questions which might better be omitted from the draft. The last clause of the first paragraph, which provides that the State must in proper cases punish the guilty persons, is covered by Basis No. 18, which places on the State the duty of punishing offenders, failure to do which would entail international responsibility.

It was thought that the question dealt with in the next paragraph, which provides that repara-

tion may include indemnity to injured persons in respect of moral suffering, was better left to jurisprudence to work out ; this is a matter for the courts to determine, and it was considered advisable not to refer so summarily to the extent of damages without going very much farther. It was therefore thought better to say nothing about the extent of damages.

The same criticism was directed against the next paragraph, which deals with the measures to be taken after the act causing the damage, which brought up a very doubtful question in international law — whether, when the State fails to prosecute a guilty person, it has thereby increased the damage to the injured person. As you know, there is a great difference in the theory and in the practice of that question, and it was thought better not to deal with the matter.

It had previously been agreed or considered by the First Sub-Committee that the local remedy rule might follow Basis No. 29. If the recommendation of the Third Sub-Committee is accepted, all that is left of Basis No. 29 is the very first sentence, subject to redrafting — namely :

> " Responsibility involves for the State concerned an obligation to place at the disposal of the injured State reparation for the damage suffered in so far as it results from failure to comply with the international obligation. "

Then would come the local remedy rule, but that is subject to the denial of justice clause which, I presume, has not yet been agreed on, because there has been no agreement with regard to denial of justice.

That, in general, is the report of the Third Sub-Committee, the conclusion being that Basis No. 19 should be suppressed completely, and that Basis No. 29 should be suppressed except for the first sentence, but that the first sentence should remain as an essential incident of international responsibility.

I presume the Chairman will determine how this report shall be voted on — whether we shall take Basis No. 19 first and then Basis No. 29, and whether the first sentence of Basis No. 29 should be referred to the Drafting Committee.

The Chairman :

Translation : I put to the vote the Third Sub-Committee's proposal to omit Basis of Discussion No. 19.

The Committee unanimously decided to omit Basis No. 19.

The Chairman :

Translation : We shall now consider the Sub-Committee's proposals concerning Basis No. 29.

M. De Visscher (Belgium), Rapporteur :

Translation : We now come to Basis No. 29. Only the first paragraph is under discussion at present. The second paragraph proposed by the Sub-Committee will be held over until later. That second paragraph refers to exhaustion of remedies, and is connected with Bases Nos. 5 and 6, on which we shall also have to vote later on.

At present, therefore, the Committee has to consider only the first paragraph submitted by the Sub-Committee, together with the amendment proposed by M. Politis.

The Chairman :

Translation : According to the amendment submitted by the Greek delegation, paragraph 1 of Basis No. 29 would be drafted as follows :

> " Responsibility involves for the State concerned the obligation to make good the damage suffered to the precise extent to which that damage is attributable to the incidents giving rise to the right to reparation. "

Mr. Borchard (United States of America) :

I would respectfully suggest that this be not accepted, for this reason : It brings up the complicated question which is involved in the second paragraph of Basis No. 29, which the Sub-Committee desires to strike out ; it deals with the problem of damages, and brings up the question whether, if a State has failed to prosecute a guilty offender, it has thereby done any damage to the person injured by the offender.

The answer of one school of thought is that failure to prosecute has caused no injury to the injured person. Therefore, it would be urged, no damages can be assessed for failure to punish because the failure to punish has not added to the injury of the originally injured person. That is a question which has been decided the other way by jurisprudence, and I do not think we should foreclose the development of jurisprudence by accepting this provision, which the Third Sub-Committee recommended should be rejected, as it really is already in Basis No. 29.

I would suggest, if I may, that this whole question of the drafting of the first sentence of Basis No. 29 be referred to the Drafting Committee, but that this particular amendment be not accepted.

M. Cohn (Denmark) :

Translation : I venture to remind the Committee of the Danish amendment to Basis No. 29. The first sentence of this basis says : " Responsibility involves for the State concerned an obligation to make good the damage suffered . . . " If a fairly long interval has elapsed between the time when the responsibility was incurred and the time when the claim was submitted, may the injured person claim interest for the whole of that period ?

The Danish delegation considers that interest should not be claimed for that period, and accordingly proposes the addition of the following sentence to Basis No. 29 :

"Interest may be claimed only for the period beginning at the time when the claim is lodged."

I propose that this amendment should be referred to the Drafting Committee.

Mr. Beckett (Great Britain):

I take it that the Sub-Committee was of the general opinion that it was inadvisable to enter into details with regard to the question of damages, and I do not at this stage of the Conference want in any way to urge any other course in this matter, because I do not think we have now the time before us to discuss the problem.

It so happens that the point which M. Cohn has just mentioned was one of the many which we dealt with in a very long amendment proposed to Basis No. 29 (Annex II). As regards the substance of what he says, therefore, obviously I am in agreement with it. Whether, if we are not going to deal with the matter thoroughly, it is better just to include that particular point alone I am really not quite sure, but, as regards the substance of what he says, I am in entire agreement with the principle that the interest should only run from that date. I am not quite sure, however, of the wisdom of inserting one small provision of a fairly detailed character when it has been decided generally not to deal in detail with the question of the measure and the manner in which damages should be calculated at all.

I support the suggestion of the delegate of the United States that the final drafting of this first sentence should be further considered by the Drafting Committee, and, if that proposal is accepted, I should like to make one suggestion with regard to the wording, which is taken word for word from a judgment of the Permanent Court of International Justice. Instead of saying "the injured State" I would say: "the State which is injured in the person of its national". That was the way the Permanent Court of International Justice put it in one of the actions with regard to the Chorzów factory.

M. Politis (Greece):

Translation: I should like to explain briefly why I have submitted to the Committee a new wording for Basis of Discussion No. 29. I propose to modify the first paragraph of the text submitted by the Sub-Committee. The original text is as follows:

> "Responsibility involves for the State concerned an obligation to place at the disposal of the injured State reparation for the damage suffered in so far as it results from failure to comply with the international obligation."

I would, in the first place, ask what is the reason for saying that reparation shall be placed at the disposal of the injured State. That is tantamount to deciding a question which is at present very much disputed. Personally, I should have little objection to that procedure if it were not dangerous at the present stage in the evolution of international law. I am one of those who think that it would be a mark of progress in the realm of international relations if the Chancelleries could be freed of certain private claims made upon Governments by private individuals.

Experience shows that a private individual whose rights have been infringed through the act of a Government frequently fails to obtain justice because political considerations prevent his Government from intervening in order to protect him, take up his claim and bring it before a court to which hitherto only States have had access.

I do not flatter myself that so radical a reform will be accepted at present. Moreover, I recognise that this question is a delicate one to study and that certain precautions must be taken before private individuals can be given the right to appeal to international courts. Nevertheless, I should think it regrettable if, in a text framed by this Conference in 1930, we confirmed the rule that only the State to which the injured person belongs may intervene, either to plead in the courts or to receive any compensation that may be granted.

Accordingly I would urge that the question should not be settled. I think it would be better not to say who is to receive the compensation. In that way the question would remain open. The law would be allowed to develop freely in the course of its evolution. We should put no obstacle in the way of such development.

Therefore I propose, in the first place, the omission of the expression "place at the disposal of the injured State". My wording is as follows: "Responsibility involves for the State concerned the obligation to make good the damage suffered . . ." This means that the State alone can act, and that any compensation will be paid to the State, which will hand it to its national in conformity with the rules of its municipal law. With the same wording it is possible, however, that a few years hence, if ideas evolve as I anticipate, this text would not prevent private individuals from appealing to international courts and receiving directly what is due to them. That is my first observation.

According to the text submitted by the Sub-Committee, responsibility involves the obligation to provide compensation for damage in so far as it results from failure to comply with an international obligation. Personally I think that wording is unsatisfactory.

On considering the consequences of international responsibility, two questions arise: (1) We must determine the damage for which compensation is possible; and (2) We must determine the extent of the reparation that should be made as compensation for that damage. International courts have given a very large number of decisions on these two questions, but I think the text proposed by the Sub-Committee does not take sufficient account of them.

The essential idea is that damage merits reparation only when it is the certain consequence of the incidents giving rise to the right to reparation. It must be the necessary and inevitable consequence of the fact giving rise to the responsibility. By adopting the idea that the damage for which reparation is made must be the necessary and inevitable consequence of the fact giving rise to the responsibility, you settle, or rather you lay down a general rule for settling, the famous question of indirect damage and loss of profits.

International case law shows that the courts do not always reject applications for indirect damage or requests for compensation in respect of loss of profits — what are called prospective profits. In many decisions the court has taken the view that indirect damage and loss of profits constitute a claim to reparation when they are the direct and inevitable consequence of the incidents giving rise to the right to reparation.

In order to take account of that idea I propose a new formula. The idea is supplemented by the indication, which serves as a general rule, that the indemnity or compensation must be exactly proportionate to the damage suffered.

This general rule makes it possible to solve another difficulty which often arises in practice, — namely, the question of interest and interest on arrears. A sum is claimed as being due from a State in virtue, for instance, of a contract. The courts are asked to order payment for a sum that is overdue. Should interest be paid? This question, which has often been discussed in international relations, has in recent years been settled in different ways by the courts and particularly by arbitral tribunals.

In decisions of mixed arbitral tribunals, for instance, I have noticed wide variations in this respect. Sometimes interest is granted from the day on which the damage occurred; sometimes it is granted only from the time when the action came before the competent court and sometimes the court allows interest only for the future, that is to say, as from the time at which the decision is given.

This uncertainty as to the rule to be applied is excusable on the part of presidents of mixed arbitral tribunals, who often are not jurists and, in many cases, are unacquainted with international precedents.

I propose that you should settle this question not by a rigid rule, but, as my proposal shows, by saying that reparation must be made to the precise extent to which the damage is attributable to the incidents giving rise to the right to reparation. We are laying down a general rule that is sufficiently wide and elastic to enable the judge in each case, and in consideration of the circumstances, to give a just decision in the case submitted to him.

Those are the different reasons why I think it would be desirable to substitute for the wording proposed by the Sub-Committee that which is now before you, and to say that "Responsibility involves for the State concerned the obligation to make good the damage suffered to the precise extent to which that damage is attributable to the incidents giving rise to the right to reparation."

M. Limburg (Netherlands):

Translation: During M. Politis's absence I wished to speak in support of his amendment. Now we are delighted to have him back with us, and after his speech, which — like all his speeches — gave us keen intellectual pleasure, I can be brief. I remember a certain statesman said that there is no need to repeat what has been well said or to say what has already been well repeated. I wish, therefore, merely to add a few remarks in support of M. Politis's amendment, which I prefer to the Sub-Committee's proposal.

I shall try, in the first place, to allay the apprehensions of our American colleague. When we say, as M. Politis's amendment says, that "Responsibility involves reparation for damage suffered to the precise extent to which that damage is attributable to the incidents giving rise to the right to reparation", we leave the judges to decide what are the different factors in the damage. Is there merely damage? Is there also loss of profits? We do not go into that question. By adopting this amendment, we leave it to the judge to decide.

We are leaving many things to the judge. That is clear if we consider the various Bases of Discussion, and we shall notice it again when we see what is left of them. We may very well say that this question of damages will also be left to the judge, for, if we decide to go into the matter and determine the different factors, I am very much afraid the Committee would not reach agreement.

I do not intend to repeat the arguments advanced by M. Politis. I merely wish to add one further argument. We are all aware of the evolution which has enabled private individuals to take part and intervene in proceedings instituted on their behalf by their State. In the Convention we are drawing up, we ought not to close the door on this development. As M. Politis has just said, we should be closing the door on the development of legal theory and case law.

I need not remind you that, for a long time past, the United States have allowed private individuals to intervene in proceedings between State and State. Nor need I recall the fact that the French Government has acted in the same way on several occasions. We ought not to close the door on the solution of this question, which is in course of development.

That, however, was not my reason for speaking, for M. Politis himself has already dealt with the point. There is a further reason why I prefer M. Politis's amendment. I do so because the Sub-Committee's proposal creates an antithesis that ought not to exist. It does

this by that second paragraph, which is not under discussion at present but which will probably be adopted, perhaps after some amendment, and inserted somewhere in the Convention, even if not under Article 29.

The first paragraph says: " Responsibility involves for the State concerned an obligation to place at the disposal of the injured State reparation for the damage suffered *in so far as it results from failure to comply with the international obligation* ". The words " in so far as " imply that there are other consequences besides the one mentioned here. That is so true that the second paragraph, which may perhaps not be included in this article, but which we shall certainly retain, reads as follows: " The State's responsiblity may not be invoked as regards reparation for damage caused to a foreigner . . . "

This constitutes an antithesis. Unconsciously, perhaps, we create an antithesis between the reparation for the damage caused to the foreigner and reparation for damage due to the State as the result of the failure to comply with an international obligation. I think that, when we are dealing with reparation for damage, we should consider every kind of damage resulting from failure to comply with an international obligation. The other consequences are political in nature. I think we should avoid the antithesis between the first and second paragraphs.

Before concluding, I should like to point out that, in my opinion, there is no need for the amendment submitted by the Danish delegation. As M. Politis has just said, the question of interest — interest on arrears, for instance — is fully covered by his amendment. When we say that responsibility involves the obligation to make good the damage suffered to the precise extent to which that damage is attributable to the incidents giving rise to the right to reparation, the question of interest is covered.

The courts have given many decisions on this question of interest, whether on arrears or otherwise. Before the war, it was the subject of a big dispute between Russia and Turkey. In my opinion, there is no need to give any explicit solution of this question, since it is fully covered by the amendment.

In conclusion, I venture to suggest that M. Politis should omit the word " precise " in his proposal. If we say " the precise extent " we are likely to place the judge in a difficult position sometimes. In some cases it is very difficult to determine the *precise* extent to which the damage is attributable to the incidents giving rise to the right to reparation, or to ascertain the amount of the damage.

M. De Visscher (Belgium), Rapporteur:

Translation: I should like to remove a misunderstanding due to a mistake that has been brought to my notice by Mr. Borchard, Chairman of the Third Sub-Committee. The words " place at the disposal of the injured State " appear by mistake in the text before you. The Sub-Committee did not intend to include those words. Accordingly, it will certainly not insist on their retention, and on that point it agrees with M. Politis.

M. Giannini (Italy):

Translation: I think that the formula we insert in this Basis of Discussion — as, indeed, in all the others — should be as simple as possible. Hence, I am not prepared to accept the amendments proposed by the Danish and British delegations.

As regards the Sub-Committee's proposal, the question has been somewhat simplified by the statement which the Rapporteur has just made.

In reality, two problems arise. The first was referred to by M. Politis. With that Hellenic elegance and grace that we always admire, he explained the new tendencies in international law; but he then proceeded to conceal them by emphasising the practical reasons for the adoption of the formula he proposes. I think we agree within him. We cannot give a theoretical solution of the problem whilst ignoring the practical side of the question. For the moment, I will not say which solution I prefer. After the Rapporteur's statement, I think we are all agreed as to the first part of the article.

The second part must be considered. In this connection, M. Politis's proposal draws a certain distinction between direct and indirect responsibility. I must say frankly that I do not like the wording of the Basis of Discussion. That wording has been retained by the Sub-Committee. Neither do I like the wording proposed by M. Politis. Perhaps he will have a better proposal to submit to us to-morrow.

In the first place, I support M. Limburg's remarks. M. Politis will certainly be acquainted with an essay on penal law by Bovio. It is a remarkable essay in which Bovio emphasises the impossibility of securing any correlation between the offence and the punishment, between the damage done and the reparation therefor. This essay is very cleverly written and reveals a great philosophical spirit but, after reading it, you ask yourself: What is the criterion that Bovio proposes?

In this connection, I think no precision is possible, and that we ought not to be too theoretical when we are drawing up an international convention. I hope, therefore, that M. Politis will readily agree to omit the word " precise ".

If we omit the word " precise ", the formula: " to the extent to which that damage is attributable to the incidents giving rise to the right to reparation " becomes an attempt at differentiation. Whilst we agree on the principle, we might perhaps leave it to the

Drafting Committee to devise a better formula which would satisfy everybody.

Thus, I agree with the substance of the proposal subject to possible modifications in the wording.

M. Matter (France):

Translation: I agree with M. Giannini in thinking that the simplest and shortest formulas are the best. I must apologise to the Danish representative for criticising his amendment. M. Limburg just now gave definite reasons for rejecting it. M. Politis, who perhaps was not aware of M. Cohn's amendment, anticipated those reasons with his usual shrewdness.

It is, indeed, impossible to stipulate that interest should run only from the time when a "claim" is lodged. Before the "claim" is lodged — and I think by "claim" is meant the international claim — a more or less protracted intermediate period may have elapsed. Now, in all bodies of law, whether municipal or international, compensation is due from the day on which the injured person institutes proceedings.

Suppose that the injured person brings his action before an ordinary court of law and that, without any unconscionable delay within the meaning of Articles 5 and 6 of our Convention, the proceedings last two or three years. Suppose, further, that the municipal courts reject the claim and that the State to which the injured person belongs takes it up and brings it before the international court. In such a case would it not be the normal course to grant interest on arrears for the period that had been taken up by the proceedings before the ordinary courts of law?

To sum up, as M. Politis rightly said, this is essentially a question of facts and particular cases. I think the simplest plan would be to adopt M. Giannini's suggestion and omit any reference to the extent of the reparation at the beginning either of the Sub-Committee's proposal or of M. Politis' proposal.

If we said: "Responsibility involves for the State concerned the obligation to make good the damage suffered", would that not be sufficient? We could, if desired, add: "in proportion to that damage". I think that would satisfy everyone whilst leaving the judge entirely free to determine how far the damage should be made good, and, in particular (I would draw M. Cohn's attention to this point) to what extent interest should be included.

Let us adopt simple formulas. That will be the best course. Those clear-cut formulas of which M. Giannini, the representative of Rome, that is to say, of Roman law, possesses the secret, are, I think, the best here, as elsewhere.

Mr. Borchard (United States of America):

Perhaps I may be allowed to say a word, because the Drafting Committee is involved in this question. I hope M. Politis will abandon his last phrase, because it involves considerable confusion with existing jurisprudence, particularly in regard to assessing damages for failure to punish the guilty offender. Moreover, his amendment involves us again in the measure of damages, which is a question which I think we ought, in the interests of developing science, to avoid trying to foreclose here.

The question of international responsibility must obviously be one from State to State; otherwise, it would not be international at all. If it were from a State to an individual it would not be international. The desire to leave open the road to that long-distant future when individuals may sue States before an international court should not, I think, lead us now into adopting a formula whereby we may foreclose something. In fact, the danger of saying that the damages may be paid to the individual is that you again confuse municipal responsibility with international responsibility, and I believe it is quite important to keep those distinct.

If we adopt some simple formula, such as that suggested by M. Giannini or M. Matter, to the effect that the responsibility of the State carries with it the obligation to make reparation for the damage suffered by the foreigner, without expressing the extent of that reparation but leaving that to the courts, I think we shall have done all that is possible in this Convention.

That leaves open the question to whom the damage should be paid — whether to the State or to the injured foreigner. I think it must always be to the State, or, with the States's consent, to the injured individual. It must always be international.

Leaving that aside, however, I venture to suggest that this provision should read in the simple form proposed by M. Giannini and M. Matter, which several delegations, including that of the United States, ventured to suggest at the very beginning, namely: "Responsibility involves for the State concerned the obligation to make good the damage suffered by the foreigner".

M. Cohn (Denmark):

Translation: I should like to draw the Committee's attention to the negative character of the amendment submitted by the Danish delegation.

We did not wish to fix the time from which interest should run, but we meant to say that, if no claim is lodged, no interest can be demanded. By the word "claim" we meant to cover not only an international claim but also a claim before the municipal courts.

Let us suppose that a certain fact involves a State's responsibility. A considerable time elapses before the claim is lodged. Our view is that interest cannot be claimed for that time. If the Committee agrees that this idea is included in the proposal submitted, I am prepared to support it.

I entirely agree with M. Giannini that we ought to devise a simple formula. The wording proposed by M. Politis, however, is of a theoretical character. It is not easy to understand what is meant by "the incidents giving rise to the right to reparations" or "the extent to which that damage is attributable to the incidents". Personally, I should prefer a simpler wording.

Mr. Lansdown (Union of South Africa):

There appears now to be very little difference between the first part of the formula submitted by the Sub-Committee and the first part of the formula suggested by the delegate for Greece, if the words: "place at the disposal of the injured State" are excluded, as the Sub-Committee intended they should be. This gets over the substantial point raised by the delegate for Greece that under the Sub-Committee's draft the door would be closed to the development of international law in the matter of reparation possibly being made directly to the person who had suffered injury.

The first parts of the two proposals would then respectively read:

The Committee's proposal:

> "Responsibility invloves for the State concerned an obligation to make reparation for the damage suffered . . ."

M. Politis's proposal:

> "Responsibility involves for the State concerned the obligation to make good the damage suffered . . ."

So far there is practically no difference between the formula of the Sub-Committee and that of the delegate for Greece.

Then, with regard to the second part, the proposal of the Sub-Committee is: "to make reparation for the damage suffered in so far as its results from failure to comply with the international obligation", and M. Politis's proposal is: "to make good the damage suffered to the precise extent to which that damage is attributable to the incidents giving rise to the right to reparation".

Now, I am rather afraid that M. Politis's proposal is so definite — so imperative — in its form that it might rather tie the hands of the judge, who might consider that he is not permitted under it to take into any account any surrounding circumstances which might have led to a diminution of the damage.

I have in mind in particular this case: a foreigner has suffered damage; it was within his power to diminish that damage, but he has failed to take steps for the diminution of damage. Now, I am rather afraid that under M. Politis's proposal the judge would have to say: "I must not take into account that circumstance", whereas it seems to me that under the Sub-Committee's proposal the matter is rather more elastic and that the judge could do so. It reads:

> "Damage suffered in so far as it results from failure to comply with the international obligation."

It seems that this wording is sufficiently elastic, and that consequently the Sub-Committee's formula to that extent is to be preferred to that submitted by the delegate for Greece.

As regards interest or loss of profits, I agree with the suggestion that neither of these formulas would prevent a claim being taken into consideration by the judge, and I am in agreement with the remarks of the delegate for Great Britain that it would be better to exclude express reference to interest, because, if you are going to have express reference to interest, then it would be a matter for comment that there is no express reference to other incidents affecting the increase or diminution of the quantum of damage.

Now, I want to say one word in regard to a point which has not been touched upon by any of the speakers, but to which reference is made in the report of the Sub-Committee — a very useful document for which I am sure our thanks are due to its members. It is the place in the Convention at which this statement of principle should be embodied.

At the conclusion of their report they say:

> "Whether Basis No. 29, with its additional paragraph covering the local remedy rule, should be embodied in one or two articles or combined with other articles to be placed at the head of the Convention, should be left to the Drafting Committee."

Now, Sir, I had views on this subject and it may possibly be remembered that in the very early stages of our discussions I submitted a prefatory basis which was ultimately displaced by the basis submitted by the delegate for France. In the basis which I submitted I had combined, in what I thought suitable terms, the idea of obligation and the necessity to make reparation for failure to comply with the obligation, and it seemed to me that this prefatory basis was the proper place in which to make a general reference to the fundamental principle of the obligation of a State to make reparation for its failure to comply with its international responsibilities.

The first part of the basis, as I submitted it, was as follows:

> "A State must conform to the standards and rules which the accepted principles of international law regard as incumbent upon States."

That has now been displaced by the formula submitted by the delegate for France, but I went on in the second part to say:

> "and must make reparation for damage suffered by a foreigner in his person or property in consequence of its failure to comply with this obligation."

That seems to me to embody substantially and in apt terms the first paragraph of the basis now submitted by the Sub-Committee, and since it asks for suggestions as to the

place in which paragraph 1 of the basis it submits should stand, I venture to make the suggestion that it might properly be combined by the Drafting Committee with the proposition which was submitted by the delegate for France and adopted by this Committee.

I would just add the words : " subject to the provisions of this Convention ", and I would do that chiefly with the idea of bringing the basis into accord with the second paragraph of the article now submitted by the Sub-Committee. That second paragraph should, it seems to me, form a separate article of the Convention, and would read — if we adopted it —

> " The State's responsibility may not be invoked as regards reparation for damage caused to a foreigner until after exhaustion of the remedies afforded to the injured person by the internal law of the State. This rule does not exclude application of the provisions set out in Bases of Discussion Nos. 5 and 6."

I venture then to make the suggestion — I suppose it is a matter for determination in the first instance by the Drafting Committee — that the general statement of the duty of a State to make reparation for its failure to comply with its international obligation should be combined with our preliminary basis enunciating the latter and that then we should have the second paragraph of the article now submitted by the Sub-Committee as a separate basis later in the Convention.

The Chairman :

Translation : I desire to draw the Committee's attention to the proposal submitted by the Netherlands delegation in regard to the wording of Basis No. 29. The text submitted by that delegation is as follows :

> " Responsibility involves for the State concerned the obligation to make good the damage suffered to the extent to which that damage results from failure to comply with international obligations."

M. Politis (Greece) :

Translation : I cannot resist the appeal for compromise addressed to me by M. Giannini and M. Matter. I, too, am strongly in favour of simple formulas. Just now I endeavoured to show that this question of reparation for damage suffered involves three problems : (1) To whom is the indemnity due? (2) For what should reparation be made (that is to say, what damage should be made good, or the determination of the damage)? (3) What should the reparation include (that is to say, what should be the amount of the compensation)?

On the first point, I am glad to see that we all agree and that we are leaving the question open for the evolution of law.

As to the other two points, I thought we might mention them and suggest a solution by saying, in the case of the first (determination of the damage), that the damage to be made good must be the consequence of the incidents giving rise to the right to reparation, and in the case of the second, by determining the extent of the reparation, in other words the amount of the compensation. Since, however, there is a fear of tying the judge's hands and since we are seeking simple formulas, I have no objection — setting aside all pride of authorship — to cutting out the sentence I proposed and ending at the words " damage suffered ", adding, as the United States delegation proposes, the words " by the foreigner ".

The text would therefore read as follows : " Responsibility involves for the State concerned the obligation to make good the damage suffered by the foreigner. " That is indeed the simplest formula. It will be the judge's duty to say what the damage is and what the reparation is to be. Thus, we are leaving unsettled the three questions which I tried to indicate in a formula that was too wide. They will be dealt with by case-law. Personally, I am glad to note that this proposal will present no obstacle to the future evolution of law.

M. De Visscher (Belgium), Rapporteur :

Translation : No one could make more concessions than M. Politis. He has, in fact, abandoned the idea of settling the three points he had in view in his proposal.

I wonder, however, whether the text, now that it is reduced to these proportions, is not too slight. We may have emptied it of its substance. Could we not accept the last part of M. Limburg's amendment?

M. Politis (Greece) :

Translation : That amendment repeats the Sub-Committee's phrase.

M. De Visscher (Belgium), Rapporteur :

Translation : It says :

> " To the extent to which that damage results from failure to comply with international obligations."

M. Politis (Greece) :

Translation : That is practically the same formula as that of the Sub-Committee.

M. De Visscher (Belgium), Rapporteur :

Translation : Have you any objection?

M. Politis (Greece) :

Translation : Yes ; it is impossible both from the theoretical and from the practical point of view.

Mr. Beckett (Great Britain) :

As I had the honour to say at the opening of this meeting, it seems to me that in this question of damages we can only deal with it in one of two ways, either in all its aspects

which would certainly require a week's work, or in a single sentence of the most simple character possible.

Since the first alternative is out of the question, I entirely support the suggestion, I think originally made by M. Giannini, supported by M. Matter, and now adopted by M. Politis himself, to reduce this text to its simplest terms. I myself would have been willing to accept the text of the Sub-Committee and, if I heard it correctly, M. Limburg's text; but since that obviously is not at once unanimously agreed to, then I think (considering the very superficial way in which we are obliged to touch upon the question of damages) we had better be content with the simple sentence, which merely states that responsibility involves the obligation to make reparation; it does not say anything more and leaves everything else open.

I never believe in pressing doctrinal or theoretical points. Therefore, since there is a doubt on the doctrine — I had not appreciated that there was any doubt before — I do not press for the inclusion of the sentence which appeared in the written text of the Sub-Committee, but which, it now appears, that Sub-Committee did not intend to maintain, about the damage being placed at the disposal of the State.

If there is a doctrinal doubt about this point, let us take the reasonable course and not endeavour to deal with it. I am afraid I had not appreciated that the matter was really now so much open to discussion, and it was for that reason that I suggested inserting a few words which were taken direct from a judgment of the Permanent Court, a judgment which I thought had probably closed the door. If, however, the door is not closed, there is no reason why we should close it now.

Since we are going — as seems to be the general opinion — to reduce this formula to a very simple sentence, it seems to me very convenient to deal with it in the manner which the delegate for the Union of South Africa suggested — namely, to place it, drafted in the simplest terms, at the beginning as one of the general principles to be embodied in the Convention.

M. Dinichert (Switzerland):

Translation: I thought that, after the last statement by M. Politis, the question was settled and I should therefore willingly have waived my right to speak. As a new formula is contemplated, however, I must say that I think the word "extent" is unsatisfactory in the general formula we are trying to frame. As M. Politis himself said, this word conveys a special notion, the notion of the extent of the damage to be made good, and I think we ought not, by employing that word, to enter into the question of the extent to which the damage should be made good. That is a subject we had better not touch upon. If we decided to take it up, we should be obliged to go further into it.

Again, I do not like the word "extent", because it seems to prejudge the form in which reparation is to be made. When we speak of "extent", we seem to be comparing two unequal things. We have always urged — the Swiss Government did so emphatically in its reply to the questionnaire — that, whenever possible, reparation for damage should take the form of *restitutio in integrum*. Whenever possible we should try to put the injured foreigner in the situation in which he would have been if there had been no failure to comply with international obligation. Hence, if we are still to seek a new formula, I should like the word "extent" to be omitted.

On the other hand, I can see no reason why I should not support the Sub-Committee's proposal. I do not think that the concluding phrase is absolutely necessary, but I should not be afraid to say that responsibility involves for the State concerned the obligation to make good the damage suffered. What damage? The damage that has occurred, the damage in so far as it results from failure to comply with the international obligation. If you omit the end of this sentence you will see that the article is incomplete in itself. It can be understood in connection with the other provisions of the Convention, but in itself it is not really complete unless it is expressed approximately in the words proposed by the Sub-Committee.

In conclusion, I willingly support the short formula that is proposed. Nevertheless, I should not object to a formula that goes somewhat farther — for instance, that proposed by the Sub-Committee. Finally, I should like to omit all reference to "extent".

M. Urrutia (Colombia):

Translation: I think we might agree on the simple formula proposed — namely: "Responsibility involves for the State concerned the obligation to make good the damage suffered". That states an old principle of civil law. Any act which causes damage to an individual involves the obligation to make reparation to the injured person. We recognise this principle of civil law as being also a principle of international law. We leave aside all details, as, for instance, the question who should receive the reparation, or whether or not interest should be calculated and, if, so, from what date. We also leave aside another question, the importance of which I fully realise but which is chiefly of a theoretical nature and would involve us in a very long discussion. It is the question whether we should settle in detail the juridical relationship between the obligation to make reparation and the incident for which reparation should be made.

To sum up, I think we might close the present discussion by adopting the simplest formula.

Moreover, whenever I vote for one of these provisions, I always remember that at the end of the Convention there will be articles to the effect that any claim connected with the question of international responsibility will be settled either by direct agreement or by application to a court. In these circumstances we must leave open the possibility for certain details to be settled by the parties in the case of a direct agreement or by the judge in the other case. One of these details would be the question of interest.

In conclusion, I would remind the Committee that we are at present concerned with reparation for damage, and that other bases, which will probably become articles of the Convention, deal with debts. Those articles will doubtless provide for interest but I think that, as regards reparation for damage, we cannot consider the question of interest prior to an agreement or a judicial decision.

M. Sipsom (Roumania) :

Translation : We have to choose between the formula submitted by M. Politis and that of the Sub-Committee.

I note that M. Politis has modified his own text, and, in my opinion, has thereby robbed it of all its value. The difference between the two formulas in their original form was, indeed, worthy of consideration.

Which of the two formulas should we prefer — that originally submitted by M. Politis, or that of the Sub-Committee which has been adopted by M. Limburg and approved by M. De Visscher ?

" Neither ", says M. Giannini, who proposes to refer the text to the Drafting Committee so that it may be made more definite and more elegant in form.

Before referring the matter to the Drafting Committee, however, there is a preliminary question to be settled. We cannot draft a formula unless we know what we wish it to contain.

Now, according to M. Politis's remarks it appears that the formula is meant to cover not only the cause of the obligation but also the extent to which reparation must be made by the party liable.

M. De Visscher (Belgium), Rapporteur :

Translation : That point has been dropped.

M. Sipsom (Roumania) :

Translation : If it has been definitely dropped, if M. Politis no longer maintains his text in its original form, which I thought very interesting, and if he now supports the later form, we are all in agreement and there is no longer any need to consider the extent to which reparation must be made. That is to say, we need not consider whether the responsibility is direct or indirect, or whether the reparation should or should not be equal to the damage inflicted.

In short, I think we should adopt the formula submitted by the Sub-Committee. This reproduces the first part of the basis itself and satisfactorily expresses the general idea which is of that abstract and indefinite nature we desire and need.

M. De Visscher (Belgium), Rapporteur :

Translation : I should like to support the appeal made by M. Urrutia.

Personally, I preferred the formula submitted by M. Limburg but, when all is considered, the words : " to the extent to which that damage results from failure to comply with international obligations " do not add very much. In practice, moreover, they would make no difference, for the international judge would take into account the relationship between the damage done and the non-fulfilment of the obligation.

Thus, we all agree to accept the shortest and simplest proposal — namely, that finally adopted by M. Politis himself and supported by several other delegates.

I should like to urge strongly the necessity for agreement on this simple proposal. In that way we should save much time at a stage when time is particularly valuable.

This Committee must indeed make progress in its work. There are only a few more plenary meetings before us, and we have to deal with a whole series of important questions. In this connection, I venture to remind you of what still remains to be done in this Plenary Committee.

After the point now under discussion we must consider Basis No. 24, which relates to self-defence. Then we shall have to prepare a text corresponding to Basis Nos. 10, 17 and 18 regarding the protection of foreigners. Next we shall have to consider the Sub-Committee's proposal concerning Bases Nos. 5 and 6, which relate to the responsibility incurred by the State through decisions of the judicial power.

Further, we have to vote on the text concerning international obligations, which has been proposed and already adopted by the Sub-Committee.

Finally, there remains the big question of the jurisdiction clause.

This bald statement shows you the questions that still have to be considered at plenary meetings of the Committee and provides, I think, an argument why we should not delay over a question which is really very simple in itself and on which we can all easily agree.

M. Vidal (Spain) :

Translation : I agree with the Rapporteur. At the present stage I think we should accept the simplest formula — namely, that proposed by M. Politis.

We are all agreed as to the substance of the question. We are trying to find the

formula which most exactly expresses the idea we have in mind. I do not think we ought merely to refer the question to the Drafting Committee because, in the formula employed here, there is a shade of difference on which the Committee ought to take a decision.

If we add the words: "to the extent to which that damage is attributable to the incidents giving rise to the right to reparation ", we shall be limiting the reparation to that extent. I admit that in most cases the reparation must be related to the incidents giving rise to the right to reparation or to the international obligation, but it may be desirable to take account of many other circumstances which cannot exactly be described as incidents giving rise to the right to reparation. Accordingly, I think it would be advisable not to restrict the reparation for damage to such an extent, and to give the courts latitude to settle the question in each case.

I wholeheartedly support the simplest formula — namely, that which says: " Responsibility involves for the State concerned the obligation to make good the damage suffered by the foreigner ".

Several Delegates:

Translation: Let us vote.

M. Nagaoka (Japan):

Translation: We have heard many speakers, and several points of view have been expressed. To my mind, if the Committee decides in favour of the perfectly simple formula regarding damage suffered by the foreigner, such a provision would have no value in the Convention. The value of the provision under discussion lies in the fact that it gives a criterion for the damage suffered by the foreigner. If we accept the very vague formula which is proposed, and which really says nothing, and if we leave *in abstracto* the idea of the damage suffered by the foreigner, I think this provision will do more harm than good.

Accordingly, unless the Committee can accept a formula similar to that proposed by the Sub-Committee, I should prefer to omit this provision altogether.

Several Delegates:

Translation: No!

M. Guerrero (Salvador):

Translation: I desire to speak on a point of order. We are apt to abuse points of order, but I think this one is really justified.

The general feeling of the Committee seems to be that the discussion has gone on long enough. We want to vote on this question. I therefore request that the Sub-Committee's proposal should be put to the vote. That proposal should be put to the vote first because there has been no proposal to strike out this basis, and no text contradicting the Sub-Committee's text or adding anything thereto.

I therefore request that the Sub-Committees's proposal should be put to the vote, in accordance with the regulations.

M. De Visscher (Belgium), Rapporteur:

Translation: I think M. Guerrero's point of order is contrary to the Rules of Procedure, which say that a vote should be taken first on the amendment farthest removed from the original text. Now that is the simplest proposal, the one accepted by M. Politis. Then will come M. Limburg's proposal, if it is maintained by its author, and finally the Sub-Committee's text.

M. Guerrero (Salvador):

Translation: In what way does the text accepted by M. Politis differ from the Sub-Committee's proposal?

M. De Visscher (Belgium), Rapporteur:

Translation: M. Politis's text, which merely says that " Responsibility involves for the State concerned the obligation to make good the damage suffered ", is obviously the one which is farthest removed from the Sub-Committee's text, which refers to the extent to which the damage should be made good — namely, " in so far as it results from failure to comply with the international obligation ".

M. Limburg's text represents an intermediate proposal, as it adds: " to the extent to which that damage results from failure to comply with international obligations ".

It is therefore clear that the three texts should be put to the vote in the following order: (1) M. Politis's proposal; (2) M. Limburg's proposal; (3) The Sub-Committee's text.

M. Limburg (Netherlands):

Translation: To meet the wishes of certain delegates I shall substitute the words " in so far as " for the words " to the extent to which " in my proposal.

If you will allow me, I would add the reason for which I am unable to accept M. Politis's last proposal. If we decide to adopt the simplest formula we must say merely: " Responsibility involves for the State concerned the obligation to make good the damage suffered." If, however, we add the words " by the foreigner " . . .

M. Politis (Greece):

Translation: We are not adding anything at present. It was not I who proposed to add the words " by the foreigner ". It is self-evident.

M. Limburg (Netherlands):

Translation: No, it is not self-evident. Some members of the Committee now think that the text as modified by M. Politis contains the words " by the foreigner ". If that text is put to the vote I shall vote against it for it may happen that damage is caused, by the same incidents both to the foreigner and to the State. I am not now thinking of political questions, of insults, or apologies. I am thinking of material facts — for instance,

the destruction of telegraph wires, which may constitute damage both to the foreigner and to the State.

M. Politis (Greece) :

Translation : I agree to the omission of the words " by the foreigner ".

The Chairman :

Translation : I put to the vote the amendment proposed by M. Politis, but without the words " by the foreigner ".

Seventeen delegates voted for M. Politis's proposal and 4 seventeen against.

The proposal was therefore rejected.

The Chairman :

Translation : I now ask you to vote on M. Limburg's amendment.

M. Politis (Greece) :

Translation : M. Limburg's text is in two parts, and I request that a vote be taken separately on each part. In the first place, there is the simple formula, which certain delegates support, and then there is the addition based on the original text proposed by the Sub-Committee.

I cannot accept the second part, for the following reason. It says something that is unnecessary, and, I venture to add, even rather ludicrous. In point of fact, what is the result of failure to comply with an international obligation ? It is responsibility, for responsibility, as we have defined it, is the result of failure to carry out an international obligation. Accordingly, to state that responsibility involves the obligation to make good the damage suffered to the extent to which — or in so far as — that damage results from failure to comply with international obligations is equivalent to stating that reparation must be made in so far as the damage is the result of the responsibility. That is quite meaningless.

Not only is it inaccurate from the practical point of view, but it is absolutely erroneous from the theoretical point of view for, once responsibility is incurred, it gives rise to a new obligation — namely, the obligation to make reparation. This obligation is mentioned in all codes, from the law of Aquila onwards. It consists in restoring to the property of the injured individual either the actual thing that was taken from him, if that is possible, or the equivalent in money of that part of his property — that is, its monetary value. The resulting obligation is the obligation to make reparation.

We have not been able to agree on the extent to which this obligation exists. What damage should be made good ? What is the amount of the indemnity ? We have left that on one side. But to say that a right to reparation exists in so far as the damage is the result of the responsibility is, indeed, in my opinion, to say something that is quite unnecessary from the practical point of view, and inaccurate from the theoretical point of view. Accordingly, I cannot take the responsibility of voting for the second part of this text.

M. Suarez (Mexico) :

We have already decided to close this debate, Mr. Chairman, and to pass to the vote. Now some delegates wish to reopen the discussion and to express their views as to the suitability or non-suitability of this formula. We have already decided to pass to the vote. The first proposal has been rejected, and we must now find a second.

M. Limburg (Netherlands) :

Translation : I desire to reply to M. Politis. I speak as author of the amendment, and I shall be brief. I made this proposal as a means of compromise, because some delegates present are not satisfied (the vote revealed that fact : there are seventeen of them) with the formula : " Responsibility involves for the State concerned the obligation to make good the damage suffered ", which they think is too bald. That is why I added : " in so far as that damage results from failure to comply with international obligations ". You may say that this is tautology and nothing more. But if this tautology meets the wishes of certain delegates it should be accepted.

One further argument : I have not the Code Napoléon with me, but if you read the articles on the non-fulfilment of contracts — that is to say, Article 1184 and those preceding it — you will see that reference is made to damages which are the consequence of the non-fulfilment, etc., and which are the consequence of the incident giving rise to the obligation to make good the damage.

M. Politis (Greece) :

Translation : You are quoting from memory. I, too, can quote from memory Article 1384.

M. Limburg (Netherlands) :

Translation : You are speaking of Article 1384, but I am referring to the non-fulfilment of contracts — namely, Article 1184 (cancellation) and the preceding articles.

That is all I have to say, as I do not wish to prolong the discussion.

The Chairman :

Translation : We shall now vote on M. Limburg's proposal.

M. De Visscher (Belgium), Rapporteur :

Translation : I will read M. Limburg's amendment. A request has been made for the division of this amendment into two parts. Such a request must be granted, I think. The first part of M. Limburg's text reads as follows :

> " Responsibility involves, for the State concerned, the obligation to make good the damage suffered. "

M. Guerrero (Salvador) :

Translation : A request has been made for the division of the proposal ; but we have just voted against this first part.

M. Politis (Greece) :

Translation : No. We voted merely on the simple formula.

M. Guerrero (Salvador) :

Translation : The first part of that proposal is the same as M. Limburg's proposal.

M. Politis (Greece) :

Translation : We should save time if, instead of dicussing the question, we voted on this first part.

M. Guerrero (Salvador) :

Translation : Then we shall contradict ourselves.

M. Dinichert (Switzerland) :

Translation : In order to avoid any misunderstanding, I would ask M. Limburg whether he does not consider his proposal identical with that of the Sub-Committee. I think there is no difference between them.

M. Limburg (Netherlands) :

Translation : There is very little difference.

M. Dinichert (Switzerland) :

Translation : There is none at all, in fact.

M. Politis (Greece) :

Translation : There is no difference.

M. Dinichert (Switzerland) :

Translation : In that case I should like the Committee to vote on the Sub-Committee's text, which I personally support strongly.

M. Politis (Greece) :

Translation : M. Limburg's text.

M. De Visscher (Belgium), Rapporteur :

Translation : It is the same thing.

I would ask M. Limburg whether, as author of the amendment, he is willing to withdraw it.

M. Limburg (Netherlands) :

Translation : In order to avoid any confusion I withdraw my amendment in favour of that proposed by the Sub-Committee.

M. Matter (France) :

Translation : Your text is much better French.

M. De Visscher (Belgium), Rapporteur :

Translation : There remains only the Sub-Committee's text. That must now be put to the vote.

M. Matter (France) :

Translation : M. Limburg's text was much better.

M. De Visscher (Belgium), Rapporteur :

Translation : To avoid any mistake as to the wording of this text, I will read it in its correct form :

> " 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. "

M. Politis (Greece) :

Transalation : I ask that the vote be taken separately on the two parts of the proposal.

M. De Visscher (Belgium), Rapporteur :

Translation : A request is made for the division of the proposal.

M. Politis (Greece) :

Translation : I shall vote for the first part and against the second.

M. Dinichert (Switzerland) :

Translation : For reasons of procedure I oppose M. Politis's request, as we have already voted.

M. Politis (Greece) :

Translation : No. The request must be granted. I ask to speak.

In Parliamentary assemblies, if the first part of a text comes up again even ten or twenty times in the same context, it is the practice to put it to the vote. When a member of the assembly asks that the proposal be divided into parts, the request must be granted and the Chairman takes a vote separately on each part of the text.

M. Giannini (Italy) :

Translation : But this is not a parliament ; otherwise I should have resigned before now.

M. De Visscher (Belgium), Rapporteur :

Translation : The article in the Rules of Procedure is explicit on this point. A request for the division of a proposal must be granted. We must comply.

Accordingly, we must vote on the following text :

> " Responsibility involves for the State concerned an obligation to make good the damage suffered. "

M. Guerrero (Salvador) :

Translation : Will this procedure constitute a precedent to the effect that proposals which have already been voted on may be put to the vote again ?

M. De Visscher (Belgium), Rapporteur :

Translation : I cannot see how we shall settle anything at all in this way. In order to save time, I urge you to vote. As our minds are made up, it will be all the easier to vote. There is no need to prolong this discussion indefinitely.

The first part of the text was adopted by 35 votes.

M. De Visscher (Belgium), Rapporteur :

Translation : The Committee now has to vote on the second part of the text, which is as follows : " ... in so far as it results from failure to comply with the international obligation ".

This clause was adopted by 29 votes to 4.

The text as a whole was adopted by 32 votes.

26. PROGRAMME OF WORK.

M. Politis (Greece) :

Translation : I desire to speak on a point of order. Just now I heard the Rapporteur refer to the questions that still remain to be settled. I think he did not mention them all.

I venture to remind the Committee that it now has very little time at its disposal. In accordance with the decisions reached by the Bureau, the Conference will close at the end of next week. For that to be possible, the last three days of next week must be devoted to plenary meetings of the Conference for the final adoption of the texts drawn up by the three Committees. Accordingly, the reports must be printed and circulated about the middle of next week. If each Committee is to do that, the respective Rapporteurs must have time to draft their reports and the Committees must consider and approve them. In my opinion that will take at least two days.

Before that, the Committees must give their final votes on the texts which they have adopted at a first reading and which the Drafting Committees will have to embody in the form of a convention, the annexed protocol and recommendations.

That work cannot be done unless the discussion on the bases is concluded by Thursday at latest, so that we have only two meetings at which to consider the bases. Unless the Committee thus limits the time it spends on the bases there will be a very great risk — in my opinion there will be a certainty — that the Conference will be a failure as far as the question of responsibility is concerned.

If the desired result is to be possible, certain sacrifices are necessary. First, and most important, the number of texts still to be discussed must be limited. This is not the first time I have expressed that view. At the outset of the Committee's work, I made the same suggestion, and I am sorry it was not adopted then. I think we should limit our work to five, six, or seven main texts. I said previously that if we entered into details we should waste a great deal of time, perhaps to the prejudice of the major rules on which I foresaw the possibility of agreement. To-day there may still be time to achieve our result if we limit our efforts. In my opinion the Committee would do well to confine itself henceforth to the following five questions :

(1) The definition of international obligations. We have discussed this fundamental text at great length. It has been drawn up by a Sub-Committee and a certain measure of agreement has been reached. I hope the Committee will be unanimous in adopting the text drawn up by the Sub-Committee.

(2) The exhaustion of municipal remedies. This question, too, is of fundamental importance. I believe the Drafting Committee has already framed a text. It was proposed just now. We still have to adopt it and to instruct the Drafting Committee as to the place which this Committee desires that text to occupy in its final work.

(3) Responsibility for the acts of officials. This is covered by Basis No. 13. On this point, too, I understand that a text has already been drawn up by the Drafting Committee. The discussion might therefore be fairly rapid.

(4) Responsibility for acts performed in the administration of municipal justice. This also is a very important question. It is referred to in Basis No. 5. A text has been drawn up on this subject and the Committee will have a very definite basis for its discussion and vote.

(5) The jurisdiction clause. This is covered by Basis No. 30. It relates to the jurisdictional means for the application and interpretation of the provisions we have framed.

If the Committee is prepared to limit its programme to these five questions, if we work hard and, particularly, if members of the Committee reduce their speeches to what is strictly necessary, I think we shall be able to conclude consideration of the bases by Thursday evening. The Drafting Committee will put the texts in order and will submit them, or at any rate part of them, to the Committee on Friday afternoon, so that a start can be made with the final voting. This work of the final adoption of the texts would continue and would conclude on Saturday. The Rapporteur would be left free on Sunday, Monday and perhaps part of Tuesday in order to prepare and complete the heavy task he has been good enough to undertake. His report would be distributed on Tuesday evening or Wednesday morning, and we might begin to discuss it on Wednesday afternoon with a firm determination to complete this final part of our work on Thursday. The report might be printed on Friday, and then on Saturday, the last day of the plenary meetings of the Conference, this Committee's work would come up for discussion.

You see that the time is strictly limited. I venture to say that every minute lost will adversely affect the final result of the important but difficult work to which we have devoted our efforts.

M. De Visscher (Belgium), Rapporteur :

Translation : As Rapporteur, I would strongly urge the Committee to accept M. Politis's proposals. My task is a very heavy one, as those of my colleagues who have been good enough to assist me recently are well aware. My time has constantly been taken up by meetings of Sub-Committees and Drafting Committees. During the next few days, in the mornings at least, I shall still be busy with the Drafting Committee.

If I am to prepare my general report, therefore, it is essential that the plenary meetings of this Committee should finish on Thursday evening ; otherwise it would be impossible for me to accomplish my work.

Accordingly I venture to point out this very serious difficulty. You know how my time has been taken up throughout, and I am sure that those colleagues who have helped me so much in all these meetings will give a further proof of their desire to assist me in my work by supporting the proposals just made.

M. Guerrero (Salvador) :

Translation : So far from opposing the proposal that has been made, I suggest that we hold two meetings on the day after to-morrow. The Committee on nationality will apparently not be meeting on Thursday morning. We might take advantage of that fact to hold two meetings of the Committee on the Responsibility of States, unless M. Politis intends to convene the Nationality Committee on Thursday morning.

M. Giannini (Italy) :

Translation : Although M. Politis has explained rather bluntly the position that we have before us, I think we must agree with his proposal. Considering the importance of the rules laid down in the Convention, as given in M. Politis's list, we may feel satisfied if we succeed.

Accordingly I support this " homicidal " proposal. We must finish with this matter, and in order to do so we must slay some victims. But there is still the question of the best method to employ.

I do not think M. Politis intends to abandon the consideration of certain rules which have already been discussed in sub-committees, although they do not entirely fall within the questions to which he referred. Progress has already been made with some of these questions, and I do not think it would be wise to drop them. The work has, in fact, already been done ; I might even say success has been achieved.

I would therefore ask the Committee to retain, either in particular sub-committees or in the Drafting Committee, those rules which have already been approved by this Committee. With that slight amendment, I support M. Politis's proposal.

M. De Visscher (Belgium), Rapporteur :

Translation : We all agree. Only one text was omitted from M. Politis' list. It is that which will take the place of Bases of Discussion Nos. 10, 17 and 18. It deals with responsibility incurred by the State on account of damage caused by private individuals.

The Sub-Committee which has considered this matter now submits this text, and I think the Chairman intends that it should be discussed at this meeting. We might therefore start with that point.

The Chairman :

Translation : I think the Committee agrees with the proposals that have just been made. If there is no objection, we shall first discuss the text that is to replace Bases Nos. 10, 17 and 18, and we shall then proceed to consider the points mentioned by M. Politis.

M. de Visscher (Belgium), Rapporteur :

Translation : We shall start, then, by considering the text submitted by the Sub-Committee in substitution for Bases of Discussion Nos. 10, 17 and 18. We might conclude our consideration of this text this evening and it is understood that to-morrow we shall start our consideration of the questions mentioned by M. Politis.

27. BASES OF DISCUSSION Nos. 10, 17 AND 18 : TEXT PROPOSED BY THE SECOND SUB-COMMITTEE.

M. De Visscher (Belgium), Rapporteur :

Translation : You have before you, the text proposed by the Second Sub-Committee in substitution for Bases of Discussion Nos. 10, 17 and 18. (Annex III, No. 3.)

After lengthy consideration of this subject, the Sub-Committee, with the exception of one contrary vote, succeeded in reaching agreement. I shall do no more than acquaint you with the text drawn up by the Sub-Committee and the reasons that led to its adoption.

The Sub-Committee proposes the following text in substitution for Bases of Discussion Nos. 10, 17 and 18 :

> " A State is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it. "

There is no need for me to give a long commentary on this proposal. A short statement of the reasons for it is attached. The Sub-Committee recognised that damage caused by private persons does not primarily involve

the responsibility of the State. The State may become responsible on the occasion of such damage through an omission on its own part. The State's responsibility is therefore involved, not on account of the acts of private persons but through its own acts.

This is the case when the State has not taken the measures, either preventive or punitive, which, in view of the special circumstances, were necessary in any particular case. In this connection I venture to point out the extreme elasticity which was intentionally given to this text by the Sub-Committee.

We tried in vain to find ways and means of defining the extent of the obligation, but we were forced to recognise that it was impossible to do so. Accordingly we followed the example of certain learned associations such as the institut de Droit international and the formula now submitted closely resembles that adopted by the Institute in 1927.

We intentionally made the text as elastic as possible, so as to leave to international tribunals the very wide freedom of judgment which they particularly need.

Those are the reasons which led us to propose the present text.

The Chairman :

Translation : The Mexican delegation has sent me a letter concerning its disagreement with the Sub-Committee's report on Bases of Discussion Nos. 10, 17 and 18. The Mexican delegate asks me to have this communication inserted in the minutes. If you have no objection I think we may comply with this request.

The proposal to insert the letter in the minutes was adopted (Annex II, Mexico).

M. Guerrero (Salvador) :

Translation : I quite fail to understand the text proposed by the Sub-Committee. If it relates to a failure to comply with international obligations, the question is already settled. If a State has not taken the necessary steps to organise its police force or judiciary so that protection is ensured for the interests of both nationals and foreigners, that case is undoubtedly covered by one of the clauses we have already approved.

According to the commentary on the Sub-Committee's text, and according to the Rapporteur's statement, the State is under obligation to take certain steps to protect the private individual from any damage he might suffer. If that is so, the private individual is placed on the same footing as a person invested with a public status. Such precautions are justified in the case of the latter but not in the case of the private individual.

If the Sub-Committee insists on this basis being inserted in the Convention, I shall be compelled to ask it to explain the foundation of this international responsibility.

When we were considering the case of officials who act within the limits of their authority, we decided that there was a foundation for this responsibility, as such officials obey an order of the State. When we were dealing with officials who exceed their authority, those who wished to assert this responsibility claimed that there was a foundation for it, but, in my view, no such foundation exists. They were of opinion that the foundation lay in the fact that such officials act in their official capacity. I now desire to know on what foundation the Sub-Committee bases international responsibility for an act committed by a private person.

This text is dangerous from many points of view, as I shall endeavour to show.

In the first place, when a private person is in his own country, he can apply only to his own courts. He appeals to the municipal law in order to secure compensation. But such a private person would merely have to cross the frontier in order to secure not only the right to appeal to the courts when he suffered damage but also the subsidiary right to invoke the international responsibility of the country in which he happened to be.

Where would the acceptance of such a clause lead us? Consider, for instance, the case of a country where strikes are permitted. When such events occur, foreigners may suffer damage in their trade or industry. Will such foreigners be entitled to invoke the State's international responsibility for damage caused them by the strikes?

The object of our Convention is to diminish as far as possible the cases of conflicts between States. Such provisions, however, would increase them, and would create new sources for international claims.

There is, I think, no need to give further proof of the fact that no international responsibility exists for such acts. I therefore request that this basis be entirely omitted.

M. Buero (Uruguay) :

Translation : M. Guerrero's speech makes my task much easier. So does the Mexican delegate's statement, as it expresses my Government's view.

To my great regret I cannot support the Sub-Committee's proposal even as a basis for compromise. The reasons for my attitude are those explained by M. Guerrero. I have also one further reason.

The Rapporteur explained that this basis was drafted in a simple form so as to meet the views expressed in the Sub-Committee. It is this very elasticity that alarms me. When we say that the State is responsible for damage caused by a private person to a foreigner and then add : " if the State has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it ", the presumption is that of the State's responsibility. That is

to say, in the absence of proof to the contrary, the State is responsible.

I cannot accept such an inversion of the facts. I think that in the community of nations it is deemed that all States act towards one another in a way that is absolutely correct and that thay have provided such an internal organisation as enables them to discharge the duties assumed by every State. Of these duties the most important is the administration of justice, which must be quite impartial, and which constitutes the basis of the national organisation included within the community of nations.

If we take that as our starting-point, the provision before us inverts the facts. It starts by saying that the State is responsible for damage caused by a private person to a foreigner unless, the basis continues, the State has taken the necessary preventive measures. In other words, the State must prove that it has taken such measures and has therefore not incurred responsibility.

Further, this very elasticity in the wording gives a right of intervention, if you will allow me to use that word, or at least a right of enquiry with regard to a country's internal organisation. That is inadmissible, particularly when we remember that there are some people who are continually going into different countries. Sometimes — this has happened frequently and, indeed, quite recently in Europe — these people evade the vigilance of the police and deliberately cause disturbances in the State which receives them. I do not wish to labour this point, but I think everyone will clearly remember such events. They happen every day, even in the best organised European countries.

Accordingly, I support all the arguments given in the document that has just been circulated by the Mexican delegation and the reasons advanced by M. Guerrero. I am definitely opposed to the adoption of any such text.

Mr. Lansdown (Union of South Africa):

This new text, submitted by the Sub-Committee in substitution for the old Bases 10, 17 and 18, has only within the last two minutes come into my hands, so I speak about it with some hesitation and, perhaps, with insufficient opportunity for its proper consideration; but it is my turn to speak regarding certain amendments which I had proposed to Bases 17 and 18 (Annex II, South Africa). I should therefore like to say a few words now on the proposed new basis.

It seems to me, *prima facie*, that the new text submitted to us does substantially meet the position which the Committee of Experts tried to set out in the old Bases Nos. 10, 17 and 18. I think substantially the position is met. I have just one *prima facie* criticism of the text submitted by the Sub-Committee, and that is this. It seems to me that it is not sufficient to say " if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it ".

I want not only preventive and punitive measures, but also remedial measures. Take the case where property has been wrongfully seized from a foreigner, and there is an opportunity of restoring it, but the State concerned does not take the proper reasonable steps for the restoration. Under this text, as submitted by the Sub-Committee, there would be no responsibility upon the State if it had taken preventive or punitive measures but that is not as the position should be.

Or take the case of a concession, for example a mineral concession, which has been seized. The respondent State might say: "Well, it was due to no absence of preventive measures on our part, and we have taken proper punitive measures, and therefore under the basis there is no liability on us, even though it be the case that the property has not been restored to the foreigner which is capable of restoration."

It seems to me that this text ought to be supplemented by the substitution for the words " or punitive measures " the words " punitive or remedial measures ".

Now, there has been some question by the two last speakers as to the basis on which this proposed principle of liability rests, and there has been a written criticism of the matter by the delegate for Mexico, which I have been able to glance at but which, since I only received it a few minutes ago, I have not been able carefully to read and digest.

Of course, the State is not an insurer for every foreigner who chooses to come upon its territory. In general, he knows the condition of affairs, and he comes there prepared to accept that condition of affairs; but it seems to me that there is a definite duty upon a State, if it claims inclusion in the community of nations, to have a reasonable organisation of its affairs, and to maintain a proper and due supervision over its officials; and it seems to me also that it is failure in this duty which is the fundamental basis of responsibility in this particular case. It is because the State concerned has failed to have the proper administration which might, in the circumstances, be expected of a civilised State which creates the foundation for this liability for damage to the foreigner.

You will notice that the Drafting Committee has been careful to use the words " such preventive or punitive measures as *in the circumstances might properly be expected of it.* " It is necessary to have regard to the circumstances; you would not expect, for instance, in a far-distant colony which is but sparsely occupied or has only recently been organised, such administration of affairs or such supervision over officials as you would expect in the home country, the basis, as worded, has due regard to that condition of things.

I do not think, as suggested by the delegate for Mexico, that this duty would be sufficiently met if it were possible to say that the same protection has been given to the foreigner as to the national. I venture to submit that this is not sufficient. There may be a state of anarchy which the State concerned is in a proper position to prevent, and it should not, in those circumstances, be enabled to say : " We have no responsibility, because you are subject to exactly the same conditions as those to which our nationals are subject. "

Prima facie, then, subject to these criticisms which I have ventured to submit, it seems to me that this basis, as presented by the Sub-Committee, is one which might be commended to the favourable consideration of this committee in substitution for the old Bases Nos. 10, 17 and 18.

M. Giannini (Italy) :

Translation : I should like to submit a formula to the Committee and would draw attention to the principles it embodies. I agree that, in general, the State has no responsibility except in the case of manifest negligence. In view of this consideration, I propose the following text :

" A State is only responsible for damage caused by a private person to the person or property of a foreigner if it has manifestly failed to take such preventive or punitive meaures as in the circumstances might reasonably be expected of it. "

I think that this formula might satisfy several delegations and that, logically, it is more in line with the provisions of the Convention which we have so far adopted.

The Committee rose at 7.15 p.m.

THIRTEENTH MEETING

Wednesday, April 2nd, 1930, at 3.30 p.m.

Chairman : M. DIAZ DE VILLAR

28. BASES OF DISCUSSION Nos. 10, 17 AND 18 : PROPOSAL OF M. GIANNINI.

The Chairman :

Translation : We have to discuss M. Giannini's proposal concerning Bases Nos. 10, 17 and 18. It is as follows :

" A State is only responsible for damage caused by a private person to the person or property of a foreigner if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it. "

M. De Visscher (Belgium), Rapporteur :

Translation : On behalf of the Sub-Committee, I desire to support the text proposed by M. Giannini at the end of yesterday afternoon's meeting. In one very important respect that text differs from the wording previously submitted. It clearly brings out the fact that, in the case we are considering, the State's responsibility constitutes an exception. In principle — as a general rule — the State is not responsible for the acts of private persons. As I have said, the Sub-Committee supports this text.

Yesterday, I explained quite impartially the formula submitted by the Sub-Committee. To-day, I should like to give my personal view on this question. I think that, in the case under discussion, it should be clearly stated (and M. Giannini's proposal does this) that only an omission on the part of the State, a clear and definite failure to fulfil its duty of protection, can involve its responsibility. Non-responsibility must be considered as the rule and responsibility as the exception. I wish to say here and now that I entirely agree with what M. Buero said yesterday concerning the matter of proof. In the case we are now considering it is certain that the onus of proving lack of vigilance on the part of the State in whose territory the damage is caused falls on the claimant State. I want my attitude on this point to be as clear as possible.

If that is the understanding, and if the text is given that meaning, there is really no objection to the adoption of the provision now submitted. What do we say ? We say merely this : it is the duty of the State to provide a certain minimum protection for the benefit of the foreigner. It fails in this duty if it does not take such preventive or punitive measures as in the circumstances might be expected of it.

As to the existence of this general duty to furnish protection, we can have no doubt. If we did not agree on that point we might

wonder why we are here at all. Thus, it is clearly understood that there is no question of the State guaranteeing the security of the foreigner. The State does not undertake to guarantee that security. It merely has a duty to provide a certain minimum protection — such as could and ought to be expected of States that are members of the community of nations.

I am referring now to a formula with which you are well acquainted and on which agreement has been reached. Let us remember, too — and that is a further reason for adopting this text — that this provision, like all the others, presupposes a judicial decision. It can be applied only is sufficiently elastic to leave the judge all possible freedom of judgment.

For those reasons, as Rapporteur of the Sub-Committee which discussed this question and devoted two long meetings to it, I venture once more to urge the adoption of the text submitted, with the modification introduced by M. Giannini.

M. Guerrero (Salvador) :

Translation : Yesterday I opposed the Sub-Committee's proposal and gave reasons for my attitude. To-day I oppose M. Giannini's proposal.

M. Giannini desires to make us a concession. — at all events, that is what I understood. I must tell the delegate of Italy that, in my opinion, there are some concessions that can never be accepted, just as there are some questions on which no compromise is possible. The question now before us falls into that category.

Let us consider for a moment the concession M. Giannini makes us. It consists in recognising the non-responsibility of the State in respect of damage caused by a private person. I do not think that is any concession at all. This provision, indeed, makes no change in the present state of international law, according to which there is no responsibility for acts of private persons. Thus there is no concession.

The second part, however, asserts a new principle, to which I would direct the Committee's attention. If it is true that the whole of the proposal asserts the principle of non-responsibility, the latter part of this proposal nevertheless, asserts a very dangerous principle, according to which the State must offer certain special guarantees for the protection of the interests of foreigners.

When the next Conference is held on the treatment of foreigners, this provision will be invoked against all those who believe that the maximum a foreigner can expect is equal treatment with nationals.

The provision we are now asked to adopt absolutely destroys the principle of equality of treatment as between nationals and foreigners, since it compels States to provide special supervision for the benefit of foreigners and says that, if they do not fulfil this obligation, they are responsible.

In conclusion, as I do not wish to prolong the discussion, I repeat that I shall vote against the proposal in the new form submitted by M. Giannini.

M. Cavaglieri (Italy) :

Translation : I should like very briefly to inform M. Guerrero that we had no intention of making any concession to anybody. Our object was to give this principle the form which seemed to us to correspond most nearly to the facts.

We quite agree with him when he says that, in principle, damage caused by a private person to the person or property of a foreigner does not give rise to any responsibility on the part of the State. As that did not seem to be clear from the first formula, we employed a negative expression and said :

> " A State is only responsible for damage caused by a private person to the person or property of a foreigner if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it. "

Nevertheless, I think M. Guerrero will agree that there are cases in which a State may be responsible even in this connection, for instance, when its organs have not acted as they should have acted according to the principles of international law. In those circumstances we say, in a form which does not deserve the criticism levelled at it by M. Guerrero and which does not give rise to the difficulties he mentioned, that the State will be responsible only if it has not taken the measures that should — we might even say that could — reasonably be expected of it.

What are these measures? They will probably be the same as those which the State employs with regard to its own nationals, for it is obvious that, at the present stage of civilisation, foreigners ought to enjoy the same treatment as nationals. As, however, we do not wish to discuss the special question of equality of treatment as between foreigners and nationals, we limit ourselves to the sentence which I read, and which we think quite unobjectionable. It says that the State will be responsible if it has not taken the measures that in the circumstances might reasonably be expected of it.

Obviously a civilised State will, even as regards its own nationals, take such measures as in the circumstances might reasonably be expected of it. I think that all delegates even M. Guerrero, might approve of this innocent formula.

M. Buero (Uruguay) :

Translation : I desire to express my approval of the clause drafted by M. Giannini in consequence of my remarks yesterday.

I observe, in the first place, that the responsibility referred to in Bases Nos. 10, 17 and 18,

which are combined in the text before us, is not in reality the consequence of the action of a private person. The State is responsible through its failure to take such preventive or punitive measures as in the circumstances might reasonably be expected of it.

This is an attempt to develop the principle which we have already accepted — namely, that responsibility is the consequence of a failure on the part of the State to comply with an international obligation. We are now giving definite cases that follow from the same principle that this Committee has already accepted. Hence I do not think the present basis implies any very serious departure from the principle we have already accepted. On no account can the principle of responsibility be understood as giving foreigners the right to any special protection when the circumstances do not justify it. Consider the case of great countries which are still sparsely populated and where police supervision is very slight. I do not think that, with this wording, the State could be required to provide any greater supervision than it normally exercises.

Finally, I would ask the Italian delegation whether it would not be prepared to make its text still more definite by adding the word "wilfully". In that case the responsibility would be the result of bad faith on the part of the State. We should then say : . . . if it has wilfully and manifestly failed . . ."

M. d'Avila Lima (Portugal) :

Translation : As we have adopted the principle of objective responsibility, we must show the greatest caution in approaching the problem of responsibility for the acts of private persons, particularly in the light of the Sub-Committee's proposal and M. Giannini's amendment.

We cannot accept the view that the State's responsibility can be involved only by the acts or omissions of its organs and never by the acts of private persons *(communitas non tenetur ex facto singulorum).*

We adopt the same attitude with regard to the view that, in all cases the State is responsible for acts performed by private persons. This view is based on the consideration that the injured State cannot exercise jurisdiction within the domain of sovereignty of the other State, nor can it demand reasonable reparation direct from the guilty persons.

Still less acceptable is the idea of extending the judge's competence so that he may enquire into the stage of development reached by the internal administration and police organisation of the State in question.

How, then, shall we define the offence and the ultimate responsibility therefore in the case before us? The State can be required only to take the appropriate measures to prevent such acts, or, if they do occur, to prosecute the guilty party. That is the extent of the State's duty. Only in that respect is there any possibility of an infringement of international obligations. That is tantamount to saying that international law considers acts which are committed by private persons, and which injure or offend foreign States, as individual acts, for which the State is not responsible. To these acts, however, international law attaches definite international obligations and corresponding rights. A State is not responsible for an illegal act of a private person, but merely for the non-fulfilment of the obligations connected therewith in accordance with international law.

In conclusion, we cannot, in principle, admit the State's responsibility for damage done by private persons. There are, however, cases in which such responsibility may be rightly invoked — for instance, cases of insufficient protection or of negligence on the part of the local authorities. Such cases are, however, always subject to the principle that foreigners can never demand greater guarantees than are given to nationals of the country. Once these reservations are admitted as a whole, their application must be governed by the judicious empiricism recommended by the British commentary according to which : "What constitutes reasonable diligence is a question to be decided after consideration of all the facts and circumstances in each particular case."

M. Giannini (Italy) :

Translation : I think we have already said all that can be said on this question. Some delegations have accepted the formula I submitted. Others have made reservations. There is no unanimity, but apart from special cases, I think there is no question on which unanimity can be secured.

I venture to draw M. Buero's attention to the fact that, if we add the word "wilfully" in the formula I proposed, we shall limit the State's responsibility to cases of fraud and we shall not even cover the case of *culpa gravis.* That would be an impossible position. I would ask you to note particularly that we are dealing with a fault on the part of the State. In this particular case, the State is not responsible for the act of a private person. It is responsible for a fault on its own part committed in connection with the acts of private persons. We ought not to overlook that point when we vote. The State is responsible for the fact that it has not taken the necessary measures to prevent the harmful act committeed by the private person ; that is to say, it is responsible for manifest negligence. I think that, in such a Convention as the present, we are bound to include this minimum.

As all the arguments for and against the proposal have been advanced, I would urge the Committee to close the discusson on this point and to proceed to vote.

M. Urrutia (Colombia) :

Translation : I agree with the suggestion that a vote should be taken on this proposal.

As, however, I shall vote against the proposal, I should like to explain my reason for doing so. I yield to no one in my enthusiam for the work of codification, and I should not like my vote to convey the impression that I am unwilling to accept a reasonable proposal.

My country has already signed treaties with several countries in Europe and with almost all those of America providing that the State's responsibility towards foreigners is exactly the same as towards its own nationals. In view of that fact, my Government could not ratify a Convention which contained a contrary principle. In any case our parliament would not agree to it. I do not wish to emphasise this point, but I venture to recall certain facts.

The statement issued by the Institut de Droit international at its session at Oxford lays down that foreigners of whatever nationality should enjoy the same civil rights as nationals of a country, save for any explicit provisions to the contrary in municipal law. The same doctrine was embodied in the American Institute's Draft Code which states that the American republics do not recognise any obligations or responsibilities towards foreigners other than those stipulated with regard to their own nationals in their constitutions, their respective laws and the treaties in force. I would add that M. Maurtua and Mr. James Brown Scott quote decisions of international courts in which these principles are recognised.

As we have accepted the general principle that the State is responsible for the acts or omissions of its organs, I question whether there is any need to insert such an article. Personally, I could not accept it. Possibly other delegations find themselves in the same position as a result of existing treaties. In any case, since I am here as the delegate of my Government, I am bound to comply with the instructions I have received.

M. Politis (Greece) :

Translation : I realise that I made a great mistake yesterday in being too kind to our colleague, M. Giannini. In order to save our time, I proposed that, in the remaining meetings, we should confine our discussion to five problems. M. Giannini asked that a sixth problem should be added. It was given a preferential position.

M. Giannini (Italy) :

Translation : It is on the agenda.

M. Politis (Greece) :

Translation : Yesterday afternoon I proposed that the Committee should limit its work to five questions. M. Giannini spoke next and, referring to a proposal for combining Bases Nos. 10, 17 and 18, asked that another question should be added to these five. It was immediately decided that the discussion should start with that question. As I have said — I plead *mea culpa* — I made a great mistake in so kindly agreeing to that proposal.

What is the result ? We discussed the question for an hour yesterday and we have been discussing it for an hour today, and the discussion is not finished now. Even if we accepted M. Giannini's proposal to take a vote at once, we could not refuse the request of all who desire to give reasons for their votes.

Personally, I should be obliged to explain the very serious reasons for which I am unable to accept M. Giannini's wording. Although it is an improvement on the wording proposed by the Sub-Committee, it is, I think, still too indefinite to become an article in the Convention.

Accordingly, I propose that the discussion of this question should be postponed. We should deal first with the other five questions to which I referred yesterday. If time remains, we might use it to discuss and vote on this question.

You could quite easily adopt my suggestion more especially as this basis seems to add nothing essential to the general principle enunciated at the head of our Draft Convention. The alternatives are clear. Either the State is under an international obligation to exercise certain diligence in the protection of foreigners and, if it fails to comply with that obligation, it is responsible in accordance with Basis No. 1, or else there is no such obligation — or it is not sufficiently definite — and we should have to start by defining it before deciding whether such a failure to comply with it involves any international responsibility.

For those reasons I strongly urge that the discussion of this question should be adjourned.

Mr. Lansdown (Union of South Africa):

I do not know whether the Committee wishes to deal with the point of order raised by M. Politis now, but on the previous point of order — namely, that we should take a vote on M. Giannini's proposal, I wish to say a word. After all, what we are dealing with here is a very important principle, and we have not devoted very much time to its discussion. The matter was introduced at a late hour yesterday ; it will be remembered that M. Giannini's proposal was made the very last thing last night, just after I had spoken.

I feel there is much in M. Giannini's proposal that I can support. I can support the idea — it is a substantial amendment of the original proposal — that the principle should be stated in a negative form ; that is, that we should affirm the irresponsibility of the State in principle and affirm responsibility as an exception.

There are one or two points, however, in regard to which I should like to know whether M. Giannini would meet me, so as to enable me to vote for his proposal. If he were able to do so, he would make my task very much easier. He will remember I referred last night

to the omission of the word "remedial". I think that is a matter of importance. I am not going to repeat the arguments I used last night. You will remember that last night I put to you certain points.

M. Politis (Greece):

Translation: I request the Chairman to apply the Rules of Procedure. I have asked that this discussion should be suspended.

Mr. Lansdown (Union of South Africa):

If I am not allowed to ask M. Giannini this in order to clear the way for my own vote, I may have to move an amendment. I want to know whether M. Giannini will not obviate the necessity for my having to do that by adding the words "or remedial" here, because it seems to me the expression "preventive or punitive" does not embody the idea I want include, and the matter will be very much clearer from my point of view if the mover would accept my suggestion.

There were other points which I wished to mention. I wished to show that there is no necessity for the word "manifestly" or the word "wilfully". However, I shall not deal with those points now.

M. Chao-Chu Wu (China):

On a point of order, I have been hitherto a model of good behaviour because I have been silent throughout, but on a question so important as this I feel it necessary to intervene

If the Italian amendment is to be discussed now, I shall feel it my duty to move an amendment — a very simple one — putting the foreigner in the same position as the national of a country. If, however, M. Politis's motion of order is to be put now and voted on, I shall not move my amendment; I second M. Politis's motion to adjourn the discussion for the present.

M. Sipsom (Roumania):

Translation: On a point of order M. Politis proposes to postpone the discussion of this question. Nevertheless, I think good progress has already been made in this discussion. Undoubtedly we have lost much time, but we might conclude the matter now. It would certainly be better to continue the discussion for a short time and then vote.

M. Politis (Greece):

Translation: There are still ten names on the list of speakers.

M. Sipsom (Roumania):

Translation: We might vote on the proposal to adjourn the question.

M. De Visscher (Belgium), Rapporteur:

Translation: This is how the matter stands. As Rapporteur I felt it my duty — I might say I was bound in courtesy — towards my colleagues with whom I worked on the Sub-Committee to see that the question to which long meetings had been devoted came before the plenary Committee. I fully realise that we have reached the last stage of our work and that there can now be no question of prolonging the discussion on this proposal.

We have to consider two points of order. According to one, there would be an immediate vote. If you think such an immediate vote is possible, and that is my own opinion, we might vote at once, and there would be no need for many explanations of the votes given. I have often voted, but I have not often felt any need to explain my vote. If, on the other hand, you think we should abandon any immediate and definite vote, I am prepared to support M. Politis's proposal. We cannot hold up the Committee's work any longer.

M. Politis (Greece):

Translation: I request the application of the Rules of Procedure.

M. Sipsom (Roumania):

Translation: I desire to speak on a point of order. I ask that M. Politis's point of order should be put to the vote.

M. Politis (Greece):

Translation: Apply the Rules of Procedure!

M. Limburg (Netherlands):

Translation: I desire to speak against M. Politis's proposal. I agree with what the Rapporteur said. Both yesterday and to-day we have had a long discussion on Bases Nos. 17 and 18. We can now proceed to vote. If we adjourn all the bases about which there is any difficulty, we shall end by having a Convention with nothing in it at all. Accordingly, I think we should now vote on M. Giannini's proposal. I oppose an adjournment which would, in reality, postpone the matter *ad calendas Græcas.* I do not, of course, refer to M. Politis personally when I speak of the Greek Kalends, but I think any postponement would indeed be *ad calendas Græcas.*

M. Politis (Greece):

Translation: The question is, what point are you postponing to the Kalends?

The Chairman:

Translation: I venture to draw the Committee's attention to the fact that there are fourteen names on my list of speakers on these bases. I propose that the Committee should vote on M. Giannini's point of order.

M. Politis (Greece):

Translation: I regret to have to say that this is not in accordance with the Rules of

Procedure. When we have two points of order, we must vote on the more radical, and mine is the more radical. I do not mind if the Committee rejects my proposal, but I must warn it that the discussion will not be concluded as easily as the Rapporteur and M. Limburg believe. They say we should proceed to vote: but you cannot prevent any delegations from explaining their vote.

Personally, I reserve to myself the right to explain my vote and to inform you of the reasons why I cannot accept M. Giannini's proposal. In this indirect way the discussion will continue. Thus, it is not correct to say that there are two simple solutions — either adjourn the discussion or vote immediately. For, if you decide to vote now, you will be agreeing to the continuation of the discussion in an indirect manner.

I therefore request that my proposal should be voted on first. It is radical. It is to the effect that the discussion of the present basis should be adjourned.

M. Dinichert (Switzerland):

Translation: We cannot, of course, prevent anyone from raising a point of order such as that submitted by M. Politis. Nevertheless, I regret — I sincerely regret — to have to tell M. Politis that, after having been unable to agree with him yesterday, I again find myself in a similar position as regards his point of order. As I was a member of the Sub-Committee, I am entitled to say briefly why I cannot vote for this motion.

The Committee should remember that it decided to refer the three Bases Nos. 10, 17 and 18 to a Sub-Committee for thorough consideration. The Sub-Committee has done its work. As the Rapporteur has just said (and he is entitled to say it, since he was called upon to preside over this work), it devoted much time to this matter and studied the question thoroughly. I am not discussing the proposal it has submitted — I am not entitled to do that at present. Nevertheless, I must remind you that the Sub-Committee really invented nothing new when it framed its proposal, which is merely a combination of the three Bases of Discussion proposed by the Preparatory Committee after almost all the Governments had expressed their approval of these bases. Opinions differing from those which were known to us before the opening of this Conference may, of course, be expressed here. Nevertheless, I think that (particularly as far as concerns, if not all our Governments, at least a large number of them) people outside will fail to understand why the Committee simply decided to avoid a discussion and a vote on these bases.

Why should we not vote on them? M. Politis admits (and on this point I agree with him) that the adjournement of these bases will mean that this Conference will not consider them any further. After the work that has been done on these bases, after receiving suggestions from almost all the Governments which sent in their replies when the work was being prepared, I really see no justification for the suggestion that we should not vote on this matter. Whether the discussion has been long or short is not for me to decide, but I think we cannot prevent anyone from explaining his vote. I am bound to ask that, at the stage we have now reached, this Basis of Discussion should be put to the vote. I am not in any sense anticipating the result of the vote, but I am sure it will be of the greatest value to Governments, and perhaps to other bodies also, to know the feeling of the Committee with regard to this proposal.

Accordingly, I propose the rejection of M. Politis's motion. Of course, if the Committee subsequently decides to vote on the suspension of the discussion, I should raise no objection.

M. Richter (Germany):

Translation: I should like to say a few words in support of M. Politis's proposal. I think it is impossible for us to take an immediate vote on M. Giannini's proposal. We have been given two interpretations of this text, and by the two most competent authorities — namely, M. Giannini, who made the proposal, and the Rapporteur.

According to the Rapporteur, the word "manifestly" was introduced to bring out the fact that the burden of proof lies on the claimant party. According to M. Giannini, this word refers to cases of fraud, *culpa lata*.

Thus, we have two explanations that are quite different, and in view of this difference I am not able to vote at present. As our time is limited, I support M. Politis's proposal to adjourn the discussion.

M. Guerrero (Salvador):

Translation: Mr. Chairman — I beg you to apply the Rules of Procedure forthwith and put to the vote the proposal made by M. Politis, which I personally support.

Several Delegates:

Translation: Let us vote!

The Chairman:

Translation: As M. Guerrero is the most competent authority regarding the Rules of Procedure I shall follow his advice and put M. Politis's proposal to the vote.

M. Matter (France):

Translation: I waive my right to speak.

M. Giannini (Italy):

Translation: The proposal I made at yesterday's meeting was intended as a compromise. In the circumstances, I see that it is quite useless to submit proposals for compromise. I therefore withdraw the formula I proposed.

M. Politis (Greece) :

Translation : I request the Chairman to ask the Committee to vote, for it cannot do so of its own accord.

M. Matter (France) :

Translation : After so long a discussion, I regret that anyone should be prevented from expressing his opinion.

I think agreement between M. Giannini and M. Politis is very easy to reach. I merely wish to add that an attempt has been made to bring about such an agreement and has succeeded.

Having said that, I waive my right to speak.

M. Erich (Finland) :

Translation : After the vote on the point of order, I reserve to myself the right to read a short statement.

M. Limburg (Netherlands) :

Translation : Am I allowed to ask a question?

The Chairman :

Translation : I put M. Politis's proposal to the vote.

M. Politis's proposal was adopted by 21 votes to 18.

29. BASES OF DISCUSSION Nos. 5 AND 6 : NEW TEXT SUBMITTED BY THE FIRST SUB-COMMITTEE.

The Chairman :

Translation : We shall now proceed to consider Bases Nos. 5 and 6.

M. De Visscher (Belgium), Rapporteur :

Translation : The Chairman asks us to consider Bases Nos. 5 and 6. They are concerned with the responsibility incurred by the State, through the acts of its judicial organs. You have before you the text drawn up by the First Sub-Committee in substitution for the former text of these bases (Annex III, No. 5) :

" A State is responsible if a foreigner suffers damage as a result of the fact :

" 1. That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State ;

" 2. That, in a manner incompatible with the international obligations of the State, the foreigner has been hindered in the exercise of his rights by the judicial authorities or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice.

" The claim against the State must be lodged not later than one year after the judicial decision has been given."

This text was drawn up by the Sub-Committee subject to verbal modifications. After the plenary meeting on Friday, the Sub-Committee had before it a very large number of amendments — ten or twelve, I think. The Sub-Committee endeavoured to find a text that might be a compromise between these very numerous proposals, which revealed considerable divergences. As a compromise, it submits the text now before you. I venture to emphasise that point, particularly in view of the stage we have reached in our work.

I would add that the Sub-Committee included all the authors of the amendments submitted and also all the speakers whose names were on the list at the end of Friday's meeting. That shows that this text was drawn up by a meeting that might be considered fully representative of the different opinions expressed here. After the very difficult discussions in which we engaged, the text now submitted was unanimously adopted. We may therefore hope that these various considerations will facilitate the adoption of this text.

M. Buero (Uruguay) :

Translation : I am sorry to disappoint the Rapporteur, but I must explain why it is difficult for me to accept this text, particularly paragraph 2.

I have always thought we ought to oppose the view that the foreigner has any special status under international law. I think the second part of the article submitted by the First Sub-Committee should read thus :

" That, in a manner incompatible with the international obligations of the State, the foreigner has been hindered by the judicial authorities in the exercise of his right to appear in Court or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice."

The second part of the text is, in fact, intended as a definition of denial of justice. Only in that sense could I accept this basis. It would be quite impossible for me to accept it if it established for the benefit of foreigners any guarantees other than those afforded to nationals.

This is my reason. My country, Uruguay, has signed with certain countries — for instance, England, France and Italy — treaties which definitely stipulate that, when the judicial authorities of the country are competent to deal with the question at issue, it is only in the case of denial of justice that arbitral jurisdiction may be invoked with regard to a dispute between a private person or corporation of one of the contracting States and the other contracting State. Thus, if we accepted the basis as drafted by the Sub-Committee, the guarantees we have already secured by these bilateral agreements or special conventions with certain countries — England, France, Italy — would be diminished since we should be giving the foreigner a special status under international law.

I therefore ask whether, in this respect, the Committee could not agree to modify the present wording in the passage referring to the rights exercised by the foreigner.

M. De Visscher (Belgium), Rapporteur :

Translation : I wish to explain at once the part of the text to which M. Buero referred. The Uruguayan delegate drew attention to the fact — which perhaps surprised several of you — that the second paragraph refers to hindrances put by the judicial authorities in the way of the foreigner's exercise of his rights. At first sight, indeed, this very general formula, which does not seem to refer directly to the right to appear in court and which does not — as might have been expected — speak of refusal of access to the courts, seems somewhat too general. I pointed that out myself during the Sub-Committee's work. I received a reply which explained this part of the text. I was told — by the United States delegation among others — that it was necessary to cover decisions by the judicial authorities in matters such as detention pending trial — *habeas corpus* — and that it was not a question of refusal of access to the courts.

That is true. The judicial decisions involved are those which may be given by the courts in a special matter — personal liberty. Hence, our American colleagues were very anxious that this more general formula should be included in paragraph 2 of the proposal.

At first sight it might seem logical — and I emphasise this point so that you may clearly understand the structure of our text — to include in paragraph 2 the following three possibilities : refusal of access to the courts, obstacles placed in the way of proceedings, delays in the course of proceedings.

Personally, I should have liked to keep to those ideas, but it was thought that the term " refusal of access " was too narrow, and our Anglo-Saxon colleagues urged the employment of a more general formula.

Mr. Hackworth (United States of America) :

Mr. Chairman — I find myself under the necessity of opposing the suggestion of the Uruguayan delegate for several reasons.

First of all, I cannot see that there can be any objection to stating that a State ought to be responsible if the judicial authorities hinder a foreigner in the exercise of his rights. Why should not a State be responsible if the judicial authorities do not give the foreigner a chance to present his case in a reasonable way, give him a fair hearing and enable him to obtain justice as we understand the word? Are we to permit the courts to hinder litigants before them in the presentation of their cases? Are we to permit them to interpose dilatory objections of one kind or another and thus to hinder the foreigner in his efforts to obtain justice in the courts, or are we to expect from the courts that standard of fairness which will be calculated to give complete justice to litigants? I do not think that the American delegation could accept this proposal in any narrower form than that in which it is now stated. We would have to have everything that is in paragraph 2. We would, in fact, like to see it broader than it is.

Another point I wish to make is in regard to paragraph 3, which, to my mind, would reduce to too short a period the time in which a claim might be presented. Often a claimant is hindered in bringing together and presenting his case to the Foreign Office in a such a fashion as will enable the Foreign Office thoroughly to understand the claim. The Foreign Office must correspond with the claimant in an effort to have the claim explained, corrected and presented in a manner which will be understandable, and, where large numbers of claims are being considered by the Foreign Office, it is impossible in many cases to reduce a claim to that state of completion which will enable the Foreign Office to decide whether or not there is a claim which it ought to espouse.

Another reason for objecting to paragraph 3 is the fact that it is in the nature of new legislation. At the present time, there is no statute of limitations on the presentation of diplomatic claims. Our purpose here is to codify international law. By adding this paragraph we would, in effect, be making new law, and we would be circumscribing the rights of claimants and the rights of their Governments in the matter of obtaining justice through the diplomatic channel.

M. de Adlercreutz (Sweden):

Translation : In this text there is only one word I should like to omit — namely, the word " clearly " *("manifestement")*. Whilst it was appropriate in the text submitted just now by M. Giannini, I think it is superfluous here. In the Italian proposal the point was whether a State had manifestly failed to take preventive or punitive measures. That was a question of appreciation of the facts. The question whether a judical decision is or is not compatible with a State's international obligations is, however, not a question of appreciation of facts. It is a question of law.

Consider, for instance, the case where a dispute is brought before the Permanent Court of International Justice It is claimed that a judicial decision given with regard to a foreigner is clearly incompatible with the international obligations of the State concerned. The Court might be unanimous in considering that the decision was, in fact, incompatible with those obligations. But it would then have to decide whether that incompatibility was clear or not. Would not that be a very strange situation?

I think the insertion of this word would be illogical, for if a State's responsibility is involved through a judicial decision, it will be so, quite apart from the question whether the incompatibility is more or less clear, more or less evident. The mere fact that the incompatibility exists should be sufficient.

For these reasons I request the omission of the word " clearly " *(" manifestement ")*.

Mr. Beckett (Great Britain) :

I have only three points to mention, and I shall be very brief. First of all, I hope that, when this proposal is put to the vote, paragraph 3 will be separated from paragraphs 1 and 2. Paragraph 3 is of an entirely different character; it is a question with regard to the time within which claims must be made. I think, therefore, that, when putting these points to the vote, paragraphs 1 and 2 might be put separately and paragraph 3 taken by itself at the end.

I am able to accept paragraphs 1 and 2 as they stand. With regard to the two criticisms which have been made of the wording, and taking first that made by M. de Adlercreutz just now, I entirely agree with everything he said with regard to the word " clearly " in the English text and " *manifestement* " in the French text. That word is quite unnecessary, and personally I do not think it has any effect at all. I would much rather see it deleted, though if necessary I should be prepared to accept the text as it stands.

I think the word is much better left out, however, because it imposes on the Permanent Court the unpleasant duty of saying not only that a decision is incompatible but that it is clearly incompatible, which means applying an unnecessarily unpleasant term to the decision in question.

With regard to the second point, the words " in the exercise of his rights " in paragraph 2, I agree with Mr. Hackworth that the proposal of M. Buero cuts it down rather too much. I have only one suggestion to make on that, and I do not want to press it unless it is accepted by everybody. I think we might say " hindered in the *enforcement* of his rights ". The phrase " hindered in the exercise of his rights " contains words hardly sufficiently connected with a judicial tribunal, but the text " hindered in the enforcement of his rights " is I think better, because a tribunal is the place to which you go to enforce your rights. By using that phrase you limit its significance to a certain extent but not so much as by the wording proposed by M. Buero.

The Chairman :

Translation : In order that the discussion may proceed on orderly lines, I propose that speakers confine their remarks to the first paragraph of the text submitted by the First Sub-Committee.

M. Crusen (Free City of Danzig) :

Translation : The word " clearly " *(" manifestement ")* in the text proposed by the First Sub-Committee has been criticised, and, I admit, not without reason.

The word " evident " *(" manifeste ")* was used in the proposal submitted by the delegations of Poland and Danzig. It occurs again in the text adopted by the Sub-Committee. When we employed this word, we did not intend to complicate the Permanent Court's task by requiring it to find that a State had clearly violated the laws which imposed on it an international obligation.

We used this word in order to ensure that the facts which give rise to proceedings before the Permanent Court should not be too numerous. We tried to limit their number by using this word " clearly ", so that such cases could arise only through facts that were indisputably contrary to the State's international obligations.

It would, I admit, be unpleasant for a State to be told that it had clearly infringed the law. But we could not find a better word. The Danzig delegation would willingly agree to this word being replaced by any other that seemed more satisfactory.

M. Sipsom (Roumania) :

Translation : The omission of the word " clearly " has been requested. The Swedish delegate gave the reason why he thought the omission was desirable. He explained that this word would compel the Court to give an unnecessary decision on a delicate question.

The delegations of Poland and Danzig replied that this word would emphasise the incompatibility. I think that idea is justified.

If we were dealing here only with obligations arising either from treaties or from custom, there would perhaps be no need for any long discussion. But we have included in international obligations those which arise from principles. This question is neither clear nor definite. It is a matter for appreciation. It must be clear from the outset that there is a definite infringement of international law through the non-fulfilment of an obligation. The Court merely finds that such non-fulfilment is a fact. Only in those circumstances can a State's international responsibility be involved.

Some obligations on the part of the State are determined by customary law, others by convention. But there are also obligations which arise from international principles. These need careful appreciation. We may say that an obligation is unfulfilled only when there is clear incompatibility with such principles.

That notion seems to be expressed by the word " clearly " *(" manifestement ")*.

M. Cohn (Denmark) :

Translation : I shall have some remarks to make concerning the third paragraph. In

regard to the first, I merely wish to support the Swedish delegation's proposal to omit the word " clearly ".

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : Some members of this Committee desire the omission of the word " clearly" (" *manifestement* "). Others have endeavoured to justify the use of that word. The Egyptian delegation is in favour of its retention.

It is very important, however, that we should agree as to the exact meaning of the word. Some speakers have explained it in its etymological sense — " *clairement* ". That is, moreover, the word used in the English text. Others saw in it a measure of the gravity of failure to comply with an international obligation.

In my view the former interpretation should be accepted. The insertion of this word would prevent a doubtful case from coming before an international court. If there are valid reasons for differences of opinion as to the incompatibility, the State's responsibility could not be said to be involved.

I venture to disagree with those speakers who think that the task of the international judge would be more difficult if the incompatibility had to be clear. Even if we admit that the task would become more difficult, the States would find themelves in a much clearer position. Their responsibility would be confined to cases where incompatibility was indisputably recognised and there could be no difference of opinion.

That is how I interpret the word " clearly ", and in accordance with that interpretation I shall vote for it. If the Committee gives it a different meaning, it would be well for all its members to be informed what that meaning is.

M. Nagaoka (Japan) :

Translation : Not only is the Japanese delegation in favour of the retention of the word " clearly ", but it even goes so far as to insist on that retention.

Just now several references were made to the difficulty in which the Permanent Court of International Justice might find itself if it had to interpret the word " clearly ". I should like to point out that there are several stages of procedure. As everyone will agree, all disputes do not reach the Permanent Court of International Justice ; most of them are settled by procedure at the first stage — namely, diplomatic negotiations.

If the word " clearly " is not inserted, disputes will be left at the mercy of any Government which desires to criticise a judicial decision. If the word " clearly " is retained, the claimant Government will be required to furnish the countries which are members of the Court with clear proof that the decision is incompatible with international obligations.

For these reasons I think the retention of the word " clearly " is of the greatest importance. As I consider that the discussion has now been completed, I would ask the Chairman to put paragraph (1) to the vote.

M. De Visscher (Belgium), Rapporteur :

Translation : M. Nagaoka raises a point of order and asks that a vote shall be taken on the first paragraph of this basis.

I understand that there is an amendment to the effect that the word " clearly " should be omitted. May I consider as an amendment the proposals made just now and the arguments advanced ?

M. Dinichert (Switzerland) :

Translation : I asked to be allowed to speak, as I wished to make another remark with regard to paragraph (1).

M. De Visscher (Belgium), Rapporteur :

Translation : I would point out to M. Dinichert that we are now considering the point of order. The Committee must be asked to decide whether the vote should now be taken. If it does so decide, we shall have to consider whether or not there is any amendment. If there is an amendment, M. Dinichert might make his remarks before the vote is taken, so that they may be duly noted.

M. de Adlercreutz (Sweden) :

Translation : I understand that the Rapporteur enquired whether there was any amendment.

M. De Visscher (Belgium), Rapporteur :

Translation : Yes, an amendment to the effect that the word "clearly" should be omitted.

M. de Adlercreutz (Sweden) :

Translation : There is such an amendment. If this amendment is deemed to exist, I should like to point out that I asked to be allowed to speak before M. Nagaoka spoke. I should like to add a few words to the proposal I made just now.

M. De Visscher (Belgium), Rapporteur :

Translation : You desire to speak in support of your amendment ?

M. de Adlercreutz (Sweden) :

Translation : Yes.

M. De Visscher (Belgium), Rapporteur :

Translation : In that case it would be well if M. de Adlercreutz explained at once what he meant with regard to the word " clearly " (" *manifestement* ").

M. de Adlercreutz (Sweden) :

Translation : I asked to speak because I desired to express the same idea as Badaoui

Pacha. I should like the Rapporteur to explain the Sub-Committee's attitude with regard to the insertion of the word "clearly".

It has been said that the Permanent Court of International Justice should be protected in respect of the number of cases that may be brought before it. The opinion has also been expressed that, with that object, the Court should deal only with those cases which are easiest, that is to say, those in which the incompatibility is clear.

M. De Visscher (Belgium), Rapporteur:

Translation: Many members of the Sub-Committee thought that the word "clearly" added nothing to the meaning of the text before you. Others thought, however, that this word was very important. The word "clearly" was finally included in the text by way of compromise. The same remark applies, in fact, to the whole text of this document.

I now answer M. de Adlercreutz's question. The Sub-Committee used the word "*manifestement*" ("clearly") as a synonym for "*clairement*"; it attached no other meaning to that word. As M. de Adlercreutz has now explained the purpose of his amendment and has asked the questions he considered necessary I think we might proceed to vote, taking first M. de Adlercreutz's amendment to the effect that the word "clearly" should be omitted.

M. Matter (France):

Translation: Let us vote!

M. Giannini (Italy):

Translation: I have only a brief statement to make.

I do not object to the proposal to consider the three parts of this basis separately. Nevertheless, before voting on the first, I would remind my colleagues that, when you begin to hurry on the work of a Conference you must be prepared to make heavy calls upon your digestion, particularly where mixed dishes are concerned. Personally, I am quite ready to do so.

After all, what is this basis? It is a combination of all the proposals made. If we wish to agree on a basis that is fundamental to the Convention we must be prepared for certain compromisies. If you vote separately on paragraph (1), I must tell you that I do not like it. But if you ask me whether I am prepared to vote for the basis as a whole, I answer "Yes".

I wished to make this statement because, if the basis is divided, my critical faculty will adversely affect my digestive power. That is why I would urge that this is a fundamental basis and that, consequently, we ought all to be prepared to compromise. I would therefore beg you not to stress certain details, and I would ask M. de Adlercreutz not to insist on his amendment. Let us make ready to swallow this mixed dish.

M. Matter (France):

Translation: Once more I fully agree with M. Giannini. Once more I am going to make a strong and earnest appeal to that spirit of agreement, conciliation and compromise, which has reigned in this Committee for the past fortnight.

Of course this text is not perfect. Of course it does not satisfy everyone. Of course it contains too much of some things and too little of others. But it does exist.

Unless you took part, as M. Giannini and I did, in the Sub-Commitee's discussions, you could not realise how carefully, meticulously even, its work was done. We succeeded in framing the text that is before you. I admit it has certain defects. Personally, I should not accept everything in it. If I were alone and in the silence of my study I might, perhaps, draft it differently. But I am not alone here, and my Government is not the only one represented.

We tried to find the resultant of opposing forces. We tried to make some progress, to achieve some results, not in a more or less distant future, but to-day. Belonging to forty-five different civilised nations, we added together, as it were, the knowledge that each one of us could contribute to the common stock. We succeeded. The text exists, and if, as I see a hand raised on my right, I may entertain a secret hope, I would ask each of you to sacrifice his individual demands and accept this proposal as a whole. Thus we might reach unanimity on what is one of the essential bases of this great agreement.

Once more I appeal for that unanimity but this time, I do it with all the earnestness in my power.

M. de Adlercreutz (Sweden):

Translation: If my amendment had been put to the vote at once the vote might heve been taken five minutes ago. In view of the appeals just made, I am quite prepared to withdraw my little amendment but on condition that the authors of other amendments to this paragraph do the same; otherwise, I shall ask for my proposal to be put to the vote.

M. De Visscher (Belgium), Rapporteur:

Translation: M. de Adlercreutz stated that he would withdraw his amendment if no other were submitted.

M. Politis (Greece):

Translation: The Rules of Procedure are not being observed.

M. De Visscher (Belgium), Rapporteur:

Translation: As no amendment is proposed, I put paragraph (1) to the vote.

Paragraph (1) was adopted unanimously.

M. Dinichert (Switzerland):

Translation: I think I am entitled to ask permission to make a statement concerning

the vote that has just been taken. At least a quarter of an hour ago I sent in my name because I wished to speak on paragraph (1).

I intended to propose the omission of the words: "which is not subject to appeal". Now that the Committee has voted, I am not allowed to explain my proposal, but I am bound to say, in order that my statement may appear in the minutes, that as I have not been able to explain my point of view and perhaps persuade the Committee to adopt it, I must here and now make the fullest reservation on behalf of my Government as regards the possibility of accepting this provision. My Government thinks that this provision prejudices a fundamental juridical question — namely, the question of the time at which a decision contrary to international law involves a State's responsibility.

I am not allowed to speak now. I always bow to decisions; but on behalf of my Government I must make this statement, as the Swiss Government, if it signs the agreement, may be compelled to make a formal reservation regarding this provision.

The Chairman:

Translation: We shall now discuss paragraph (2) of the text proposed by the First Sub-Committee in substitution for Bases Nos. 5 and 6.

M. Giannini (Italy):

Translation: This second paragraph repeats the first part of a Polish proposal which was based on a declaration in the Pan-American Convention. I heard M. Buero raise some objections to this formula. I was surprised to see that the American States are not satisfied with this Pan-American formula. I had thought we should have had their united support.

The second part of the second paragraph contains the formula submitted by M. Matter. What does this second paragraph amount to? It is the interpretation of what, at the present time, we consider to be a denial of justice, but it does not mention that expression. We have merely made a slight change at the end of M. Matter's proposal by saying "unjustifiable obstacles or delays implying a refusal to do justice". After a long discussion, this formula was unanimously adopted by the Sub-Committee.

As the Sub-Committee was unanimous concerning this formula, I shall vote for the second paragraph for the same reasons as those which led me to vote for the first.

But now Mr. Beckett submits an amendment in order to meet certain objections raised by M. Buero. I must explain the differences between the two formulæ submitted.

Mr. Beckett (Great Britain):

That is a mistake. There is no amendment.

M. Giannini (Italy):

Translation: In that case I withdraw my observations. I think it would be very dfficult to find a more satisfactory formula than that on which we all agreed in the Sub-Commitee, subject to any slight formal modifications that may be made at the time of the final drafting. As this text was unanimously adopted by the Sub-Committee, I venture to ask the Committee to expedite our work by proceeding to vote.

M. de Vianna Kelsch (Brazil):

Translation: I am one of those who has done least to impede this Committee's work, but I must say that the words "the foreigner . . . in the exercise of his rights" lend themselves to many interpretations, and that my Government would never ratify an article containing this expression. I could not accept this second paragraph unless it were drafted as follows, or in words to the same effect:

> "That, in a manner incompatible with the international obligations of the State, the foreigner has been deprived of the right to have recourse to the judges and the courts or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice."

I know I shall rouse a storm, and that plenty of arguments will be advanced to show me that I have failed to understand. But I shall not change my view.

Abd el Hamid Badaoui Pacha (Egypt):

Translation: In order to remove certain apprehensions, may I point out that the phrase "the exercise of his rights" does not prejudice the question of the treatment of foreigners? The question whether the foreigner should have the same treatment as the national or a different treatment is left open. It would have to be shown that the foreigner had certain rights, and then that the obligation had not been fulfilled. The acceptance of this formula therefore leads to no difficulties or uncertainties as it leaves quite open the question as to what is the nature and extent of the treatment accorded to the foreigner.

M. Sipsom (Roumania):

Translation: The expression "the foreigner . . . in the exercise of his rights" in the second paragraph seems to make agreement difficult, as it may bear various interpretations. That is why M. Buero proposed to substitute for it a formula which included only the right to appear in court. The Rapporteur replied as follows: "You are quite likely to be right, but we had to take account of conflicting opinions, and particularly of a remark made by the United States delegate to the effect that denial of justice, as he understands the term, does not meet all his wishes. To satisfy that delegate this rather more general formula was devised, covering also the point he had in mind.

I quite understand the Rapporteur's anxiety, but I would point out that the wishes

of the United States delegate which led to the change in the formula are specifically met by Basis of Discussion No. 11, which says : "A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty."

M. Giannini (Italy) :

Translation : Where is that provision? Is it outside the Convention?

M. Sipsom (Roumania) :

Translation : It will be in the Convention as soon as it is adopted.

M. Giannini (Italy) :

Translation : When will that be? At the next Conference?

M. Sipsom (Roumania) :

Translation : There are many other questions on which we have not voted. Some of them are very important — for instance, the question concerning the limitation of a State's responsibility in the case of legitimate self-defence. Yet that was the necessary corollary to provisions we have already adopted concerning the State's responsibility.

Why should we introduce, without previous discussion, points that are contained in Basis No. 11 ?

I think we should meet the wishes of the Rapporteur if we referred the delegations of the United States and Great Britain to this text, which will be discussed in due course — "à la suite", as M. Politis neatly said — but which we cannot interpolate in a disussion that is already proceeding. Basis No. 11 *in terminis* fully meets the American delegation's wishes. There is therefore no reason for including this idea — which is still undigested, as M. Giannini said — in the article now under discussion.

It would be more reasonable to adopt the formula proposed by M. Buero and replace the words : "in the exercise of his rights" by the words : "in the exercise of his right to appear in court". The anxiety it is intended to remove by another formula — a somewhat strained one — seems, on examination, to be unfounded.

The Chairman :

Translation : I put paragraph (2) to the vote.

M. Buero (Uruguay) :

Translation : I submitted an amendment to the effect that the words "in the exercise of his rights" should be replaced by the words "in the exercise of his right to appear in court ".

M. De Visscher (Belgium), Rapporteur :

Translation : M. Buero's amendment should indeed first be put to the vote. It makes the text more definite.

M. Buero's amendment was adopted by by 15 votes to 7.

M. De Visscher (Belgium), Rapporteur :

Translation : As the amendment has been accepted we must now vote on the whole of paragraph (2) as amended.

Paragraph 2 was adopted by 30 votes to 0.

M. Giannini (Italy) :

Translation : I desire to point out that paragraph (3) was inserted by the Sub-Committee in accordance with the Danish delegation's proposal, which it simplified somewhat. As our Danish colleague stated, this proposal originates from a formula that appears in certain arbitration and conciliation treaties signed by Switzerland. The formula has been considerably enlarged in scope. An almost similar formula is found in a hundred different conventions.

What is the object of this provision ? It is to prevent a State from being indefinitely threatened with international proceedings.

M. Cohn (Denmark) :

Translation : After the Italian delegate's explanation, I can be very brief. May I point out that the reasons for this proposal are not only of an international character but are also connected with civil law?

National jurisdiction has, in reality, two objects. It has to settle disputes between private persons. It must do this impartially, but it is no less important that such disputes should be settled finally. Practical life demands this. It is a necessary condition for maintaining order in any society.

We are granting foreigners engaged in litigation a very great privilege when we allow them to raise afresh a question that has already been finally settled by the highest national court.

This privilege must not be pushed too far. There must be a limit. Moreover, such a rule is found in many treaties : for instance in almost all the arbitration and conciliation treaties concluded between Denmark and many other countries.

An objection has been raised to the effect that the time-limit is rather short. I think so, too. These questions must be very carefully considered before a claim is made. I should be glad if the time-limit could be extended to two or three years. We might also leave the appreciation of such matters to the international court.

I do not wish to propose another formula, but the following wording might be employed :

> "Claims against a State must be lodged within two years of the date of the judicial decision, unless it is proved that there are special reasons which justify an extension of that period."

There may have been certain apprehensions as regards decisions that have already been

given. But, as I understand it, the rule we are going to insert in the Convention will apply only to disputes which arise in the future. Such a provision will affect only decisions that are given after the entry into force of the Convention.

M. Dinichert (Switzerland) :

Translation : I accept the provision contained in paragraph (3), but I think it is not in its right place. It is connected with the provision concerning remedies.

We are rightly reminded that this provision has been introduced in many arbitration treaties. I think that amongst the first arbitration treaties in which it was introduced were those concluded by Switzerland.

The State's responsibility may be invoked only after exhaustion of the remedies. Nevertheless, it is understood that, when the remedies have been exhausted and a final decision has been given, there must be a time-limit for the institution of international proceedings.

Thus it is quite a mistake to connect this provision with that concerning the State's responsibility for the judiciary. It ought normally to come when we discuss the provision that has been proposed concerning remedies. Thus we should say :

> " The remedies must be exhausted, but it is understood that, when the last remedy has been exhausted, international proceedings must be instituted within one year ; otherwise they lapse."

I contend that this provision is not in its right place. It should be connected with the question of remedies.

Far from opposing this provision, I support it. I merely ask that its position should be changed.

M. De Visscher (Belgium), Rapporteur :

Translation : We do not all share M. Dinichert's point of view. The Committee could, however, vote on the text at once, subject to a reservation concerning the place where it will be inserted.

The Danish amendment was put to the vote and adopted by 16 votes to 15.

M. De Visscher (Belgium), Rapporteur :

Translation : The Committee can now vote on the article as a whole.

M. Limburg (Netherlands) :

Translation : M. Dinichert stated that he had not had an opportunity to speak on the words : " judicial decision which is not subject to appeal " in paragraph (1). I would remind my colleagues of the Sub-Committee that, with their approval, I proposed that these words should be reserved. If these words are retained we must decide whether the terms of the provision concerning exhaustion of remedies should be according to Basis No. 29 or Basis No. 27.

I can only vote for the article as a whole subject to this reservation. When we have discussed the exhaustion of remedies we shall be able to decide whether anything should be modified or omitted.

M. De Visscher (Belgium), Rapporteur :

Translation : Subject to M. Limburg's remarks, we might proceed to vote.

M. d'Avila Lima (Portugal) :

Translation : Should we not mention a final judicial decision ?

M. De Visscher (Belgium), Rapporteur :

Translation : The text adopted includes the words : " which is not subject to appeal ". I do not understand the meaning of the proposal now made.

M. Matter (France) :

Translation : Let us vote !

M. De Visscher (Belgium), Rapporteur :

Translation : We are about to vote.

M. Dinichert (Switzerland) :

Translation : I request that it shall be recorded in the minutes that, to my great regret, I was unable to vote on this basis.

M. Richter (Germany) :

Translation : I, too, must request that it be recorded in the minutes that I abstained from voting, as I do not yet know whether my Government can accept the word " clearly ".

A vote was taken on the text as a whole which was adopted by 16 votes to 15.

30. DEFINITION OF INTERNATIONAL OBLIGATIONS : TEXT SUBMITTED BY THE FIRST SUB-COMMITTEE.

M. De Visscher (Belgium), Rapporteur :

Translation : The next item on the agenda is the discussion of the text concerning the sources of international obligations. You will remember that on Thursday last I submitted a proposal that had been adopted by the First Sub-Committee (Annex III, No. 1). After long discussion it was adopted unanimously. The text proposed is the result of mutual concessions; it represents an enormous effort at compromise. I hope that, in view of that great effort, we shall now be able to adopt this text unanimously and without any long discussion.

M. Suarez (Mexico) :

I regret not to be able to vote for this proposal. The reasons for that are expressed in a document which I would request to have inserted in the Minutes (see Annex II, Mexico). In that document I explain the reasons for

which I must dissent from the opinion of the Sub-Committee. They are of importance for my country, and I am not able to adopt this proposal.

M. Plesinger-Bozinov (Czechoslovakia) :

Translation : To my great regret, I am compelled to adopt the same attitude as my Mexican colleague, that is to say, I must vote against the text submitted by the Sub-Committee. I shall do this because it is not sufficiently definite ; it is particularly vague as regards the definition of international obligations. I had proposed to the Chairman that he should wait until I had received instructions from my Government, seeing that it would be bound by this definition. As, however, we have to vote at once, I shall vote against the proposal.

M. Sipsom (Roumania) :

Translation : I think we accepted the formula proposed by the Rapporteur, with the following phrase: " . . . designed to assure to foreigners in respect of their persons and property, a treatment in conformity with the rules *indisputably* accepted by the community of nations " — that was how the text ended. I may be mistaken, but at all events I think that is the meaning we had in mind. We are concerned, indeed, with rules that are indisputably accepted by the community of nations and not with rules that are vaguely accepted by that community. Such a qualification can do no harm, since we are speaking of the community of nations, a term which is itself extremely vague. We should at least have something expressing to some extent what we mean by " community of nations " if we said " indisputably accepted by the community of nations ". As there are some rules that are disputed, I propose that we say " indisputably accepted " ; that in no way changes the idea.

M. De Visscher (Belgium), Rapporteur :

Translation : I can definitely assure M. Sipsom that the word " indisputably " was never included in the formula submitted to the Sub-Committeee and, as he is aware, unanimously adopted.

M. Politis (Greece) :

Translation : I should like briefly to urge the Committee to accept this text unanimously. I confess I do not understand the objections that have been raised. I should like to explain why I think such objections are unfounded.

There might be reason to fear that, as regards the treatment of foreigners, this text might introduce a system that has not been voluntarily accepted and that is not in force. But that is not what the text says. It does not say that there will be any obligatiou to accord to the person and property of foreigners treatment in conformity, and so on. This provision relates to obligations which, having a certain source, are also designed to assure, etc. That is to say, they are not obligations concerning the registration of mortgages, for instance. They relate to the treatment of foreigners. It does not follow from this text that, if the obligations you have otherwise assumed — whether in virtue of treaties or customary law, or the general principles of law — have not already bound you to give such treatment, you will be obliged to give that treatment in virtue of this text.

In brief, you are not assuming any new obligation. I should like those of our colleagues who feel somewhat uneasy to understand the situation clearly. M. Sipsom has asked us to say : " treatment in conformity with the rules indisputably accepted by the community of nations ". That is not merely useless but, from the jurist's point of view, it is contradictory, for a rule is either accepted or it is not accepted. We cannot say that a rule is indisputably accepted or that its acceptance is doubted or disputed. If a rule is disputed it does not exist. We may say that a rule is indisputably accepted in legal theory, because theories may vary, may be contradictory. There may be one school of thought which asserts the existence of a rule and another which disputes it. From that point of view, therefore, a rule may not be indisputable.

But when we speak of rules accepted by the community of nations, that is to say, rules having the force of law, the rules either exist or they do not exist. If you wanted to say that the rules are indisputably accepted, you would have to add " and undisputed ". Now, these adjectives and adverbs add nothing to the meaning of the sentence in the text under discussion.

In short, I think we can all accept this text. It adds nothing to our present obligations. Its aim is merely to define what we mean in this Convention by the expression " international obligations ".

M. De Visscher (Belgium), Rapporteur :

Translation : The Roumanian delegation has submitted an amendment asking for the insertion of the word " indisputably ". The last part of the text would thus read as follows : " the rules indisputably accepted by the community of nations ". We should vote first on M. Sipsom's amendment.

M. Guerrero (Salvador) :

Translation : I have asked our Mexican colleague whether he would vote for the text proposed if the word " indisputably " were added. He replied in the affirmative. I mention this merely for your information.

M. Giannini (Italy) :

Translation : I should like to address a little request to my Czechoslovak colleague. As you have not yet received instructions from your Government, I think that to vote against this proposal would be going too far. You

might abstain from voting, as you will have an opportunity to vote against the proposal when the final vote is taken.

Having said that, I must add that the long discussion we have had in our attempt to include this rule in the Convention has convinced me that the provision is useless. Nevertheless, I beg my colleague and friend M. Matter to support my attitude when I say that I shall vote for the proposal in order to secure unanimity, though I am convinced that it is of no value.

M. Matter (France) :

Translation : In reply to my witty friend, M. Giannini, I must say that I shall vote for this proposal because I think it is good.

Why do I think it good ? As the English say, " That is another matter ".

M. Duzmans (Latvia) :

Translation : I should not have spoken unless a doubt had arisen concerning the word " indisputably ". Should we use this word or not ? I strongly dislike amendments that are proposed to a text submitted by a Drafting Committee which has worked so hard in preparing it. Nevertheless, I venture to express the hope that the doubt that has arisen might be removed by a slight change in the last sentence.

I think the doubt occurs because the proposed text has separated twin brothers. On the one hand there is the expression " resulting from treaty, custom or the general principles of law " ; on the other hand, there is the expression " rules accepted by the community of nations ". Obviously these rules must be those which are imposed by law. If we replaced the words " rules accepted by the community of nations " by the words " rules of law " we might perhaps remove the doubt as to the meaning of this text. I therefore venture to propose, as an amendment, that the words " in conformity with the rules of law " should be substituted for the words " in conformity with the rules accepted by the community of nations".

M. Sipsom (Roumania) :

Translation : If the addition of the word " indisputably " had no other advantage than that it secured one vote — that of the Mexican delegate — for the general proposal, that addition should be approved, particularly as M. Politis has described it as useless and redundant, and consequently not harmful.

I venture to think that the distinction M. Politis drew between rules of law and custom is not quite correct. A rule is something absolute and indisputable, whereas custom is sometimes questionable and does not constitute a rule that can be set up against another rule. It is merely a resultant and has not the absolute definiteness of a rule. It can therefore be accepted only in the form of a resultant that is generally accepted, that is to say, accepted indisputably by everyone. I am adding nothing to the idea which is already included, even in the definition. For a rule to be customary, in the sense of being internationally accepted, it must be generally and indisputably accepted.

Consequently, there would be an advantage in making the text more definite by inserting the word " indisputably ". This would not so overload the text or make it so clumsy as to justify either the bitter attack that has been made against it, or an opinion such as M. Giannini expressed just now. Moreover, it might gain votes. I therefore think it would be advisable to include it, as it meets the wishes of certain delegates.

Mr. Beckett (Great Britain) :

On a motion of order, may I ask, that we proceed to a vote on this question?

M. Politis (Greece) :

Translation : I support that proposal.

M. Limburg (Netherlands) :

Translation : I also support the proposal.

The Chairman :

Translation : I put to the vote first M. Sipsom's amendment, according to which the word " indisputably " should be inserted after the words " the rules ". The phrase would then read : " the rules indisputably accepted by the community of nations ".

The amendment was rejected.

The Chairman :

Translation : I put to the vote M. Duzmans's amendment, according to which the words " the rules of law " would be substituted for the words " the rules accepted by the community of nations ".

The amendment was rejected.

The Chairman :

Translation : There are no other amendments. I put to the vote the Sub-Committee's text.

The text was adopted by 28 votes to 3.

The Committee rose at 6.55 p.m.

FOURTEENTH MEETING

Thursday, April 3rd, 1930, at 3 p.m.

Chairman : M. DIAZ DE VILLAR.

31. BASIS OF DISCUSSION No. 27 : TEXT SUBMITTED BY THE FIRST SUB-COMMITTEE AND REVISED BY THE DRAFTING COMMITTEE.

The Chairman :

Translation : I will ask you to re-examine the text proposed by the First Sub-Committee and revised by the Drafting Committee (Annex III No. 6). It reads as follows :

" 1. The State's responsibility may not be invoked as regards reparation for damage caused to a foreigner until after exhaustion of the remedies afforded to the injured person by the internal law of the State.

" 2. This rule is inapplicable when the employment of local remedies is impaired in the cases mentioned in Article . . . (article replacing Bases Nos. 5 and 6)."

M. De Visscher (Belgium), Rapporteur :

Translation : The question now before you has already been considered by our Committee at great length. You will remember that in reference to an amendment by the Belgian delegation we examined very fully the question of the preliminary exhaustion of the available remedies. The point was referred to your Sub-Committee to enable it to be made clear and a decision to be reached on it. The Sub-Committee has discussed the matter and now lays this text before you.

The Sub-Committee unanimously agreed, as did the full Committee, too, that the rule regarding the previous exhaustion of remedies is an absolutely fundamental rule of international responsibility. Like the Committee itself, it attached the utmost importance to it. In drawing up the present text the Sub-Committee's sole aim — as you will clearly realise by the use of the words " the State's responsibility may not be invoked " — was to determine the moment at which action could begin, the international claim become operative. It did not express any definite view as to the moment at which international responsibility arises. That question is still wholly reserved.

As you will see, the first paragraph contains a phrase worded as follows : " as regards reparation for damage caused to a foreigner ". By these words the Sub-Committee intended to limit the stipulation, that the available remedies must be exhausted, to the case of damage caused to a foreigner. By that I mean that the Sub-Committee gave no opinion as to whether the same rule is applicable in the case of separate damage caused to the State as, for example, in the case of damage caused to foreigners of a particular nationality. In that case, as you know, apart from the reparation for damage to the individual, there may arise the question of reparation for damage due to the State. In order to make it clear that this point was not taken into consideration, the Sub-Committee used the words : " as regards reparation for damage caused to a foreigner ".

I now come to the second paragraph. Here the numbering of the article is reserved ; the text simply refers to the article which will replace Bases Nos. 5 and 6.

This text has enabled agreement to be reached between those of us who advocated inserting the words " in principle " and those who wished that expression to be omitted from the definition of the rule regarding the exhaustion of remedies. The Sub-Committee agreed to draw up the rule on general lines, deleting the words " in principle ", but it also agreed — and this was self-evident — that the exception must be provided for when the remedies are inadequate. When the inadequacy of the remedies is such that, in the terms of the article adopted yesterday, the State is responsible, there can be no question of requiring the remedies to be first exhausted. On that question there was general agreement.

This point, I repeat, did not need to be discussed at great length by the Sub-Committee which was concerned mainly with defining and clarifying the question, and I do not think the adoption of the proposed text will give rise to much difficulty now.

M. Guerrero (Salvador) :

Translation : Gentlemen, — If I had to consider only the explanation just given us by our Rapporteur, I should consider the first part of the proposal before us to be perfectly clear. If, however, I take the wording of the draft before us, I am afraid that difficulties will arise in practice. I will take one example to show what I mean.

Suppose a foreigner considers that he has been denied justice and that therefore damage has been done for which reparation is due. According to the first sentence of Basis No. 27, the Government of the country to which the foreigner belongs may make a claim through the diplomatic channel. The State against which the claim is made raises the objection

that the remedies allowed at municipal law have not yet been exhausted by the foreigner who claims to have suffered the damage.

The other country thereupon rejoins that its claim is based not on reperation for the damage caused to one of its nationals but simply on the damage done to itself as a State.

We might thus find ourselves faced with two different procedures and claims, one instituted immediately against another State on account of the alleged damage it has indirectly suffered, and the other arising only after the exhaustion of the remedies and based on the damage caused to the foreigner.

In order to prevent such a possibility of confusion I propose that we draft the article as follows :

> " The State's responsibility may not be invoked, *in the case of reparation in respect of damage caused to a foreigner*, until after the exhaustion of the remedies afforded to injured persons by the internal law of the State."

The remedies at municipal law must be exhausted, whereas the wording originally proposed leaves it doubtful whether there may not be two claims — an immediate claim by one State against another, and a claim put forward, after exhaustion of the remedies, by the foreigner who alleges that he has been injured.

M. De Visscher (Belgium), Rapporteur :

Translation : If it were merely a question of form we might entirely agree, but, unfortunately, as M. Guerrero's account of the matter has shown, the question at issue is a question of substance.

The Sub-Committee thought that, when a State advanced a claim in respect of damage caused to one of its nationals, we need not make the diplomatic claim subject to the exhaustion of the available remedies. It thought that this eventuality should preferably be disregarded altogether, and, as M. Guerrero will see, we have done so.

As you will remember, we set aside the question of damage caused to the State affecting its prestige. The Committee took the same view : it did not open the question of the separate damage caused to the State, but simply laid down a rule regarding the damage caused to the individual. It did not take up an opposite view, or a view in any way hostile to M. Guerrero's arguments. It said that in the case of damage caused to individuals the available remedies must be exhausted.

I do not think, therefore, that the text submitted by the Sub-Committee conflicts with M. Guerrero's ideas ; at the same time, in view of the interpretation he has given, and the terms he proposes in the case of claims in respect of damage caused to a foreigner, we are entering into a question of substance which, in point of fact, we want to reserve. That is the difficulty.

M. Sieczkowski (Poland) :

Translation : I will not oppose the wording suggested by the Sub-Committee, provided it is understood that the report will give special prominence to the ideas set forth here by our Rapporteur, and in particular that the last words of paragraph 1, regarding the exhaustion of remedies, in no way affect the moment at which responsibility arises.

M. Suarez (Mexico) :

I support the observations which have just been made by the delegate for Salvador. I think that for the sake of clearness it would be better to put in the phrase proposed. I believe that the explanations given by the Rapporteur are not altogether satisfactory. He wants to put aside those questions in which the responsibility of the State arises through injuries suffered by a State directly. I think we have no need to take precautions as regards those cases, because we are dealing only with responsibility which arises for damages suffered by an individual. It is to be supposed that all those cases in which responsibility arises directly from one State to another would be decided by a convention on the subject we are now taking.

I would accept the second paragraph of the text, I think it is altogether contrary to the principles of international law and I think that the rule of exhaustion of legal remedies has nothing to do with the rule as to denial of justice. I understand that if, for instance, a State does not furnish a special right, or denies justice, to a foreigner, it would be responsible under the basis we approved yesterday as to denial of justice. However, I would not object to the adoption of the second paragraph.

M. De Visscher (Belgium), Rapporteur :

Translation : I should like to say, in reply to M. Suarez, that there is evidently some misunderstanding in regard to the words " damage caused to a State ". I did not speak of direct damage caused by one State to another but damage which may be incurred by a State on account of damage caused to one of its nationals : that is quite another thing.

M. Cohn (Denmark) :

Translation : I should like to raise three small points of drafting.

(1) I quite understand M. Guerrero's proposal. There is really a difference between the two methods of expression. If we want to disregard the whole question as to the moment at which the State's responsibility arises, I think M. Guerrero is right and his expression is the best. In any case the difference is very slight, and if we accept M. Guerrero's formula we are not necessarily accepting his reasons. For my part I should be quite willing to accept his formula.

(2) The term " responsibility of the State " is of a wholly general nature. It relates to cases

of claims in respect of damage caused. Sometimes, however, the State itself may be responsible for the damage, and then it cannot be said that the State's responsibility cannot be invoked, if the State is responsible at municipal law. The point at issue is simply the international responsibility of the State, and this must be explicitly mentioned.

(3) I am not quite sure that we can say in the second paragraph that this rule is inapplicable when the employment of local remedies is impaired in the cases mentioned. The term seems to me too rigid. The application of the rule is not necessarily excluded simply because the cases in question are unimportant and may be settled without loss of time. In my opinion we must say in the second paragraph that the rules contained in Bases Nos. 5 and 6 are reserved; but we cannot definitely say that the rule laid down in the first paragraph is inapplicable.

M. Guerrero (Salvador) :

Translation : My sole intention was to make the matter clear. I am afraid the wording submitted to us may give rise to a doubt whether two kinds of claims may exist, one direct and the other indirect. If you find that the text I have proposed is not very clear, I suggest saying that the State's responsibility may not be invoked until after exhaustion of the remedies afforded to injured persons by the internal law of the State.

In this way we should be omitting a few words, but we should not be affecting the substance of the question, and we should be making it quite clear that the exhaustion of the remedies relates solely to the case of damage caused to a foreigner, since we speak of the injured person, and the case of direct recourse by one State against another, which is not covered here, is left out of account.

M. Giannini (Italy) :

Translation : I should like to be quite sure that I understand M. Guerrero. We have considerably widened the scope of the article. If we say " the State's responsibility may not be invoked until after exhaustion of the remedies ", that means that no State responsibility whatever may at any time be invoked until after exhaustion of the remedies — that is to say, not even in inter-State relations in respect of foreigners.

M. Guerrero (Salvador) :

Translation : I meant that there must be an injured person, whereas in the case I have in mind where claims are made direct between State and State there is no injured person, it is the State itself which is injured.

M. Giannini (Italy) :

Translation : Then we agree.

M. Dinichert (Switzerland) :

Translation : We had better be quite free from misunderstanding. After the discussions which took place in the Committee and the Sub-Committee I thought that what was meant was this : A person is injured by an illicit act ; if remedies are afforded for the reparation due to him for the damage, those remedies must of course be exhausted.

But I never understood, these provisions to mean that the remedies provided must be exhausted before any claims could be invoked by the State on grounds other than the damage caused to the injured person. In other words, the remedies must be exhausted as far as the damage done to the person himself is concerned, but if —and such a contingency is not excluded —an illicit act gives rise to questions of a different nature, I cannot undertake in a Convention such as this to allow all claims to remain pending because the illicit act affects the person or property of an individual to whom remedies are still available in respect of the damage.

What we say, in effect, is this. In all cases of violation of international law in which a person is injured and in respect of which a remedy is available, all international action must be suspended until the remedies are exhausted by the person concerned. That situation, I submit, cannot be accepted. Examples have been given, but I do not think the exhaustion of remedies has been ever yet taken to mean the barring of international action as a whole because it is a foreigner who happens to be injured. If this is the interpretation it is intended to give to the provision, it would be better to abide by what has never yet been disputed in either the doctrine or the judicial decisions or the theory of international law.

M. Limburg (Netherlands) :

Translation : On the point on which a difference has arisen between M. Guerrero and several other speakers, I fully support what has been said by the Rapporteur and M. Dinichert. The Sub-Committee was careful not to word this proposal so as to exclude the possibility of claims concurrent with those of the injured person. We must take care not to bar inter-State claims. The text before us was drawn up with an eye to this consideration, and leaves the question absolutely open. We must examine M. Guerrero's amendment from this angle ; and if I do, I cannot accept it.

In reply to what M. Cohn said, I should like to point out that the word " international ", which he proposes to add to the word " responsibility ", is unnecessary. We are obviously speaking of international responsibility here, because the whole Convention deals with it.

In the second place, M. Cohn considers that the word " inapplicable " is not the right word. I understand his objection, and I propose that we should word the second paragraph as follows : " An exception to this rule may be allowed when the employment of local remedies . . . " To say that the rule is

inapplicable is tantamount to saying that the doctrine breaks down. But it does not; only in practice there is an exception. If M. Cohn accepts my proposal I will ask the Rapporteur to take note of it.

M. De Visscher (Belgium), Rapporteur:

Translation: The Bureau ventures to make the same recommendation as yesterday regarding our discussion. If you agree, we will examine it paragraph by paragraph.

M. Vidal (Spain):

Translation: I second M. Cohn's proposal to add the qualifying word "international". I agree that there is no question of any other responsibility here, but, although the word may be superfluous, it does no harm. We must not forget that besides responsibility at international law there is also responsibility at municipal law. The question was discussed at great length, and I will not reopen the debate. Nevertheless, I think it is well to be precise. I also think that the formula proposed by M. Guerrero might be acceptable, too.

It is true that, by omitting the words "as regards reparation for damage caused to a foreigner". we are doing away with a stipulation which it was thought desirable to make, but what the wording would lose in precision it would gain in adaptability. Admittedly, it would be vaguer; but then the only formulæ on which agreement has been reached are those drafted in such vague terms as to lend themselves to different interpretations. In omitting this clause we do not say that direct inter-State responsibility is invoked. The question is left obscure, and I am sure that a vague formula could be accepted by all.

For my own part, I am prepared to support it, though I shall submit a small proposal regarding paragraph 2 when it comes up for discussion.

M. De Visscher (Belgium), Rapporteur:

Translation: M. Vidal's first observation raises a question of terminology on which I should like to be clear. I agree that his intention is to enable a uniform terminology to be adopted. In the course of the Drafting Committee's work, indeed, I wondered whether it would not be better to substitute for the "State's responsibility" the words "international responsibility".

M. Vidal (Spain):

Translation: That suggestion seems to me preferable.

M. De Visscher (Belgium), Rapporteur:

Translation: I will ask the Committee to take an immediate decision on the point. If it shares this view we shall throughout substitute for "The State's responsibility" the words "international responsibility".

Agreed.

M. Guerrero (Salvador):

Translation: After what has been said by M. Dinichert and M. Limburg, I need not make any further comments, since they have shown that the wording of this text is open to different interpretations. They have also shown that a State must make two different claims in respect of the same text. I cannot agree to that.

To make my point clearer, I will again take the case of a denial of justice. Suppose, for example, that two States are bound by a convention to have recourse to arbitration in the event of a denial of justice. In the course of legal proceedings a foreigner alleges that a denial of justice has taken place. The State to which he belongs at once lodges an international complaint on the ground of violation of treaty. That would be quite possible, in my opinion, according to the wording you suggest, and according to what M. Dinichert and M. Limburg have said. Such a claim, however, would be premature. So long as recourse at international law is still available, and so long as the denial of justice is not proved and no reparation is made for it, it cannot be claimed that there has been a violation of the treaty. No doubt this wording is open to different interpretations, and for that reason I desire to press my proposal, which is twofold. The first point you already know: the second is the omission of the words I have referred to.

M. Richter (Germany):

Translation: I asked to speak in order to submit an observation on paragraph 2. As, however, the discussion is confined to paragraph 1, I will merely say that I agree with M. Dinichert in regard to M. Guerrero's proposal.

M. Sipsom (Roumania):

Translation: Gentlemen,—We cannot take any decision on the question with which the Rapporteur was concerned—namely, whether personal action on the part of the State may be taken immediately or not. What our colleague says amounts to this: we do not want to take a decision on the question, because opinions differ. But since we do not wish to take a decision, we must neither preclude action nor reserve it.

The words "as regards" have the effect of reserving action, and, therefore, I think that the second proposal submitted by M. Guerrero just now is wholly sound. It entirely excludes this controversial phrase, and it leaves the question unsettled in either sense.

As regards the substance of the question, M. Limburg and M. De Visscher really want to allow the State to take two actions in respect of one case of damage caused to one of its nationals. In their opinion action would be twofold: first, there would be action subject to the exhaustion of remedies at municipal law, and, secondly, there would be direct action; and both would be taken by the State.

But from the legal point of view that is impossible, because no State can be allowed to take two actions in one case — one direct and one subsidiary. If it were merely a matter of diplomatic representations, I could understand; but there is no question of that. It is not mentioned, and the point is reserved.

For all these reasons I fully agree with M. Guerrero's suggestion to omit the words: "as regards reparation for damage caused to a foreigner. . ." The article would then read as follows:

> "The State's responsibility may not be invoked until after exhaustion of the remedies afforded to injured persons by the internal law of the State."

This wording leaves the question of remedies through the diplomatic channel entirely open as regards insults, affronts and so on — that is to say, in the matter of international relations.

Mr. Beckett (Great Britain):

I should like these words, "as regards reparation for damage caused to a foreigner", left in, because they make it clear that we are dealing with claims for reparation for damage caused to a foreigner. They also make it clear that all the other cases are not dealt with but are left completely open and are not settled one way or the other.

Now, a great many speakers have said that, if you take out the words, these other cases would be left for jurisprudence to settle. But I say that, if you include the words, then these other questions are left for jurisprudence to settle, because it is made perfectly clear that the rule we have laid down here does not cover them. I am very much afraid that, if you take the words out, jurisprudence may have some difficulty in ascertaining exactly what you intended to be the scope of the rule which you laid down.

Surely in these cases the cautious and prudent thing is to lay down your limited rule to deal with the cases about which you are perfectly certain in terms which show exactly what its scope is, and to leave all the other questions which you have not meant to cover perfectly open. It is for that reason that I support the maintenance of these words, because, if they are taken out, I think there will be serious misconceptions as to the exact scope of the rule which we are here laying down.

Mr. Hackworth (United States of America):

Practically everything that I wanted to say has now been said by Mr. Beckett. I submit, however, that analysis of the paragraph amended as suggested by M. Guerrero would leave it extremely doubtful whether a State has any right to make representations, even on its own behalf, if its national has not exhausted the local remedies. The provision would read: "The State's responsibility may not be invoked until after exhaustion of the remedies . . ." The word "responsibility" is in no way qualified; it may be the State's responsibility to the complainant's State or its responsibility to that State's national. There is nothing to indicate definitely the particular responsibility to which reference is made. This responsibility may not be invoked until after exhaustion of the remedies afforded to the injured person.

Now, if the State and its national are injured at one and the same time, there is no reason why the State should postpone its right to claim indemnity until its national has exhausted his local remedies. It is very well to say that a foreigner shall exhaust his remedies, but it is quite a different thing to say that a foreign State shall exhaust its remedies, because no State will submit to the jurisdiction of another State to determine its right.

I am therefore of the firm conviction that by changing this paragraph as suggested we would be departing from its purpose — namely, to state when the responsibility of a State on account of damage to a foreigner may be asserted.

M. Giannini (Italy):

Translation: Time compels me to raise a point of order. We have already devoted two meetings to this question, and to-day we have already spent an hour and a-half on the formula as revised by the Drafting Committee.

In the course of the discussion we have considered at great length whether we should insert the words "in principle" or not.

The amendment now proposed constitutes a question of substance and not a question of drafting. We must decide whether we want to paralyse all State action in the case referred to in the basis, or whether we want to limit the suspension of action only in respect of reparation for damage.

I think that we are now clear on every point of the problem and have all made up our minds. Accordingly, I ask that the discussion be closed and that a vote be taken.

M. Matter (France):

Translation: I second M. Giannini's motion. After a long discussion the text was sent to the Sub-Committee, which was asked to find a wording that would form a compromise. After an exhaustive discussion, in which all the questions at issue were examined, we reached agreement on the proposal laid before you.

The proposal put forward by M. Guerrero and M. Sipsom, and seconded by several delegates, brings the substance of the question into discussion once more. I think that we are now all fully informed on the subject, and for the reasons so strongly put by Mr. Beckett, Mr. Hackworth and M. Giannini, I second M. Giannini's motion.

Several Delegates:

Translation: Let us take a vote.

The Chairman:

Translation: I put to the vote M. Guerrero's proposal.

M. Guerrero (Salvador) :

Translation : I ask that both proposals be put to the vote. In that way we shall each be able to vote as we choose, and the Committee will perhaps decide to accept one or other of my proposals.

M. De Visscher (Belgium), Rapporteur :

Translation : There is one point which must be cleared up. The Committee has agreed to take a vote. We must therefore proceed as follows :

Two alternative amendments have been submitted by M. Guerrero. If he wishes, we will first vote on the omission of the words in question. That would be the logical course, since it is the amendment farthest from the original text.

I propose therefore that we vote on M. Guerrero's proposal to omit from the Sub-Committee's text the words "as regards reparation for damage caused to a foreigner".

The proposal to omit the words in question was rejected by 18 votes to 16.

The Chairman :

Translation : We now come to the second amendment proposed by M. Guerrero — namely, to word the Drafting Committee's text as follows :

> "The State's responsibility may not be invoked in the case of reparation in respect of damage caused to a foreigner, until after exhaustion of the remedies afforded to the injured person by the internal law of the State."

The amendment was put to the vote and rejected by 18 votes to 15.

The Chairman :

Translation : I put to the vote the first paragraph of the text proposed by the Sub-Committee.

The first paragraph was adopted.

The Chairman :

Translation : We now come to the second paragraph :

> "This rule is inapplicable when the employment of local remedies is impaired in the cases mentioned in Article . . . "

M. De Visscher (Belgium), Rapporteur :

Translation : M. Cohn tells us there is no need to provide for this inapplicability of the rule in cases where the employment of local remedies is impaired, as he considers such cases unimportant. I venture to say that such cases are very serious. The reference here is to the article replacing Basis No. 5 and relates to a most characteristic case. The action in question must inevitably be most serious, and the State's responsibility will assuredly be involved. Accordingly, I think the text will satisfy our colleague.

M. Cohn (Denmark) :

Translation : It seemed to me that the expression did not quite apply to all cases, or perhaps even in the case of a denial of justice where the procedure — in a village, for example — is inadequate and where the case does not come to the knowledge of the Government. For that reason I thought we could not say that the rule laid down in the first paragraph was always inapplicable. I agree with the Rapporteur, however, when the cases are of a serious nature.

M. Cavaglieri (Italy) :

Translation : I have before me a text drawn up by the Preparatory Committee which might perhaps satisfy our Danish colleague, because it mitigates the force of the word "inapplicable". I refer to the wording at the end of Basis No. 27 : "This rule does not exclude application of the provisions set out in Bases of Discussion Nos. 5 and 6". The principle would remain the same, only the form would be made less definite.

M. De Visscher (Belgium), Rapporteur :

Translation : I am quite prepared to accept a more moderate wording. I do not think, however, that we can go back to the original formula of the Preparatory Committee, because it lacks clearness. The Preparatory Committee had to evolve Bases of Discussion, but the formulæ drawn up in preparation for our work are not suitable for inclusion in their existing form in an international convention. If the text proposed seems to you somewhat blunt, we are quite prepared to accept M. Limburg's formula.

M. Matter (France) :

Translation : What M. de Visscher says is quite true. The last paragraph of Basis No. 27 is devised to meet an entirely different situation, and we should be making a mistake if we adapted it to the present case. The text proposed by the Committee makes the rule we have just passed inapplicable only when the employment of remedies is impaired — that is to say, in the case referred to in paragraph 2. By adopting the formula of Basis No. 27, however, we should be excluding all cases of application as regards both paragraph 1 and paragraph 2 of the article we adopted yesterday. We should therefore be quite wrong if, by adopting a formula employed for an entirely different purpose, we tried to exclude cases which, in point of fact, we wanted not to exclude.

M. Richter (Germany) :

Translation : The second paragraph provides that the sole exception to the rule as to exhaustion of remedies is the case of denial of justice. In our opinion there are other cases where it would be wrong to require the preliminary exhaustion of remedies at municipal law. I have in mind, for example, cases where such

remedies would clearly be useless, because the authorities of the country concerned apply a specified practice in such cases, and in view of that constant practice the foreigner obviously would never win his case. It seems to me self-evident that in such a case and in similar cases the State cannot invoke the rule laid down in paragraph 1. But it would be desirable to say so in the report, in order to obviate the possibility of any other interpretation.

M. Sipsom (Roumania) :

Translation : I venture to make an observation on the second paragraph in order to make the text consistent with itself. The proposal laid before us is this : " This rule is inapplicable when the employment of local remedies is impaired in the cases mentioned in Article . . ." If, however, we turn to the article referred to in the text, we find that it relates to the question of a refusal to administer justice. That is not the proper correlative, which would be : " This rule is inapplicable — or is subject to exception — when the employment of remedies is refused or denied as in the cases provided for in Article . . ."

The wording proposed by the First Sub-Committee introduces a new factor, that of " impairing ", and this requires to be defined and is not the outcome of Article 5 which we have adopted. It is the refusal to administer justice which must be the condition underlying direct action. If the intention was to introduce a new factor by the term " impaired " — which, I repeat, seems to me vague and dangerous — the Roumanian delegation would be in favour of omission. If the sense intended to be given in this paragraph is really that of Basis No. 5, as submitted by the First Sub-Committee, I ask that the same terms be used — namely, " refusal to do justice ".

M. de Berczelly (Hungary) :

Translation : When we examine the second paragraph of the First Sub-Committee's proposal we must also examine the second paragraph of Article 9 as finally revised by the Drafting Committee (See Annex IV), which lays down that : " International responsibility is incurred if damage is sustained by a foreigner as a result of the fact . . . that, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies . . . "

We might perhaps overcome the objections felt by several delegations if we introduced into this paragraph the principle that, even if a foreigner is refused the right to appear in court, there are other remedies available at municipal law, since, if the first instance refuses access to the courts, there is a possibility of appeal. If we could find a formula on those lines, the second paragraph could perhaps be accepted by the delegations which at present are opposed to it.

M. Sieczkowski (Poland) :

Translation : In reality paragraph 2 relates only to the cases provided for in the second paragraph of the basis replacing Bases Nos. 5 and 6. It would be desirable to say so explicitly by using the words " in paragraph 2 of Article. . . "

The words " this rule is inapplicable " are too categorical, because we undoubtedly have in mind cases where there will, as a rule, be no remedies when the employment of remedies is impaired as mentioned in paragraph 2.

That point should be made clear in the text of paragraph 2.

For these reasons I am prepared to support M. Limburg's proposal — namely, that it should be stated that the rule is subject to exception when the employment of remedies is impaired or when, etc.

Or again, we might consider another solution, on the following lines : " This rule is inapplicable when the employment of remedies is impaired in the cases provided for in paragraph 2 of Article . . . , in so far as no remedies are allowed therein ".

In this way the text would definitely refer to cases where, as a rule, no remedies were available.

M. De Visscher (Belgium), Rapporteur :

Translation : We are undoubtedly agreed as to the substance of the question. I propose that we adopt the text suggested by M. Limburg, and then, in order to take into account M. Sipsom's very sound remark, that we word the end of the paragraph as follows :

" . . . when the employment of remedies is impaired in the circumstances specified in Article . . ., paragraph 2. "

That wording would remove all uncertainty.

M. Guerrero (Salvador) :

Translation : I should like to make the following proposal :

" This rule is subject to exception in the cases mentioned in Article . . ., paragraph 2."

In that way we shall not need to add : " when the employment of remedies, etc. ".

M. Giannini (Italy) :

Translation : The question seems to me a very simple one, and it is not worth while spending so much time over it. Could we not take M. Guerrero's proposal as our basic text ? If any slight improvement if necessary, the text will be revised by the Drafting Committee.

M. Sipsom (Roumania) :

Translation : I agree.

M. De Visscher (Belgium), Rapporteur :

Translation : I am quite prepared to accept M. Guerrero's proposal, but I am not quite sure as to the soundness of the French. Is the wording really quite correct ? I shall be grateful if M. Matter would give us his view.

M. Matter (France) :

Translation : The wording is in good French, but is literary rather than legal. The word " inapplicable " was much clearer. We might say :

> " Cette règle ne comporte point d'application dans les cas prévus à l'article..., alinéa 2. "

M. Wu (China) :

On a point of order, Mr. Chairman. In principle, I am in agreement with the Rapporteur, but I do not think that the cases mentioned in what we may call Article " *x* " are an exception to the first paragraph.

My point is that the cases mentioned in Article *x*, the article we passed yesterday, are really exhaustion of remedies so far as the injured foreigner is concerned. He has done everything he can; he has therefore exhausted all the remedies. In consequence, logically speaking, these cases are not an exception. They are not cases of inapplicability to paragraph 1.

I would therefore suggest an amendment. It may seem radical as far as wording is concerned, but in essence I think it is the same. It would read something like this :

> " Cases falling under Article *x*, paragraph 2, are, for the purposes of this article considered to be an exhaustion of remedies."

M. Cohn (Denmark) :

Translation : I quite agree with the Italian delegate that we must not prolong the discussion on this point.

I willingly accept the expression proposed by M. Limburg. Could we not vote on that definition and leave the final wording to the Drafting Committee ?

The Chairman :

Translation : I think the Committee can now proceed to vote.

M. De Visscher (Belgium), Rapporteur :

Translation : If the amendments proposed are accepted, the text you have before you is as follows :

> " Cette règle ne comporte pas d'application dans les cas prévus à l'article *x*, paragraphe 2 " (This rule is not applicable in the cases provided for in Article *x*, paragraph 2).

M. Wu (China) :

Mr. Chairman, on a point of order. Is it not true that, when there are several amendments before the Committee, the amendment farthest removed from the original text should be first put and voted on? I request a ruling from the Chair on that point.

M. De Visscher (Belgium), Rapporteur :

Translation : Would the Chinese delegate be so good as to hand me his amendment?

The Chinese delegation's amendment reads as follows :

> " Cases falling under Article *x*, paragraph 2, are for the purposes of this article considered to be an exhaustion of remedies."

M. de Berczelly (Hungary) :

Translation : I venture to point out that the Chinese delegation's proposal is not quite in conformity with the sense of the article that is to replace Bases Nos. 5 and 6. Paragraph 2 does not say that the remedies at municipal law must be exhausted in the cases mentioned in that paragraph.

M. De Visscher (Belgium), Rapporteur :

Translation : The Bureau has received the amendment. I will read it again, and the Committee will take a decision on it.

The Chinese delegation's amendment was rejected by 15 votes to 3.

M. De Visscher (Belgium), Rapporteur :

Translation : We now have the Committee's text amended in the sense indicated just now :

> " This rule is inapplicable in the cases provided for in Article . . ., paragraph 2."

The text was put to the vote and adopted.

M. De Visscher (Belgium), Rapporteur :

Translation : I propose that the text as a whole be put to the vote.

The text of Basis No. 27 as a whole was put to the vote and unanimously adopted.

M. Limburg (Netherlands) :

Translation : Gentlemen, — I venture to make a short observation. We have just adopted Basis No. 27, and I now call the attention of the Rapporteur and the Drafting Committee to the fact that Basis No. 5, which we accepted yesterday, is worded as follows :

> " A State is responsible for damage suffered by a foreigner as the result of the fact :
>
> > " 1. That a judicial decision which is not subject to appeal is incompatible with the international obligations of the State. "

Now that we have just adopted Basis No. 27 we ought, I think, to decide whether to place the words : " that a judicial decision which is not subject to appeal " in Basis No. 5, as these words might give rise to a number of difficulties.

M. De Visscher (Belgium), Rapporteur :

Translation : I should like to reply briefly to M. Limburg. I could propose a drafting amendment, if this were no more than a question of drafting. As you know, however, it is a question of substance. We were fully aware

of what we were doing when we inserted the words "which is not subject to appeal" in Basis No. 5. I cannot, therefore, take out that clause. You yourselves would have to take a decision on the subject, and you would be reversing a previous decision.

M. Giannini (Italy):

Translation: We have several proposals before us. Some delegations suggest the words "décision définitive" ("decision which is final and without appeal") and others, like the Polish delegation, have asked that the words "*en dernière instance*" ("not subject to appeal") should be used.

What form of words can be found as a compromise which will meet all these cases? It lies in the impossibility of seeking a remedy. I will give you an example. After a remedy in first instance, the period given within which to seek a remedy in second instance is allowed to lapse. The decision in first instance then becomes final and without appeal. If a State has a third instance, and if the period within which a remedy must be sought is allowed to lapse, the same thing again takes place. Then let us take the case of a State which has a court of cassation, and suppose that Court rejects or grants the appeal. In every case there is a final decision.

The formula which can cover all these cases seems to me to be this: "against which there are no other remedies". If anyone can propose a better formula, I will accept it. As far as my own country is concerned, the words "final and without appeal" are sufficient.

M. Dinichert (Switzerland):

Translation: I should like to know, on a point of order, whether the effect of M. Limburg's remark is to reopen the discussion on Basis No. 5. As M. Giannini has just made certain observations arising out of that remark, I will ask the Chairman whether the discussion on Basis No. 5 is reopened.

I can quite understand that the reply will be in the negative. The text will come up for second reading and will then be submitted to the full Conference: I will, on that occasion, revert to Basis No. 5, which I cannot accept for reasons that I was not given an opportunity of stating the other day.

I therefore ask: Is Basis No. 5 brought up for discussion again now? If not, I will say no more; if it is, then I ask to speak.

M. De Visscher (Belgium), Rapporteur:

Translation: In reply to M. Dinichert's question, Basis No. 5 is certainly not being discussed now. For that reason I told M. Limburg, in reply to his observation, that, if the point at issue were merely one of drafting, we could have considered it before the question was brought up for discussion again. As, however, it is a question of substance, we must take it that yesterday's vote settled the matter provisionally, and that we cannot reopen discussion on the point now.

M. Limburg (Netherlands):

Translation: I had no intention of re-opening the discussion on Basis No. 5. I did not for a moment depart from the question before the Committee. I only said this: now that we have adopted the text on the exhaustion of remedies, the Rapporteur and the Drafting Committee ought, I think, to see whether, in Basis No. 5, the words "which is not subject to appeal", after the words "judicial decision", should not be deleted.

The Rapporteur tells me that, if it were merely a question of drafting, it might be considered, but he says it is a question of susbstance. I have been a member of the Netherlands Parliament for thirteen years, and I have been a member of a number of drafting committees; I have always found that whether a question is a drafting one or not is largely a matter of opinion, and I venture to say in conclusion that there is always some way of reaching an accommodation.

32. BASIS OF DISCUSSION No. 30: TEXT PREPARED BY THE DRAFTING COMMITTEE OF THE CONFERENCE.

The Chairman:

Translation: M. Giannini will submit and explain the text prepared by the Drafting Committee of the Conference dealing with the question treated in Basis of Discussion No. 30.

M. Nagaoka (Japan):

Translation: This text has only just been distributed. It is quite different from the original, and I ask that a period of twenty-four hours should be allowed to elapse after its distribution before it is discussed.

M. Giannini (Italy):

Translation: I fully understand the misgivings of our colleague, the Japanese delegate, who is afraid that this text contains rather a large number of points. I can, however, explain it in brief, and if, after what I have said, the text seems to him clearer we can take a vote. If he is still doubtful, we can postpone it.

The only text which can form a basis of discussion on jurisdiction is that relating to responsibility; but the General Drafting Committee's text is, of course, intended for all three Conventions.

The first paragraph reads as follows:

> "If there should arise between the High Contracting Parties any dispute relating to the interpretation or application of the present Convention and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes."

What is the gist of this first paragraph? We have utilised our experience of several

conventions drawn up in recent years, in which the principle is always confirmed that any disputes that may arise must be settled in a friendly way through the diplomatic channel. That is the principle laid down here. If the dispute cannot be satisfactorily settled through the diplomatic channel, the provisions in force between the States parties to the dispute are applied first — that is to say, either a general convention for the settlement of disputes or any clauses of a special treaty relating explicitly to methods of settling disputes affecting that agreement.

In the second part of the basis we had several hypotheses before us. The list is rather a long one, but for various reasons to which I need not specially refer we had to accept this wording in order to reach unanimous agreement. What does this second paragraph say?

> "In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement, in accordance with the constitutional procedure of each of the parties to the dispute."

They must therefore conform to their constitutional laws before they can refer their dispute to arbitration or judicial settlement. This wording was adopted, as you will readily understand, for the sake of certain States which require such explicit reference to constitutional laws.

The article then goes on as follows:

> "If no other tribunal is agreed upon, the dispute shall be referred to the Permanent Court of International Justice if all the parties to the dispute are parties to the Protocol of December 16th, 1920, relating to the Court, or, at the choice of the parties, either to the Permanent Court of International Justice or to a tribunal constituted in accordance with the Hague Convention of October 18th, 1907, if any of the parties to the dispute are not parties to the Protocol of December 16th, 1920."

Thus provision is made for all possible contingencies. First, there is the particular procedure provided by special agreements; then, in the absence of special agreements, there is the arbitral or judicial procedure; in the event of failure to agree upon the choice of a tribunal, there is recourse to the Permanent Court of International Justice or to an arbitral tribunal constituted in accordance with the Hague Convention of 1907.

There we have a list which covers all possible cases, but if you consider this long basis carefully you will see that the underlying principle is a very simple one. For these reasons I submit it now to the Committee, and I leave the rest of the discussion wholly to the Committee, though I hope that, after my explanation, our Japanese colleague will realise that there is not a great deal in this long basis.

M. Nagaoka (Japan):

Translation: The first part of the text submitted by the Drafting Committee does not occur in the basis itself, but the Japanese delegation can agree that disputes relating to the interpretation of this Convention shall be submitted to arbitration. As regards the application of the Convention, however, the Japanese delegation wishes to have a separate protocol, as is proposed in Basis No. 30, so that this provision would be divided into two parts.

M. Guerrero (Salvador):

Translation: I propose that we adjourn the discussion of this basis until to-morrow, in order to allow ourselves time to examine the proposal just made.

M. Giannini (Italy):

Translation: We have before us a proposal by the Japanese delegation that a clause regarding interpretation should be inserted in the Convention itself and that there should be a separate protocol regarding its application. Such a division is not contrary to the Rules. Moreover, if we defer the discussion until to-morrow, it will be understood that we shall take a decision then.

The Chairman:

Translation: Does the Committee accept M. Guerrero's proposal?

M. De Visscher (Belgium), Rapporteur:

Translation: I quite understand the wish just expressed by our colleague of Salvador, but it is essential that to-morrow's meeting should be the last, in order to give me time to complete my work. This is to be the first reading, and we might have a meeting on Saturday afternoon after the drafting is finished.

M. Giannini (Italy):

Translation: I would point out that the Drafting Committee was unable to meet until yesterday. It did its best and prepared the articles of the Rules of Procedure which will be discussed this evening at the plenary meeting of the Conference. It drew up the article which has already been distributed, and others as well, but it still has several important questions to consider, such as that of reservations.

Moreover, there is a fundamental problem to be considered — the relation between the Convention and the rules of international law. I would beg the Committee to consider these questions without having the actual texts before them, so as to enable the Drafting Committee to know the views of the various delegations on these fundamental problems. It is essential that we should discuss them to-morrow.

M. Politis (Greece):

Translation: I should like to draw the Committee's attention to the special character of this discussion. The text which the Drafting Committee has just drawn up is submitted to the various committees for consideration

and for exchanges of views but not for a decision; that must be taken by the full Conference. The text will be submitted to the three Committees, and similar discussions and exchanges of views to those which take place here will probably take place also in the First and Second Committees. Each one retains its freedom of decision until the last moment.

The object of this discussion is to enable us to reveal the value of the text, what are its contents and what are the objections to which it may give rise. In these circumstances I hardly think we have anything to gain by postponing the exchange of views. If any delegations afterwards consider that they were not sufficiently fully informed, they might, I think, ask for the exchange of views to be continued later, but it seems to me preferable that we should proceed with our examination of the text now. If at the end of the meeting we are all sufficiently enlightened, so much the better; if any uncertainty still remains, we shall resume our examination at another time.

M. Guerrero (Salvador):

Translation: What M. Politis has said makes the situation quite clear. We are to exchange views on the proposal submitted to us; the discussion and final vote will take place to-morrow.

M. Politis (Greece):

Translation: There will be no vote.

M. Guerrero (Salvador):

Translation: I agree with M. Politis. We might suspend the meeting for a few moments and then resume the discussion on this question.

This was decided.

(The meeting was suspended at 5.55 p.m. and resumed at 6.5 p.m.)

M. Buero (Uruguay):

Translation: Gentlemen,—As the representative of a country which has acceded to the Optional Clause of the Statute of the Permanent Court, I see no objection to accepting our Drafting Committee's proposal regarding the draft article on arbitration and the judicial settlement of disputes.

I take no particular view of the different interpretations regarding the application of the Convention. I think it is purely a matter of drafting, which can easily be settled by our Rapporteur and the Drafting Committee.

We must, however, provide at the end of the text for countries which are not Members of the Permanent Court, and we must study all the possibilities offered them.

The second paragraph of the draft article submitted to you reads as follows:

> "In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement, in accordance with the constitutional procedure of each of the parties to the dispute. If no other tribunal is agreed upon, the dispute shall be referred to the Permanent Court of International Justice if all the parties to the dispute are parties to the Protocol of December 16th, 1920, relating to the Court, or, at the choice of the parties, either to the Permanent Court of International Justice or to a tribunal constituted in accordance with the Hague Convention of October 18th, 1907, if any of the parties to the dispute are not parties to the Protocol of December 16th, 1920."

We must make provision for the possibility of two countries which are parties to a dispute being unable to agree upon the choice of a tribunal, and we should decide now what final instance will settle the dispute.

M. de Adlercreutz (Sweden):

Translation: Gentlemen,—It seems to me quite easy to remedy the difficulty that arises through one country party to a dispute having acceded to the Protocol of December 16th, 1920, and the other not.

For cases of that kind we might say that States which cannot agree to submit the dispute to the Permanent Court of International Justice should refer it for settlement to a court of arbitration constituted in conformity with the Treaty of 1907.

M. Politis (Greece):

Translation: I venture to draw the Committee's attention to a passage in this text which, from what I hear, causes a number of my colleagues some misgiving.

This passage relates to the constitutional laws of certain countries. It is asked what the position would be if a dispute arises between a State which, under its constitutional laws, must obtain the approval of its legislature before submitting the case of judicial settlement or arbitration, whereas the other party's Constitution and laws do not prevent it from doing so.

To my mind the situation is very simple. A rule of international law is valid only on the basis of reciprocity. Accordingly, in the case to which I refer, if two countries are parties to a dispute and only one is faced with this constitutional obstacle, a solution will be found by drawing up a *compromis* or special agreement which will place both countries on a footing of complete equality.

M. De Visscher (Belgium), Rapporteur:

Translation: I only wish to support what M. Politis has said. The clause in question undoubtedly implies equality between the parties. Reciprocity is essential.

M. Novakovitch (Yugoslavia):

Translation: I should like some information regarding a case which I think may arise in practice. Let us suppose that a foreigner

brings a claim against a State for damage due to the fact that, as he alleges, that State has violated its international obligations. The State against which the claim is lodged replies to the claimant's State that it does not consider that it has violated its international obligations, because it interprets them differently from the other State. Thus there will be both a dispute as to the interpretation of the treaty and a claim by a private individual in respect of violation of obligations.

You will agree that this case may arise. A private claimant would thus have to wait until the question of interpretation was settled by the means provided in the draft article which is to replace Basis No. 30. There may be a dispute pending. We must be be quite clear on this point.

Further, there may not be complete concordance between the basis regarding the arbitration with which we are now dealing and Bases Nos. 5 and 6, which provide that the claim must be submitted within a year. If the question as to interpretation must be settled first, we must say so.

M. Politis (Greece) :

Translation : Yesterday we agreed to a longer period.

M. Novakovitch (Yugoslavia) :

Translation : I think it is desirable to make the point I have raised quite explicit.

M. Limburg (Netherlands) :

Translation : I quite agree with this Basis of Discussion ; I only want to draw the Committee's attention to a small drafting error in the French text. The text reads as follows :

> " S'il s'élève entre les Hautes Parties contractantes un différend relatif à l'interprétation ou à l'application de la présente Convention, et si ce différend n'a pu être réglé de façon satisfaisante par voie diplomatique, il le sera conformément aux dispositions . . . "

" Il le sera " implies that it will be settled in a satisfactory manner by diplomacy. We should, therefore, I think, revise the text, omitting the word " le " and saying : " il sera réglé ".

M. Giannini (Italy) :

Translation : I should like to reply to the objections raised by our Yugoslav colleague. As regards the second paragraph, we decided that a period of two years should be allowed within which the remedy may be sought, and that a longer period might even be fixed for particular cases. Moreover, this paragraph possesses a certain amount of elasticity.

If the claim is submitted within the prescribed period, you have nothing to fear ; the remedy remains open. Consequently there is no discrepancy between the texts.

M. Novakovitch (Yugoslavia) :

Translation : There is the question of the time-limit and also that of the suspension of proceedings. Is the actual claim to remain in suspense until the question of interpretation — in the event of a dispute — is settled ? In others words, must the person concerned wait or not if there is a dispute as to interpretation ?

M. Giannini (Italy) :

Translation : It is not a matter of a period of prescription, but of the time when the right to claim is forfeited. If you submit your claim within the fixed period, the remedy remains open until the Court or arbitral tribunal takes its decision.

M. Novakovitch (Yugoslavia) :

Translation : But that is not what is said.

M. Giannini (Italy) :

Translation : I think there cannot be any complication. If the period within which the claim must be brought is interrupted, it cannot lapse.

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : The difficulty which the Yugoslav delegate has in mind cannot arise in so far as disputes regarding interpretation and disputes regarding application are both subject to arbitration under the terms of one and the same convention. In point of fact, when a claim arises in respect of international responsibility, it is a case of application. A question of interpretation may arise out of the claim, and will then become a point of law, which will be settled by the same international tribunal in the same proceedings. There are not two completely separate cases ; there is only the one opened by the international claim. If, therefore, in the course of these proceedings the defendant State raises a question of interpretation in regard to a provision of the Convention the application of which is sought, it is simply another point of law to be examined by the international tribunal.

A difficulty would arise, however, if there were two separate protocols, one for application and the other for interpretation, as the Japanese delegation proposes, and if both States were not parties to both protocols. There would then necessarily be two independent cases, one relating to application and the other to interpretation. Normally, however, there would only be one, and the question of interpretation could be linked up with it.

M. Guerrero (Salvador) :

Translation : I cannot see how we shall examine all the details of this proposal at tomorrow's meeting. I should like the undertaking to have recourse to the international authority to be made more precise ; I should like the first sentence to contain the explicit

terms: "*The parties undertake* to settle the dispute in accordance with any applicable agreements in force", and so on; and similarly at the beginning of the second paragraph; ". . . *they undertake to submit*, etc.".

M. Giannini (Italy):

Translation: The Committee cannot go into these theoretical questions on points of interpretation and application which our distinguished Egyptian colleague has raised. Interpretation is an abstract matter; application is a practical one; it is difficult to treat them separately, because they are liable to arise simultaneously. It is very difficult to say at present how the two cases should be treated. If I am concerned only with interpretation, I raise the question in abstract terms: could I do this or that? If I enter into the practical domain, I should ask the Court or the arbitral tribunal whether, in the circumstances, I had the right to do this or that. As you see, the question can be treated from the point of view of interpretation and from that of application simultaneously, and it is difficult to separate them. For that reason we must consider both situations.

There still remains, however, the question raised by our Japanese colleague. That, however, cannot be considered this evening because it raises the question of the final form we are to give to our decisions. It is a general problem which concerns the Conference as a whole and may arise in the other Committees. I do not know the Bureau's view on the point. I refer to M. Politis.

M. de Adlercreutz (Sweden):

Translation: I am sorry I did not quite understand what was said just now by M. Politis and M. de Visscher on reciprocity as it affects constitutional law.

Suppose a dispute arises between Switzerland and Sweden. It will be submitted to an arbitral and judicial procedure. Each country will have to conform to its own constitutional laws. The Swiss Constitution might require the assent of the Federal Assembly, or perhaps even a referendum. I know that is not the case; I only assume it as a hypothesis. In such a case we in Sweden could not apply the Swiss Constitution; we should apply our own, and possibly it would be our own Government alone which would decide the matter.

Reciprocity must therefore consist in the application by each country of its own Constitution. I should be glad to have some information on that subject.

M. Politis (Greece):

Translation: I should like to give a brief explanation of all the points which have just been raised. The questions which have been considered are, I think, extremely simple.

As regards reciprocity, what I meant just now was not of course that a country would be asked to apply the constitutional provisions of another country. What I meant was this: some countries, according to their Constitution, cannot undertake in advance to apply compulsory arbitration in future contingencies. They must in each case draw up a *compromis* or special arbitral agreement, have it approved by the competent authorities and then go before the arbitrator or judge.

If one of those countries has a dispute with another whose Constitution does not prevent it from accepting compulsory arbitration or compulsory recourse to a judicial body — to take literally the text you have before you — the country whose Constitution contains the obstacle I have just referred to might cite the other country direct before the Court, whereas the latter would not be able to do so. It would have to wait until the special agreement had been concluded and approved by the competent authorities.

In order to restore the equality and reciprocity which are essential and are assumed to exist in every rule of international law, it is obviously necessary, whenever a dispute arises between two countries and one cannot cite the other direct before the Court, that the other, too, should not be able to do so, and that, if a special agreement is necessary for one of the two, it should also be necessary for the other. In these circumstances, all disputes which arise with a country, thus prevented by its Constitution from accepting compulsory arbitration at once, will not be brought before the judicial body until a special agreement has been concluded. In that way equality and reciprocity will be restored. I think — and the Rapporteur has confirmed my view — that there can be no doubt whatever on that point.

I agree with M. Limburg that it would be clearer if in the fourth line of the text we said: "il sera réglé conformément . . ." instead of: "il le sera . . ."

M. Guerrero asked that the undertaking to have recourse to arbitration and judicial settlement should be expressed more clearly in the text. I myself see no objection. I will only say that, when a text states that the parties shall submit the dispute to a procedure, it means that they bind themselves to do so. If the text is not regarded as constituting an obligation, it has no meaning at all. But, I repeat, if it is thought necessary that this idea, which is understood, should be expressed more clearly, I shall make no objection.

There remains the questions raised by our Yugoslav colleague and the observations of our Egyptian colleague. As far as I am concerned, the situation is quite clear. The text we adopted yesterday was intended to prevent judicial awards at municipal law from being made the subject of international claims for an indefinite period. If an appeal is to be made against such an award, it must be made within a specified period. A period of two years is suggested or, in exceptional circumstances which justify an extension of the period, a rather longer time.

This text, however, means that the claim must be made within the period specified. The Government of which the injured party is a national need only approach, through the diplomatic channel, the State alleged to be responsible, in order to invalidate an objection based on lapse of time. What will become of this claim through the diplomatic channel? If an agreement is reached, there will be no legal proceedings ; if no agreement is reached, the procedure we have in mind will take place. That, however, is where the difficulty arises.

The country in regard to which action is taken may possibly not have agreed to have recourse to a judicial body except for the sole purpose of interpretation, as our Japanese colleague asks. On the other hand it may have agreed to such recourse for purposes both of interpretation and of application. I take the latter hypothesis as being the simpler. Failing a diplomatic agreement, the State putting forward the claim on behalf of its national may, according to circumstances, go before the Court direct and ask not only for an interpretation of the Convention but also for a statement of the consequence of the interpretation — according to it, an erroneous one — placed upon the Convention by the other State in passing judgment — that is to say, in fixing the compensation claimed as reparation for its national.

On the other hand, again, if — and this is the other hypothesis — a State has accepted recourse to a judicial body for the purpose of interpretation only, the Court can only be asked one thing — namely, to decide that, contrary to its assertion, the opposing State has violated its international obligations according to the interpretation placed upon the Convention by the other State. The Court will say whether the State cited before it has interpreted the Convention correctly or not in the case in question. It cannot pass sentence — that is to say, it cannot grant compensation.

You say that the situation will still be unsatisfactory. I agree ; but it will be so because the State in question will not have accepted the judicial remedies available for cases of application. I hasten to add that I feel little misgiving on that account, because a self-respecting State, after receiving a solemn and official opinion from the Court that it has wrongly interpreted its international obligation, will obviously be unable to ignore the new diplomatic claim submitted to it for the fixing of an indemnity ; otherwise it would be guilty of an act of injustice, and the claimant State would have the right to bring the question before the League of Nations and to make it generally public. I do not think, however, that because the situation seems unsatisfactory in theory, it ought to remain so in fact, or that the Court's decision as to the interpretation of the Convention could ultimately be left without a sanction.

That, in my view, is the position as regards the various cases put forward. As you see, the difficulties are not very great, and I think we might easily come to an agreement.

33. POINT OF ORDER : PROPOSAL OF THE BRITISH DELEGATION TO ADJOURN THE DISCUSSION OF BASIS No. 30 AND TO CONSIDER BASES Nos. 10, 17 AND 18.

Mr. Beckett (Great Britain) :

On a point of order, this discussion on Basis No. 30 in this Committee, is not, I understand, in any event to be conclusive ; it is an informative exchange of views on a matter which will be finally decided elsewhere.

Now, there is another matter which has to be decided by this Committee. I refer to Bases Nos. 10, 17 and 18. Here is a matter which a number of delegations think it is essential should come before this Committee and be finally decided by it, and I hope that arrangements will be made so that the Committee may have time to discuss these bases, and that the debates upon Basis No. 30, which are in this Committee purely provisional, should not be allowed to extend so long that there will be no time to take Bases Nos. 10, 17 and 18.

M. De Visscher (Belgium), Rapporteur :

Translation : You have just heard the motion submitted by the British delegate, to the effect that the examination of the question we have been considering should be postponed, and that we should now proceed to discuss the questions raised by Bases Nos 10, 17 and 18.

I must also inform you that I have received a text from the Greek, Italian, British, United States and French delegations, reading as follows :

> " As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, make reparation or inflict punishment for the acts causing the damage."

M. Sipsom (Roumania) :

Translation : Gentlemen, — Yesterday evening, as a result of what M. Politis said, and in view of the weighty considerations he advanced, we decided to leave the discussion of these bases, postpone them, and take up certain matters which are considered by all to be more urgent ; but to-day, at 7 o'clock, at the end of our meeting, and without our having received any fresh formula, it is suggested that we resume a discussion which was considered inexpedient yesterday evening.

I should like to know why we are now doing the opposite of what we decided yesterday. If there are serious reasons for such a course, we ought at least to be given time to examine the new formula. Moreover, I cannot quite see how we shall save time by breaking off

and then resuming and then again leaving questions which, as the Rapporteur admits, are urgent.

In conclusion, I will say that, though I do not understand the reasons for this change of view, I should like the rediscussion of the basis — if it is to be rediscussed — to take place to-morrow, so that we shall have time to see how we stand.

M. De Visscher (Belgium), Rapporteur :

Translation : The position seems to be this. The decision adopted yesterday was that we should postpone the question. What else is on our agenda? The examination of the question of jurisdiction.

The view taken by Mr. Beckett and several other delegates is that the question of jurisdiction should not be unduly prolonged, as we cannot get the length of taking a vote on the point and as there is no decision to take. Accordingly, it is proposed that we take now the question which was postponed yesterday.

M. Sipsom rightly objects that no text has been circulated.

Accordingly, I think it will be agreed that this question, which many delegates consider to be of fundamental importance, should be discussed in due course to-morrow.

That is the course I propose, and I think it will meet with the views of all who want something definite to be done in the matter.

I beg the Committee to decide whether it will adopt the procedure I propose.

After the exchange of views to-morrow on the question of jurisdiction we shall have time to take the proposal submitted by the British delegate.

M. Sipsom (Roumania) :

Translation : And the other questions.

M. De Visscher (Belgium), Rapporteur :

Translation : I would point out to M. Sipsom that there are no more questions on the agenda for discussion in first reading. A vote has been taken on the question of officials, and it has been referred to the Drafing Committee. That Committee will submit to us a text which we can then read a second time.

M. Giannini (Italy) :

Translation : Unless I am mistaken there are some Bases of Discussion which we are not to consider. It would perhaps be desirable to mention this in the report, and even to add that we had no opportunity of considering them. Some of these bases lay down general rules, and I myself am sorry they have not been examined because, in my opinion, they are as essential as the rest.

M. Sieczkowski (Poland) :

Translation : Gentlemen, — The Polish delegation had the honour to submit to you a proposal for the adherence in principle to Basis No. 30. As this question is included in the one that we have already begun to consider, I ask whether I shall still have an opportunity of supporting my proposal.

M. Dinichert (Switzerland) :

Translation : I believe I was the only speaker yesterday who urged the Committee to continue the discussion of the questions arising out of Bases Nos. 10, 17 and 18. The Committee will not be surprised to learn that I have not changed my mind. I recommend that we continue the examination of this question, but as a number of delegates have submitted a new text, it will be desirable for us to receive it.

The Chairman :

Translation : I think that the point of order raised by the British delegation to postpone the discussion until to-morrow is adopted.

M. De Visscher (Belgium), Rapporteur :

Translation : In the meantime all the necessary documents will be circulated.

The Chairman :

Translation : I put the point of order to the vote.

The motion to postpone the discussion until the next day was unanimously adopted.

M. De Visscher (Belgium), Rapporteur :

Translation : An amendment has been submitted by the Polish delegation, the text of which follows upon that proposed by the Drafting Committee for Basis No. 30.

Our colleague's amendment provides that damage caused to the person or property of foreigners cannot in any case justify the application of measures of coercion by the State whose nationals have suffered damage to the State on whose territory the act giving rise to the damage took place.

I venture now to give my view on this amendment. I understand the general motive which underlies it and I fully sympathise with that motive. In the form in which it is submitted, however, the amendment would give rise to lengthy discussion and numerous reservations. It is proposed to exclude measures of coercion. Now that is an extremely wide term. As my Polish colleague well knows, measures of coercion are applied in a number of fields. They may be measures of armed force or economic measures, or they may take the form of reprisals, or again they may be simply acts of retortion.

All this requires to be made quite explicit ; otherwise a very long exchange of views may take place. I therefore ask my Polish colleague to think over before to-morrow the difficulties which his text raises. We may have a talk on the subject in the meantime.

The Committee rose at 7.10 p.m.

FIFTEENTH MEETING

Friday, April 4th, 1930, at 3 p.m.

Chairman : M. DIAZ DE VILLAR

34. BASIS OF DISCUSSION No. 30 : TEXT PROPOSED BY THE DRAFTING COMMITTEE OF THE CONFERENCE (Continued).

The Chairman :

Translation : The discussion will be continued on Basis No. 30, which deals with the question of jurisdiction.

M. Sipsom (Roumania) :

Translation : I have heard that amendments are to be proposed to the preamble of the text submitted to us. At present the preamble reads as follows :

> " If there should arise between the High Contracting Parties any dispute relating to the interpretation or application of the present Convention . . . "

There is one important point, I think, for which no provision is made. I refer to the question of the judicial body before which disputes as to the responsibility of a State are to be brought. The preamble speaks only of disputes regarding the interpretation or application of the Convention. In my opinion, however, the other question is more important — namely, if a State alleges that another State has caused damage to one of its nationals and if that State disputes the claim as to responsibility, to what judicial body will it apply?

The Supreme Court has two kinds of powers and you have only considered one. It has the power to decide *in concreto* in individual cases, and that, in my opinion, is the most essential. When responsibility has been incurred under a provision of the Convention, it must be known what judicial body is to hear the dispute. The case provided for in the first paragraph of the text submitted to us does not require an individual decision but a decision *in abstracto*, with the object of obtaining an authentic interpretation of one of the clauses of the Convention.

When a dispute arises as to the meaning, scope, interpretation or application of a clause of the Convention, it would be desirable to have it referred to a judicial body which can interpret with authority, and which must be recognised whenever an agreement cannot be reached as to interpretation.

It would, I think, be useful to add a paragraph regarding individual cases — that is to say, the responsibility invoked by a State against another State for damage caused to one of its nationals, and to give the Permanent Court of International Justice under the same conditions as those referred to in the second paragraph, power to settle such disputes ; otherwise, if responsibility is recognised in principle there would be no indication as to what judicial body should be asked to decide the question of responsibility.

Such are my observations on the first paragraph. When the Committee discusses the conditions governing appeals to the Court I shall have some further observations to make. At present I will merely maintain my request, for which I have given the reasons, and I ask the Rapporteur to tell me whether I am wrong in saying that an essential factor in the question of the Court's competence has been omitted.

M. Giannini (Italy) :

Translation : Gentlemen — By arrangement with M. De Visscher I am speaking as Chairman of the Drafting Committee in the absence of the Rapporteur.

I should like to point out to our Roumanian colleague that, before we can reach an agreement we must first of all consider on what lines the general rules were drawn up by the Drafting Committee. In that way we may clear the ground.

The General Drafting Committee considered the desirability of taking up as soon as possible the general rules which existed in previous conventions. I will not venture to say that all those rules were well drafted, and I myself might offer several criticisms of them.

I think, however, that texts based on experience are always better than those based on purely literary considerations or on other grounds.

Those are the lines on which our texts were drawn up. I think I need add no more.

Let us take a practical example. Suppose dispute arises between Italy and Roumania I purposely take two friendly countries because neither you nor I will thereby be offended. If we are bound by a treaty of general conciliation and arbitration we shall already have a particular judicial body to settle the dispute. That body will have to settle both the question of the interpretation of the treaty and also its application. Indeed, application is hardly conceivable without interpretation, because it is impossible to apply a treaty without interpreting it.

Consequently, if the Convention deals with both interpretation and application the Convention will be applied. There is little difficulty in that.

The difficulty may arise if a particular convention relates only to interpretation. What can be done before the judicial body in such circumstances ? I could not oppose the actual or individual case, but I could oppose the case as to interpretation.

How are we to interpret this formula? Here, it is the way in which the problem is stated that is important. We may agree to state the problem in such a way that there will be only a theoretical question to be submitted to the judge.

That is a thing that happens every day. A Government may ask for an opinion in a particular case, or for a general opinion.

M. Politis has said that the treaties must be applied in good faith. It is therefore mainly a question of application, and the various States will find no difficulty in reaching agreement. Even though they fail to agree, however, they have at their disposal other means of settling the case.

Moreover, if you want a formula which will solve the doubt you have raised, I should like to know what, in practice, — that is to say in concrete terms — you can find better than this wording, which already has a certain practical basis. If you can find such a formula the Drafting Committee will gladly accept it, or any other better worded formula covering these general clauses.

M. Urrutia (Colombia) :

Translation : This article of the Convention is so important that we must all agree to make the wording as clear and precise as possible, so as to avoid giving rise to any uncertainty. The text submitted by the Drafting Committee is satisfactory, but perhaps not satisfactory enough. There are, in point of fact, not two but three different cases : first, the interpretation of the Convention ; on that point we all agree that there can be no doubt and that precedent is so firmly established that it would be a most unusual course not to put this article in our Convention : secondly, there is the case of application, and on this, in order to avoid disputes in the future and in view of the great progress made in arbitration, we may also reach agreement, thirdly, there may arise cases which relate neither to interpretation nor to application. Two States may agree as to the application of the Convention, that is to say, on the question of invoking responsibility, but there may be a discussion as to the amount of the damages.

That is a entirely different case from those of application or interpretation, and compulsory reference to a judicial body should be established for that also.

This case relates to the consequences of the application of the Convention rather than to the application itself or the interpretation, and this is evidently the view taken by the Preparatory Committee, since it asked States whether or not they wished to establish an obligatory procedure for cases of claims, without mentioning cases of interpretation or application. The original wording of Basis No. 30 is as follows :

> " A claim made by a State in respect of damage suffered by one of its nationals and based on the provisions of the Convention . . . "

Since M. Giannini has asked whether we can suggest a clearer wording I will ask the Drafting Committee whether we could not say the following :

> " If there should arise between the High Contracting Parties any dispute relating to the interpretation or application of the present Convention, and in general *for any claim* submitted by a State for damage suffered by one of its nationals, if such dispute cannot be satisfactorily settled. . ."

That wording would cover both the application and interpretation of the Convention, and in general all claims in respect of State responsibility. In that way there could be no uncertainty. All questions of responsibility, whether the responsibility were invoked or not, or whether the matter related to the consequences of responsibility when invoked or the estimate of the damage — all cases of responsibility without exception would be submitted to a judicial body such as that which we are establishing here — that is to say, there would be compulsory jurisdiction.

M. Guerrero (Salvador) :

Translation : We all think that all disputes relating to State responsibility must be submitted to an international judicial authority since we almost all represent States which are signatories of the Statute of the Permanent Court. Moreover, I remember that, when we discussed international obligations, the main argument of almost all the delegations forming the majority was the argument invoking Articles 36 and 38 of that Statute. We cannot therefore be divided in opinion on that point. To make the agreement complete, I propose that we introduce in the first paragraph, after the words " of the present Convention ", the words " or regarding the effect of the responsibility in dispute ". The text will thus read :

> " If there should arise between the High Contracting Parties any dispute relating to the interpretation or application of the present Convention, or regarding the effect of the responsibility in dispute. . . "

M. Urrutia (Colombia) :

Translation : That would not be enough.

M. Guerrero (Salvador) :

Translation : We might say : " . . . or regarding the effect of the responsibility in dispute or the consequences thereof ". That is a drafting question which can easily be settled.

Mr. Beckett (Great Britain) :

I am in entire agreement with the ideas expressed by M. Guerrero and M. Urrutia, but I do not think that, in order to obtain the results which they desire, it is necessary to make any such additions. The words " interpretation or application " are words which have appeared in a very large number of Conventions, and they have already been the subject of interpretation by the Permanent Court of International Justice. If from one point of view the decisions of the Permanent Court of International Justice are not absolutely binding precedents, nevertheless I think we can aceept them as being interpretations of these words which we can very well follow.

Now, the very point which M. Urrutia and M. Guerrero have raised has, in fact, come before the Permanent Court and has been decided. It was decided in the long course of litigation which arose out of certain affairs in Upper Silesia, where the Court held under the terms of a basis of the Convention which gave them jurisdiction to determine questions of interpretation, that they had jurisdiction to determine the measure of damages payable for a breach.

Therefore, as interpreted by the Court this point is covered. Now, when points are covered in this way is it not really a great mistake to depart from time-honoured formulæ which everybody understands and to introduce new expressions which after all, always tend to increase doubts rather than to allay them ?

Abd el Hamid Badaoui Pacha (Egypt) :

Translation : I fully agree with the conclusions of our British colleague. The word " application " must be understood in its customary legal sense — namely, the deduction from a rule of law of the solution to be applied to a group of facts.

The Convention affirms *inter alia* responsibility in the event of failure to fulfil an international obligation and an obligation to make good the damage done.

Consequently, when two States are at variance in regard to facts which have given rise to responsibility, or in regard to the extent and the amount of the damage caused, it may be said that the obligation to make compensation has not been fulfilled by the defendant State. As the international judge has to deduce from the whole body of provisions the particular solution to be applied to the dispute, he will have to determine the facts and assess the amount of compensation. That is what generally takes place in national courts. The judge applies the law ; in other words, in the matter of criminal responsibility he imposes the penalty, and in that of civil responsibility he awards damages.

The essential point is that the Convention proclaims the principle of obligation to make reparation. Accordingly, whenever a dispute arises in regard to the amount of compensation, it must be assumed that there has been a failure to meet this obligation, and the judge who has to apply the convention will have to indicate the means of fulfilling the obligation ; in other words, he must fix the amount of the compensation.

M. Vidal (Spain) :

Translation : The formula submitted to us seems quite a good one. In point of fact, all the questions that may arise relate to the interpretation or application of the Convention. On the other hand, the observations made by M. Urrutia and M. Guerrero have a certain weight. They are not really asking for the opposite of what is laid down in the text before us ; they only want to make it a little more precise. I wonder whether we could not slightly change this text. After the words : " If there should arise between the High Contracting Parties any dispute relating to the interpretation or application of the present Convention " we might add : " or to such acts as give rise to responsibility and to the consequences resulting therefrom. . . . ."

This is not merely a question of the legal application of the Convention, but of the acts which give rise to responsibility and all the consequences ensuing therefrom. The acts to which M. Urrutia referred would be covered by this wording.

M. Urrutia (Colombia) :

Translation : I quite agree with our Spanish colleague. I think the wording he proposes is, in fact, the outcome of our observations. I should like, however, to make a few observations on what was said by our British colleague.

I consider that the decisions of the Permanent Court of International Justice carry great weight. They will constitute in the future an important body of case law. They can never, however, constitute international law. One day, we will say, a decision is given ; the next day an award may be given in a contrary sense. Arbitral tribunals often disagree on this very question of the responsibility of States. It is difficult to find two awards of arbitral tribunals which exactly concord. Some decisions, such as the well-known one of the Costa Rica Packet, have been studied by almost all writers on international law.

If the Permanent Court of International Justice can evolve a principle we can make it a basis of the Convention.

Above all, we must try to remove all uncertainty. A case may arise where a State agrees to recognise its responsibility, but does not agree as to the amount of the indemnity

In these circumstances I think our Spanish colleague's wording may satisfy everybody and remove all doubts. I should be glad if the Committee can accept this provision, to which no objection whatever can be raised.

M. de Adlercreutz (Sweden) :

Translation : I understand that the Committee is not asked to vote on the text now before us. In that case I ask whether there is any real point in continuing the discussion on this first paragraph. It is clear from the opinions expressed that we are all agreed as to the substance of this paragraph ; we differ only on the matter of drafting.

The proposals and observations of the various members of the Committee will be entered in the minutes. This will also be the case in the other Committees. The question of drafting this paragraph will be dealt with, I understand, at a plenary meeting.

That being so, I think we should now pass to the discussion of the second paragraph.

M. De Visscher (Belgium), Rapporteur :

Translation : You have heard M. de Adlercreutz's proposal. He has raised a point of order. We thus have two proposals before us on which we have now to vote.

M. Urrutia (Colombia) :

Translation : Why?

M. De Visscher (Belgium), Rapporteur :

Translation : Because that was decided yesterday. We are simply exchanging views on this text. This exchange of views was also agreed upon yesterday evening, and it was decided that it should not be unduly protracted. M. de Adlercreutz, bearing in mind what the Committee decided yesterday, proposes that it should not continue its exchange of views on this first paragraph, and should pass to the second paragraph.

M. Urrutia (Colombia) :

Translation : I cannot quite understand why the point of order is raised. The Committee must take a decision. I ask the Chairman to consult the Committee as to the wording submitted by the Spanish delegation in amendment of the Drafting Committee's text.

M. Giannini (Italy) :

Translation : I would remind you that this text has been discussed here only by accident. It was inserted as No. 30 of the Bases of Discussion regarding the responsibility of States. As the Drafting Committee had already prepared a text, the Rapporteur felt it desirable to point out that there already existed a general rule suggested by the Drafting Committee. That was why we held an exchange of views.

Of the general rules suggested by the Drafting Committee only one was referred to our Committee — namely, that relating to reservations. All the other general clauses are reserved for the Drafting Committee. That Committee, however, may always benefit by experience, by the discussions that take place and by any suggestions that are made.

In my opinion the question before us is this : Must the general formula as prepared for the three protocols be modified for particular reasons in the case of this Convention? If so, what practical suggestions can you make? The three practical proposals should, I think, explain the word "application". I ask our colleagues who have submitted these amendments whether they have anything to add to explain what is meant by " application " ? M. Urrutia's formulæ has a wide scope ; it relates to questions which lie outside the Convention.

Then there is another suggestion — that of M. Vidal, who has submitted an amendment in the form of a sentence to be embodied in the paragraph.

Lastly, there is M. Guerrero's formulæ.

The last two formulæ lie wholly within the scope of the Convention. I should like to ask, however, whether you think that, if we adopted these two formulæ, we should be adding something to the practice followed in regard to application, to the meaning traditionally attached in practice to the words " interpretation " and " application " in the treaties concluded hitherto. I feel some uneasiness on that point. We must not spend too much time on the meaning of "application". If we discuss the general formulæ consecrated by usage we might go on for a very long time.

For these reasons I can assure the Committee that the suggestion made to refer the matter to the Drafting Committee may safely be accepted. I beg you to place confidence in us. We are going to consider the problem in all its aspects. We shall see whether any changes are necessary in view of the suggestions made.

M. Urrutia (Colombia) :

Translation : This is not a matter of drafting : it is a question of substance, and it is for the Committee to give a decision on the subject.

M. Giannini (Italy) :

Translation : If it is a question of substance then I fail to understand the matter at all.

I should like to add a few words to enable us, if possible, to come to an understanding. The General Drafting Committee has to prepare the general rules which are to be embodied in all the conventions and to co-ordinate the formal clauses prepared by the three Committees, and also the recommendations and *vœux* to be submitted to the Conference. All the suggestions made so far will thus be sifted by the General Drafting Committee.

In the second place, there is a very important problem to which I should like to draw attention. We have now come to the last meeting of the first stage of our work. The General Drafting Committee considered that the formulæ as to reservations must be drawn up in a special way for each Committee. This problem is therefore of very special importance, and requires to be exhaustively considered by the Committee. We, however, have no power to determine the form of these rules. Moreover, we must save time, and that is why I ask you to give up the problem we

are discussing, and to pass to the second paragraph, on which a proposal has been made by the Japanese delegation. The problem of reservations must be solved to-day, so as to enable the General Drafting Committee to do its work.

M. Guerrero (Salvador) :

Translation : If I have rightly understood the exchange of views that has just taken place, we are here to accede to the text adopted by the Drafting Committee and not to make observations.

As far as the delegation of Salvador is concerned, I have not authorised the Drafting Committee to draw up a text on a question which has not been discussed, still less put to the vote. You who are signatories of the Statute of the Permanent Court of International Justice, believe in arbitration ; yet you are afraid to allow light to be thrown on a text which you are submitting to us. I wholly fail to understand what it is you fear since you all believe in international justice.

I do not know what you have decided. In any case, if the discussion which has been begun is to continue, I withdraw my proposal and support that of the Spanish delegation.

M. Sipsom (Roumania) :

Translation : I also support M. Vidal's proposal.

M. Dinichert (Switzerland) :

Translation : May I say a few words on the procedure we are following at the present time? When a Committee discusses a question it has a fundamental right to know what it is doing and I think there is some uncertainty on that point.

If I understand aright, the situation is this : we are now discussing a clause that is to be introduced into the instruments which will be the outcome of the work of the three Committees. As we are all working as parts of the same Conference, we have naturally no reason to make differences in the form of the general provisions which are to appear in the agreements reached by the three Committees, and these general provisions will be discussed at a plenary meeting of the Conference.

The General Drafting Committee, however, which has to pave the way for that discussion, has thought it right to lay a draft before the Committees, including our own, in order that we may give it some guidance. We are told— very rightly — that we were not asked to take a final decision here, since this Committee cannot impose its decisions on the other Committees. We are therefore doing preparatory work which will be of very great use to the General Drafting Committee, and that Committee will draw up, in the light of the work of the three Committees, a new draft to be submitted to the Conference, which will discuss it and take a decision.

As the discussion has been begun here, we might profitably pronounce an opinion on the practical questions which have arisen in the course of it, not with the idea of giving a final decision — it is not for us to do so — but in order to help the Drafting Committee. We have not helped that Committee, because it does not know whether our Committee prefers, in regard to the first paragraph, the text submitted or the text as completed by the proposal that has been made.

What I venture to ask is that, if we think the discussion is practically finished, the Committee should be allowed to express its opinion on the definite proposal which has been made, on the understanding that it will thereby be doing no more than offer a suggestion to the Drafting Committee.

I myself could quite well support the Drafting Committee's text, because I feel sure that, when we speak of the interpretation and application of this Convention, it will be found that any particular case will certainly be covered by the term " application ".

That does not mean that I see any insuperable objection to the addition proposed, but I do not think that addition necessary. It may not do any harm, yet I question whether it is really expedient, since, if we add that the international tribunal will deal with acts out of which responsibility arises, we seem to imply that that point is not included in the application of the Convention. To assume so, however, would be a mistake. I can understand that those who feel misgiving should prefer the addition to be made, but I simply wanted to show that in my opinion it was not specially necessary.

In any case, my point is that the Committee should give an opinion on a question which has been discussed at considerable length already.

M. Politis (Greece) :

Translation : I wish to make only a few brief remarks in order to dispel the misgivings of those of my colleagues who are afraid that the expression " disputes relating to the interpretation or application of the present Convention " may not cover all cases, and in particular that mentioned by M. Urrutia regarding the fixing of an indemnity.

He assumed that the two disputant States agree that responsibility has arisen and that the Convention must be applied, but that they disagree as to the amount of the indemnity.

I will not repeat what Mr. Beckett very admirably said. A large number of treaties concluded between various countries in different parts of the world contain the expression : " disputes relating to the interpretation and application of a convention or treaty ".

Moreover, there are a large number of judicial precedents on the subject, established by mixed tribunals and by the Permanent Court of International Justice. To the best of my knowledge, however, those tribunals, and in particular the Permanent Court, have always

understood the expression : " disputes relating to interpretation and application " as covering difficulties of all kinds, including the fixing of indemnities.

There is therefore no occasion to make this addition to the wording, and there would even be some danger in doing so. To modify here terms which have become consecrated, which have a definite meaning both in doctrine and in practice, would be to lessen and even call into question the value of those terms.

There would be a very serious objection to changing what has already become established, more particularly at a time when a legal nomenclature is in process of formation.

Before addressing you. I consulted a number of texts, and I found a formula which might be more complete, and which might perhaps satisfy all our colleagues. I found it in a treaty. It would mean simply adding after " dispute " the words " of any kind ". The text would thus read : " any dispute of any kind relating to the interpretation or application of the present Convention ".

A treaty drafted in this form has come before the Court of International Justice. In the opinion of the Court there was no doubt that the text so drafted included the examination and fixing of the amount of the indemnity.

Lastly, when we speak of the application of a Convention, that covers all questions, as Mr. Beckett very rightly said. See how true this is, and particularly in the case cited by M. Urrutia. Of the texts you adopted at first reading, that founded on the former Basis 29 provides that responsibility involves an obligation to make good the damage suffered. Thus, so long as no reparation has been made for the damage, this clause of the Convention has not been applied. It would therefore suffice to have this text and to rely on it before an international tribunal with the clause relating to jurisdiction ; there would then be not the least doubt — if any doubt could have subsisted at all — that the Court would agree to decide on the amount of the indemnity.

I therefore propose this slight addition, whereby the text will read :

> " any dispute of any kind relating to the interpretation or application of the present Convention. "

M. Urrutia (Colombia) :

Translation : I agree with my distinguished colleague, M. de Visscher. We cannot draw up a single text for all three Conventions. We can, however, make certain suggestions regarding the Convention on the Responsibility of States, which, by its very nature, cannot be compared with the Conventions on Nationality and Territorial Waters. The questions involved are quite different. The Committee may give the Conference some indication as to the special purport of the Convention on Responsibility.

I should like the Committee to be consulted, so that it can give its opinion on the point. If it decides against M. Vidal's proposal, which is supported by M. Guerrero and myself, I will bow to its decision. I should, however, like to know its real wishes. I should like this particularly because — and I venture very respectfully to bring this point especially to the notice of the Chairman, the Bureau and the Committee itself — we are negotiators, representatives of Governments with full powers, and naturally we are trying to negotiate a Convention such as we can sign. At an international conference of plenipotentiaries negotiating a convention, small questions of procedure must necessarily be given rather less attention than the actual substance of the negotiations. We are spending time here in discussion, but the matter is a very difficult one and the question is serious.

I do not agree with our distinguished colleague, M. Politis, and I will tell you why. He was present at the meeting of the Institut de Droit International held at Lausanne in 1925. There we drew up a draft on responsibility, and, after approving an article on arbitration for purposes of interpretation, we adopted a separate recommendation to the effect that all disputes regarding responsibility should be submitted to arbitration — as an entirely different question, however. It was because doubt existed and discussion took place that the Courts were asked to decide. It is that discussion that we are trying to obviate by stating that questions of damages and interpretation are covered by the application of the Convention.

It is for that reason that M. Guerrero and I have accepted the Spanish delagate's proposal, and I ask the Chairman to consult the Committee on it. If the suggestion is rejected, I should in any case prefer the proposal of M. Politis, who at the end of his statement agreed that a change was necessary.

M. Limburg (Netherlands) :

Translation : I will not speak on the substance of the question after hearing M. Politis, because he has said what I was going to say — namely, that it would endanger the position of existing treaties to add to this Convention a new word to the words " interpretation and application ", which are established by practice. I propose, however, on a point of order, that the debate be closed.

M. de Berczelly (Hungary) :

Translation : In order not to narrow the meaning of the term " interpretation and application ", we might simply say :

> " . . . any claim submitted on the basis of this Convention, and if such claim cannot be satisfactorily settled by diplomacy, shall be submitted " . . .

The Spanish delegate's proposal amending the Drafting Committee's text was put to the vote and rejected by 16 votes to 11.

M. de Berczelly's amendment was put to the vote and was also rejected by 14 votes to 10.

M. De Visscher (Belgium), Rapporteur :

Translation : We now have M. Politis' proposal to add the words "of any kind" after the word "dispute".

M. Politis (Greece) :

Translation : I made this proposal by way of a compromise. Since M. Urrutia does not accept it, I withdraw it.

M. Urrutia (Colombia) :

Translation : I do accept it.

M. Politis (Greece) :

Translation : Nevertheless, I still withdraw it.

M. Urrutia (Colombia) :

Translation : Then I will take it up again and submit it to the Committee.

M. Politis' amendment, reintroduced by M. Urrutia, was put to the vote and adopted by 22 votes to 8.

M. Buero (Uruguay) :

Translation : I have a small observation to make on the second paragraph ; it relates to the logical order of the remedies.

The situation is this : according to the basis, the parties to the dispute have drawn up rules for the settlement of their dispute. If, however, one of the parties has not accepted this undertaking, various possibilities may arise. The first to be considered is, of course, that both parties are Members of the Permanent Court of International Justice and have signed the Protocol of that Court. Possibly, however, both parties may not have signed the Statute of the Court, and in that case the dispute might be submitted to arbitration as provided in the Hague Convention of October 18th, 1907.

If none of these remedies is available, the parties might, in this case only, choose another arbitral or judicial procedure, in accordance of course with their constitutional laws.

We must ensure that as many cases as possible are submitted to the Permanent Court of International Justice. Unless the two parties have already drawn up a special convention, the Permanent Court of International Justice should be the first instance to which appeal is made, provided of course that both parties have signed its Statute.

I have drafted a text containing practically the same words as the text submitted to us. In doing so I had to perform some very delicate mosaic work. The idea underlying this text is to affirm the priority of the Permanent Court of International Justice. It is this :

> " In case there is no such agreement in force between the parties, the dispute shall be referred to the Permanent Court of International Justice if they are parties to the Protocol of December 16th, 1920, relating to the Court, or, at the choice of the parties, either to the Permanent Court of International Justice or to tribunal constituted in accordance with the Hague Convention of October 18th, 1907, or to any other arbitral or judicial procedure in accordance with the constitutional laws of each of the parties. "

I think the order given in this text is quite logical. The wording takes due account of certain preoccupations felt by various countries, whose Constitutions place serious difficulties in the way of the preliminary acceptance of a special arbitral agreement. The terms employed : " in accordance with the constitutional laws of each of the parties " cover all contingencies.

Take, for example, a country like the United States of America, which is a member of the Permanent Court of International Justice, but which cannot accept in advance a special agreement of this kind. As the last part of the article refers to constitutional laws, a country in that position will be able to choose another procedure : either the Permanent Court of International Justice or the Hague Court of Arbitration, or any other arbitral or judicial procedure.

For that reason I think — and this is the point of my proposal — that the position of the Permanent Court of International Justice as a means of facilitating this work of codification must be still further strengthened. It is not enough for us to lay down rules here ; we must also prepare the instrument to apply them ; and we shall do so better by empowering it to act in as many cases as possible.

I may add that in this wording I have followed the text of the Drafting Committee. The last clause of my amendment is included to meet the case of countries which cannot accept special arbitral agreements in advance.

Mr. Lansdown (Union of South Africa) :

I have no objection to offer on the merits of this draft clause, but in view of the fact that the Drafting Committee have asked for suggestions, I have one or two observations to make. I shall be very brief, because I am anxious not to prolong this discussion.

I want the Drafting Committee to consider whether the words : " in accordance with the constitutional procedure of each of the parties to the dispute " are really necessary. We have said that the dispute shall be referred to arbitration or judicial settlement ; is it not sufficient that we have said that ? No nation will have accepted this provision unless its constitutional position allows of it, and it seems to me that the State which wishes to submit this matter to a decision must necessarily do so in accordance with its own procedure. It must have its own means, and it is not our function to tell disputants how they shall submit the matter or by what means they shall submit it. I would therefore suggest for the consideration of the Drafting Committee that these words " in accordance with the constitutional procedure of each of the parties to the dispute " carry the matter no further and might well be excluded.

Secondly, if you read the last five lines of the basis you will see that the wording is very involved, and I think the matter could be greatly simplified if you struck out the words in the last two lines : " if any of the parties to the dispute are not parties to the Protocol of December 16th, 1920 ", and added in the fifth line from the end, after the word " or " the words " if this be not the case then. . . " If you do that I think you will simplify the draft very considerably.

Lastly, I have a suggestion which I think is one of rather more importance. You will see in the last few lines that something is to be left to the choice of the parties ; in the final resort it is to be at their choice whether the matter is to be submitted to the Permanent Court of International Justice or to a tribunal constituted in accordance with the Hague Convention.

Now, it seems to me that the indefiniteness of the basis in this connection is likely to lead to difficulty, and that you might have a situation in which the disputants would not be able to agree to which of the two tribunals the matter was to be submitted. That is not merely imagination on my part ; some years ago I happened to be intimately associated with an international dispute the settlement of which was delayed for many months because the disputants could not agree as to whether the matter should be submitted to tribunal A or to tribunal B.

Therefore, it seems to me necessary to add at the end of the basis the following words : " or if agreement on the point is not arrived at then to the former ", or something on those lines. Personally I prefer the Permanent Court of International Justice. It certainly seems necessary to provide for a situation where agreement is not reached.

M. Medina (Nicaragua) :

Translation : As the Statute of the Court has been signed by my Government without any reservation whatever, I am glad to be able to support the motion of my colleague of Uruguay, since it has the effect of strengthening the position of the Permanent Court of International Justice, which has already shown its great usefulness in settling international disputes of every kind.

M. De Visscher (Belgium), Rapporteur :

Translation : We have had several suggestions which are certainly very important, and the Drafting Committee will be able to make good use of them.

We have had no definite proposal for an amendment. Consequently, I think the best course would be to note all the suggestions made and to ask the Drafting Committee also to take note of them. We may thus close the discussion on this point.

Mr. Hackworth (Unites States of America) :

Mr. Chairman — I have no desire to go on with the discussion on this subject, but I would observe that the United States, of course, is thoroughly in accord with the proposal to submit to arbitration disputes which cannot be settled through the diplomatic channel.

The formula which was presented by the Drafting Committee would be satisfactory ; most of the changes which have been suggested have been changes of phraseology to which I would raise no particular objection, with one exception, namely, that made by the delegate of South Africa to the effect that, if no agreement can be reached, the parties shall resort to the former, that is, to the Permanent Court of International Justice. I would only say that, since the United States has not as yet ratified the Protocol of the Permanent Court of International Justice, we should probably be unable to accept any formula which would at the time force us into the Court.

The Chairman :

Translation : If the Committee accepts the Rapporteur's suggestions we may close the discussion.

M. Sieczkowski (Poland) :

Translation : I have already put forward a proposal on behalf of the Polish delegation in regard to Basis No. 30. As various changes in this basis are proposed by the Drafting Committee, I have altered my own proposal, and will ask you to insert certain lines in front of the Drafting Committee's text. The reasons for my amendment are these :—

The intention is to lay down the principle that resort to force is prohibited. In making my suggestion I have in mind the Convention of October 18th, 1907, drawn up at the Second Hague Conference. Our delegation thinks that, in view of the development of international law since that time, it would be desirable to lay down the same principle in the present Convention, more particularly since the Convention of 1907 related only to a particular kind of responsibility — namely, the recovery of debts. The present Convention has a much wider field of application and refers to responsibility in general.

On these grounds, and in the belief that there is no reason for not taking in this field the step forward which was taken in 1907, I propose that we insert the following words in front of the text submitted by the Drafting Committee :

> " Considering that resort to force for the settlement of disputes which may arise between them with regard to the questions covered by the present Convention is inadmissible, the High Contracting Parties agree that . . . "

The Chairman :

Translation : The Committee will duly consider the Polish delegate's suggestion.

(The meeting was suspended at 5.40 p.m. and resumed at 6 p.m.).

35. EXAMINATION OF BASES OF DISCUSSION Nos. 10, 17 AND 18.

M. De Visscher (Belgium), Rapporteur :

Translation : Gentlemen — The next item on our agenda is the examination of the proposals regarding Bases of Discussion Nos. 10, 17 and 18.

We have two texts before us, one submitted by the Greek, Italian, British, French and United States delegations, and the other by the Chinese delegation. The Chinese amendment was circulated this morning.

As I read the first proposal at a previous meeting (see page 175), I will read only the Chinese delegation's proposal now. It runs as follows :

> " A State is only responsible for damage caused by private persons to the person or property of foreigners if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it had the persons injured been its own nationals. "

M. Erich (Finland) :

Translation : Gentlemen — At the last meeting I asked leave to read a statement drafted jointly by the Estonian, Latvian and Finnish delegations. The text proposed to-day by the Greek, Italian, British, French and United States delegations meets our views ; nevertheless, I will venture to read you our statement in order to show you why the text submitted by the Sub-Committee did not seem to us satisfactory.

The statement is as follows :

> " Bases 10, 17 and 18 refer to the diligence which may be expected from a civilised State. The intention was to establish a criterion such that the whole regime in force in the State should be in accordance with the principles of humanity, justice and equity.
>
> " While admitting that the term 'civilised State' is open to criticism, and that a better term may be found, implying that the only States under consideration are those where normal standards exist, I find that the Sub-Committee's texts ignore one special case — namely, that of a State which is not by accident placed in an irregular position, but which intentionally applies at home a general regime incompatible with the proper application of preventive or punitive measures.
>
> " In such a case there would be no question of *force majeure*, nor would the circumstances be abnormal ; the whole structure of the State would be such that foreigners might not be able to claim proper measures of protection.
>
> " The expression 'the diligence which may be expected from a civilised Sate' would have furnished an objective criterion by laying down explicitly that a minimum of order must be maintained within the State as regards the protection of certain elementary rights of the individual ; otherwise foreigners could not be ensured the necessary security.
>
> " The State would be responsible if foreigners suffered damage as the result of the acts of a private individual.
>
> " The criterion implied in the words 'the diligence which may be expected from a civilised State' has now been abandoned.
>
> " The words 'having regard to the circumstances' cover any irregular situation which arises by accident. No account, however, is taken of the case where the internal order existing in a State is due to the regime generally applied, which creates a condition of affairs incompatible with any reasonable policy for the prevention and punishment of crime such as exists in a normal State.
>
> " In such circumstances the State could not seriously be expected to show normal diligence in the protection of private individuals, whether its own nationals or foreigners.
>
> " It is most important, therefore, that the provisions of the proposed Convention should make it clear that such a State would not be fulfilling its international obligations if it failed to maintain an internal regime such as would ensure the proper prevention and punishment of crime. "

The new text drafted by the Greek, Italian, British, French and United States of America delegations satisfies our requirements, since it refers to a State which fails to take such measures as in the circumstances should normally have been taken to prevent, make reparation or inflict punishment for the acts causing the damage.

It is agreed that there is a certain normal standard to which civilised States conform, and that in considering measures of prevention and punishment we cannot simply take the situation existing in the particular State concerned. It is also recognised that there is a minimum standard of conduct which may reasonably be expected from every country.

These, Mr. Chairman, were the considerations I wished to lay before you, but I repeat that the new wording proposed satisfies my requirements.

M. Politis (Greece) :

Translation : I should like to explain why the text now submitted on behalf of five delegations has been preferred to the previous text.

Its general trend is to make State responsibility more precise and more limited in the case of damage caused to a foreigner by a private individual. The original text, both that of the Sub-Committee and that of M. Giannini, showed some vagueness in the case where no direct relation existed between the damage and

the alleged negligence on the part of the State. It was said that the State was not responsible in principle, but that it was so when damage was caused by a private individual and the State was guilty of negligence, did not take the necessary measures . . . No specific mention was made of the relationship between cause and effect, and that seems to me essential in order to make the State's responsibility clear.

The object of the new text is to give prominence to this idea and to show that the State is responsible for damage only if the damage is the outcome of negligence on the part of the State. The text reads :

> " . . . where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken . . . "

The value of this text lies in the fact that, except for a few words in the second line, where " ou de leurs biens " is added after " à l'égard des étrangers " — an addition which was self-evident, but which has to be stated — and in the last line but one, the word " réparer ", which is badly translated in the English text by " make reparation " (it should have been " redress ") — except for these words, the text is taken from the one which the Institut de Droit international unanimously adopted at its Lausanne session. Accordingly, with these slight amendments, it should, I think, merit your approval.

The only objection which might be felt by certain delegations and which, I think, some of them might regard as definitely preventing them from accepting the text, is the fear that such a wording would introduce the possibility of according foreigners better treatment than nationals.

That, of course, is precluded by the Chinese delegation's proposal. I think, however, that we shall never reach agreement here, just as no agreement could be reached by a purely scientific association like the Institut de Droit international, on this serious question whether the treatment of the national is the sole criterion of the treatment of foreigners, or whether there are exceptional cases where a foreigner may be entitled to better treatment than a national.

If we are wise, we shall avoid settling the question in either sense. According to the Chinese proposal, you are asked to reply to it in the negative. I do not think that is possible. We cannot affirm with certainty that in a few exceptional cases a foreigner may be accorded better treatment than a national. The text submitted jointly by the five delegations has the merit of leaving the question open. It does not say whether the treatment of the foreigner is better than, equal to or inferior to that of a national.

The text does not settle this question, and indeed there are many other questions which will not be setttled by the Convention we are drawing up. I think, therefore, that this wording is a very wise one and merits your approval.

M. Wu (China) :

I think that the question before us is not one merely of a search for a formula. We are faced here with the question of principle. We have to decide one way or the other. The question is, what is the standard according to which foreigners in a country should be treated?

Before I make a submission to you of the grounds for the proposition which I have the honour to place before you, I should like to clear the field for the discussion. We have already passed a resolution moved the very first day by our French colleague in regard to the general principles of State responsibility — namely, that a State is responsible for the failure of its organs to carry out its obligations.

We have also passed a basis dealing with the acts and omissions of the executive, another dealing with those of its officials, another dealing with the judiciary. We have therefore already decided on State responsibility in the case of damage to a private person with accompanying aggravating circumstances.

I would ask the Committee to remember that these cases do not now enter into the discussion. We are dealing here simply with cases where there is just simple damage by one or more private individuals to one or more private individuals of a foreign nationality without any accompanying or aggravating circumstances.

Having cleared the field in that sense, I ask you to decide on what is the standard, what is the criterion, on which the treatment of foreigners should be based. We have had several offered to us ; one is that of the Drafting Committee. You all know it. It lays down that a State is responsible if it has not taken such measures as might properly be expected of it. This is a standard of propriety. That, I submit, gentlemen, is really no test at all. It merely leaves matters to the judgment of that State whose national has been injured. I must congratulate the Drafting Committee upon their success in hitting upon a formula which leaves things where they were, but I am afraid it does not help us very much in our present discussion.

We have now another formula presented by the five delegations and supported by the Greek delegate. The criterion proposed is, as has been pointed out by M. Politis, "the measures which should normally have been taken ". It is therefore a test of normality, and I submit that this is a test to which no country could subject itself. Take even the most highly organised countries in point of peace and order ; even in those countries there must be times of stress — whether human, whether of *force majeure* — there must be abnormal times in which it cannot be expected to take measures such as would be taken normally.

We have another standard offered by our colleague from Italy. I do not know whether his proposition has been withdrawn, but in any case it is worthy of consideration because it offers another standard — namely, that a

State is responsible if it has not taken such measures as might reasonably be expected of it. This is a standard of reasonableness. Compared with the other two I think that is a little better standard, but even so it is still subject to more than one vital objection.

All three standards offered to us are open to the objection that they really offer no solution. That is practically admitted by M. Politis. On the important question as to what is really the concrete standard to be applied in the case of damage to a foreigner, we evade the issue. We either say " properly ", " normally " or " reasonably ". We may evade the issue now, but in an actual case, when unfortunately damage is suffered by a foreigner can we evade it then? We have to face the issue either now or then, and I submit that it should be faced now.

It is, of course, well known to us that in regard to this matter there have really been two standards: one a higher one, one a lower one, depending on the circumstances — depending unfortunately in some cases on the relative strength, prestige and influence of the disputing nations.

I submit further that, if we accepted any one of these three formulæ, we should not only be, as M. Politis said, leaving things as they were, we should be leaving them worse off, because the formula, being ambiguous, in case of dispute will be quoted in two different senses by the two different nations, and it will reinforce the argument of the stronger nation. In that sense I submit that the adoption of any of these three solutions leaves us worse off than if we did not sign the Convention.

I have to propose, therefore, a single standard, a definite standard; that of the treatment accorded to a nation's own nationals. From the point of view of logic, from the point of view of justice, I do not see that any nation can complain. When a person goes to another country he goes there with full knowledge of the conditions, whether they are as good as those in his own country or whether they are worse. He knows beforehand what they are; he knows what they are just as well as he knows the climatic conditions there — for example, whether there is malaria or not. He knows the economic conditions there if the object of his visit is to make money; if his object is to travel for curiosity, he knows what the scenic conditions are.

In the same sense he knows what the conditions are in regard to the preservation of peace and order in regard to the administration of justice. He goes there with his eyes open. Secondly, he goes there uninvited. I do not think any nation legally and morally invites foreigners to come to its soil; foreigners go there of their own accord. Why, therefore, should the Government of that country be saddled with a heavier responsibility than that which it has towards its own nationals?

From a more or less casual reading of authorities on this matter I have not really seen any cogent reason advanced on behalf of the theory that foreigners should be treated on a higher plane than the nationals of the country; the only argument which I think is worthy of consideration is that advanced by a prominent jurist that the national of a country has a right of redress which is denied to a foreigner, that right of redress being revolution. But I submit that the foreigner has even a better right of redress than that of revolution — that is, the right of absence.

I will not detain you any longer; but as a last word I should like to say that, in bringing forward this proposal to the Committee, the Chinese delegation is not speaking from its own interest. We are rather speaking against our interest. The majority of the delegates here are from Europe and America. The number of the Europeans and Americans in China for whom if necessary the Chinese Government will be responsible number only thousands, whereas our nationals abroad for whom if necessary we claim protection from European and American Governments, number not thousands — not even hundreds of thousands — but millions. That is why I say that, in bringing forward this motion, we are not prompted by any question of our own interest but purely and simply that of justice and logic.

So far as the wording of the proposition is concerned, I am ready to accept any amendments that delegations may desire to make. It has been pointed out to me that it could be worded in a more precise and simple manner. That is a question of drafting, and if necessary it can be referred to the Drafting Committee. But I should like the Committee not to beat about the bush, not merely to seek a formula which is ambiguous and which can be interpreted when the occasion arises in more than one sense, and to remember that if we do not face the issue now it has to be faced some time, and that we should be failing in our duty to lessen causes of international dispute in the future should we not face this question fairly and squarely to-day.

M. Giannini (Italy):

Translation: So we must discuss the question of reservations again. We have already discussed it for a whole day, and it was deferred for reasons which are familiar to you all.

To-day we have before us a compromise which I am prepared to support. We have only one amendment, that of the Chinese delegation; and we have heard M. Wu in support of his amendment.

Further, the reasons why we have submitted this compromising text have been most admirably set forth by M. Politis.

In these circumstances could we not close the discussion? The question is now ripe for a decision. We have all considered the pros and cons. Time is passing. Let us try to reach some definite conclusions. If we do not finish our examination of the bases this evening

we shall not be able to begin to-morrow the discussion of the Drafting Committee's text, and we shall thus waste two more days.

The Chairman :

Translation : I would point out to the Committee that, according to the Rules of Procedure, when a point of order is raised only two representatives have the right to speak.

M. Guerrero (Salvador) :

Translation : I ask to speak.

I support M. Giannini's proposal, provided that the discussion is closed immediately. But if anyone asks to speak and is given leave to speak I must also ask leave, for I too have something to say.

The Chairman :

Translation : One speaker is still entitled to address the Committee.

Mr. Beckett (Great Britain) :

I was going to say exactly the same as M. Guerrero. I believe I was next down to speak, but I am willing to renounce the privilege on condition that the debate is now closed. Otherwise I want to speak and to reply to the excellent discourse of M. Wu.

M. De Visscher (Belgium), Rapporteur :

Translation : We will take a vote on the point of order.

The motion to close the discussion was adopted.

M. De Visscher (Belgium), Rapporteur :

Translation : We have before us two texts : one which must be regarded as that of the Sub-Committee, since it was accepted by that Committee, and one submitted by the Greek, Italian and other delegations. Another text is submitted by the Chinese delegation, but I think M. Wu intended his text to be regarded as an amendment to the Sub-Committee's, and it therefore has priority.

M. Buero (Uruguay) :

Translation : I ask for the vote on the amendment to be taken by roll-call.

M. Guerrero (Salvador) :

Translation : I second M. Buero's proposal for a roll-call.

M. Duzmans (Latvia) :

Translation : I have not been able to consult the first delegate of my country in regard to this vote, as he is not here. I think it is very unfortunate that we should close the discussion on a motion of such outstanding importance before being given an opportunity of discussing it. We are closing this discussion at 7 o'clock this evening : we have the alternative of postponing the discussion until to-morrow or of not discussing it at all. Accordingly I will refrain from voting now, as I did before. Important though it may be to expedite our work, everything must give way to the necessity of achieving success in all the important questions to be dealt with by our Conference, even if we have to prolong our meetings until after Easter.

The vote by roll-call was taken on the proposal of the Chinese delegation.

The following voted for : Brazil, Chile, China, Colombia, Czechoslovakia, Free City of Danzig, Egypt, Mexico, Nicaragua, Persia, Poland, Portugal, Roumania, Salvador, Turkey, Uruguay, Yugoslavia.

The following voted against : Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, India, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Spain, Sweden, Switzerland, United States of America.

The following abstained : Cuba, Latvia.

The Chairman :

Translation : The Chinese delegation's amendment is rejected by 23 votes to 17, with 2 abstentions.

M. De Visscher (Belgium), Rapporteur :

Translation : We now have before us the Sub-Committee's text.

The Chairman :

Translation : It is put to the vote.

M. Guerrero (Salvador) :

Translation : I ask for a vote by roll-call.

M. Wu (China)

The Chairman, I understand, proposes to put the amendment of the Sub-Committee.

M. De Visscher (Belgium), Rapporteur :

Translation : The proposal submitted by a number of delegations has been adopted by the Rapporteur of the Sub-Committee on behalf of that Committee. That is the text now submitted to you.

M. de Berczelly (Hungary) :

Translation · I ask that the following be added to the text on which we are to vote :

> " . . . and if the State does not give the foreigner any opportunity of asserting his claims against the said author of the damage. "

M. De Visscher (Belgium), Rapporteur :

Translation : An amendment has been submitted by M. de Berczelly and forms an additional text to that submitted by several delegations and accepted by your Rapporteur. I think we may put the original text to the vote and then decide as to the addition proposed by M. de Berczelly. We will thus take a separate vote on each proposal.

M. de Berczelly (Hungary) :

Translation : I do not agree, because I consider that my proposal constitutes a compromise. By adding the words I have read to the text accepted by the Rapporteur I think I should enable those delegations who cannot accept the original text proposed by several delegations to vote for this provision.

M. De Visscher (Belgium), Rapporteur :

Translation : Then we are to add M. de Berczelly's proposal to the text.

M. Politis (Greece) :

Translation : The practical procedure in this case is the following : The text before us is regarded as consisting of two parts. To be logical, and for the sake of clearness, we ought to separate them ; consequently we must take a separate vote on each and then a vote on the text as a whole. In this way if, as our Hungarian colleague fears, some delegations do not vote in favour of the first part, they may, if the second part is adopted, accept the whole.

M. de Berczelly (Hungary) :

Translation : Mr. Chairman — I am afraid that if we take a decision only on the text as it stands the situation will not be very clear. I am not proposing a new paragraph ; I am simply making an addition to the Drafting Committee's wording. For that reason we cannot take a vote on the two parts separately.

We have before us two texts, one submitted by the Drafting Committee and the other mine ; and it is mine which ought to be put to the vote.

M. Limburg (Netherlands) :

Translation : M. de Berczelly proposes an amendment, the object of which is to make an addition to the Drafting Committee's text. We must first take a decision on that amendment and say whether or not the proposed words are to be added.

M. De Visscher (Belgium), Rapporteur :

Translation : In cases of this kind the best course is to refer to the Rules of Procedure. What do these say? " When an amendment adds to a proposal . . . " — that is the case here — " . . . it shall be voted on first, and if it is adopted the amended proposal shall then be voted on ". If it is rejected the text to be put to the vote will be that of the Sub-Committee.

I therefore put to the vote the text proposed by M. de Berczelly.

The Hungarian delegation's amendment is as follows : " Add to the text submitted by several delegations and accepted by the Sub-Committee the following words : 'and if the State . . .' "

M. de Berczelly (Hungary) :

Translation : Excuse me, but my proposal amounts to more than this amendment. What I propose is a complete text. I take the Drafting Committee's text and make an addition to it.

M. De Visscher (Belgium), Rapporteur :

Translation : According to the Rules of Procedure an amendment has been submitted.

M. de Berczelly (Hungary) :

Translation : I am making a proposal which completely changes the meaning of the whole text.

M. De Visscher (Belgium), Rapporteur :

Translation : I agree ; nevertheless it is an addition, an amendment which " adds to a proposal ". I cannot understand your proposal in any other sense.

In any case you need not feel any anxiety. The Drafting Committee's text is before us all, and we have all heard your proposal and fully understand its purport. There can be no misunderstanding.

M. de Berczelly (Hungary) :

Translation : But in those circumstances separate votes will be meaningless ; we must read the text as a whole.

M. De Visscher (Belgium), Rapporteur :

Translation : You may feel quite reassured ; all the delegates have before them the text which has been distributed. Your proposal which I began to read just now has been added to it. We thus have the whole wording before us. The Sub-Committee's proposal as amended by you is quite comprehensible to all of us.

I will read the proposed addition :

> " After the text distributed add the words : ' . . . and if the State does not give the foreigner any opportunity of asserting his claims against the said author of the damage.' "

M. Giannini (Italy) :

Translation : Does M. de Berczelly wish to add anything to Basis No. 27?

M. de Berczelly (Hungary) :

Translation : I cannot answer that question at the moment because we are not now discussing Basis No. 27.

M. Giannini (Italy) :

Translation : But does M. de Berczelly not consider that the addition he proposes is already embodied in the Convention, in Basis No. 27 which we have approved?

M. de Berczelly (Hungary) :

Translation : No.

M. De Visscher (Belgium), Rapporteur :

Translation : I put to the vote the amendment submitted by the Hungarian delegation.

The Hungarian delegation's amendment was put to the vote and rejected.

M. De Visscher (Belgium), Rapporteur :

Translation : We now have the original text.

M. Cohn (Denmark) :

Translation : May I make a small suggestion? Could we not refer the Sub-Committee's text to the Drafting Committee to be slightly altered? According to the wording before us the State can apparently be held responsible for negligence only. That is the only case provided for, and no reference is made to any positive action on its part. In my opinion that is not right. Positive action should be included as well.

M. De Visscher (Belgium), Rapporteur :

Translation : The Drafting Committee will duly note your suggestion.

The Sub-Committee's draft was put to the vote by roll-call and adopted by 21 votes to 17.

The following voted for : Australia, Austria, Belgium, Canada, Estonia, Finland, France, Germany, Great Britain, Greece, India, Irish Free State, Italy, Japan, Netherlands, Norway, South Africa, Spain, Sweden, Switzerland, United States of America.

The following voted against : Brazil, Chile, China, Colombia, Czechoslovakia, Free City of Danzig, Hungary, Mexico, Nicaragua, Persia, Poland, Portugal, Roumania, Salvador, Turkey, Uruguay, Yugoslavia.

The following abstained from voting : Denmark, Latvia.

M. Piip (Estonia) :

In order to explain my vote I would refer you to the explanation given by M. Politis.

36. QUESTION OF RESERVATIONS.

M. Giannini (Italy) :

Translation : The General Drafting Committee has referred to each Committee the question whether reservations regarding various articles should be included in the Convention or not.

I regard the Convention as forming a single whole, as an agreement which is in the nature of a compromise and in regard to which it is not permissible to accept certain principles and reject others. For these reasons the Italian delegation proposes that an article should be added to the Convention to the effect that it does not include reservations.

M. Wu (China) :

I am against the motion of the Italian delegate. I move that the right of reservation should be allowed in this Committee. I took considerable time last night in plenary Conference in advancing the reasons which I thought were cogent in this respect, and I shall not repeat them now.

In substance I do not think that the sovereign right of each State should be restricted. If an attempt is made to force Governments to sign what they do not want to sign, the result will be that they will not sign at all. It simply means that the results of our four weeks of deliberations would be nil. Whereas if we allow reservations, although reservations will come, we shall at least save something out of the meagre results.

Therefore I suggest and move that reservations be allowed in this Committee, especially as they have been allowed in the First Committee.

M. Nagaoka (Japan) :

Translation : I ask that this discussion be adjourned until the second reading of the Convention.

M. Politis (Greece) :

Translation : Then it must take place before the second reading.

M. Nagaoka (Japan) :

Translation : I do not mind ; it is for the Committee to decide.

M. Politis (Greece) :

Translation : No : It is very imporotant.

M. Giannini (Italy) :

Translation : On grounds of expediency which will be clear to all, we can postpone the examination of this problem until after the second reading of the text prepared by the Drafting Committee, because the vote taken on the bases will necessarily serve as a guide.

M. Politis (Greece) :

Translation : I think it is essential that a decision on any question should be taken before a final vote. The same difficulty arose in the first Committee, which this morning unanimously decided to vote first on a text regarding reservations, for the simple reason that the votes may depend upon whether there are to be reservations or not. I therefore consider it essential to begin the second reading with this question of reservations. I agree with the Chinese delegate because it seems to me that States ought not to be placed in a dilemma as to whether to sign or not.

M. Matter (France) :

Translation : I have given my opinion on this point so often that the Chinese delegate may be sure that I am in favour of reservations.

I am not against the postponement of the question, but, like others who have already expressed their views, I say that the voting on each article may be influenced by the decision taken in regard to reservations.

In these circumstances the reservations question must be discussed first when we come to the second reading, before the final vote is taken. We shall then indicate the details of the reservations.

M. De Visscher (Belgium), Rapporteur :

Translation : I do not know whether a meeting on reservations could be held to-morrow morning. If that is impossible I will ask you to begin to-morrow afternoon punctually at 3 o'clock, because I must have Sunday and Monday to prepare my report. It is therefore essential that the vote at the second reading should be taken by to-morrow evening.

I hope the discussion on the reservations question will not be unduly long, and that if we begin punctually at 3 p.m. we shall conclude our work early ; otherwise I shall find it extremely difficulty to prepare my report.

M. Wu (China) :

A motion has been made by M. Politis, supported by M. Matter, that this question of reservations shall be taken before the second reading. Has that been accepted by this Committee, or not? It seems to me that it must be accepted in order that delegates may vote intelligently and not in the dark.

M. De Visscher (Belgium), Rapporteur :

Translation : M. Wu proposes that we vote on M. Politis' point of order — namely, that we decide now whether the question of reservations will be dealt with before the second reading of the other articles.

The proposal submitted by M. Politis and M. Matter was put to the vote and unanimously adopted.

The Committee rose at 7.40 p.m.

SIXTEENTH MEETING

Friday, April 11th, 1930, at 10.30 a.m.

Chairman : M. BASDEVANT

37. QUESTIONS OF PROCEDURE.

The Chairman :

Translation : You will remember that at your fifteenth meeting, held on Friday, April 4th, you decided to discuss at the next meeting the question of the reservations to be introduced in any Convention that might be concluded. That was to be the Committee's last meeting before the framing of the report.

The meeting, however, did not take place. In the meantime, as you know, the delegations held unofficial conversations in an endeavour to find some way of achieving the task entrusted to the Third Committee. You know, too, that those negotiations were not successful ; it was held in consequence that the chances of finding a solution at this session of the Conference were practically nil, so that the only course was to determine what action should be taken on the Committee's earlier proceedings.

It was suggested at those unofficial meetings that the Committee might submit a report to the Conference, and I accordingly convened the Committee for to-day.

Moreover, immediately after making arrangements for this meeting, I received from the United States delegation a request that the Committee on the Responsibility of States might meet as soon as possible to vote on the questions submitted to it.

I got into touch with the first delegate of the United States, and he agreed with me that we should hold the meeting to-day and that, as regards procedure, we should consider whether a report was to be submitted and, if so, what the nature and tenor of that report should be.

That is the position to-day. We have first to deal with a preliminary question. On April 4th you decided to include in the agenda of your next meeting a discussion on the question of reservations. I do not think anyone will suggest examining that point to-day, and we can leave it on one side. What we have to consider now, therefore, is the action to be taken on the Committee's previous proceedings.

It was suggested that this might take the form of a report, and, in order to save time, the Rapporteur was good enough to set to work. You have his draft report before you. I know I have been guilty of a slight irregularity, for which I crave your indulgence, but I

realised how very limited was the time at our disposal. I requested the Rapporteur to set to work and circulate a draft report, before the Committee had decided whether a report was to be submitted at all.

On this point, of course, the Committee has a perfectly free hand, and we shall only examine the draft report if the Committee thinks that a written report really should be submitted to the plenary Conference. The Committee is perfectly free to decide this point, and that is why the agenda reads : " Possibly, examination of the draft report ".

In the course of the private conversations which we decided to hold I had occasion to speak to a number of delegates, and I came away from those conversations with the impression that many of you thought it preferable not to submit a written report at all, but simply to proceed as follows :

At the plenary meeting to be held this evening the Rapporteur or the Chairman of the Committee, without going in detail into the substance of our work, will simply state, as briefly as possible, in accordance with such instructions as you may give, that the Third Committee has been unable to complete its examination of the questions relating to the responsibility of States for damage caused to foreigners, and accordingly is not in a position to submit conclusions to the Conference on that point.

If the Committee accepts this suggestion, it will not have to examine M. de Visscher's report. (Annex V).

The Committee by 21 votes to 4 approved the proposal of the Chairman.

M. Politis (Greece) :

Translation : If the proposal which you have just submitted and the Committee has just approved is to produce its full effect, it must be clearly understood that no one at the plenary meeting of the Conference will ask to speak after the statement submitted by the Rapporteur or the Chairman of the Committee. This will prevent the reopening at the Conference of a discussion which we all agree should be brought to a close.

M. Guerrero (Salvador) :

Translation : Is it understood that there will be nothing but the verbal report ?

The Chairman :

Translation : That is understood. I now wish to know the Committee's views on M. Politis's suggestion.

The suggestion was approved.

The Chairman :

Translation : In view of this decision, we ought also to decide that the Final Act shall simply mention that it was not found possible to conclude the work of the Committee.

This was agreed.

The Chairman :

Translation : I have here the formula suggested for insertion in the Final Act. We are not exactly qualified to draft it, but I think all the same that it would be well for the Committee to express its views on the clause to be inserted. This is what is proposed

" The Responsibility Committee was unable to complete its study of the question of the responsibility of States for damage caused to the person or property of foreigners, and accordingly was unable to make any report to the Conference. "

M. Giannini (Italy) :

Translation : In view of the peculiar position as regards the work of the Third Committee though without wishing to prejudice the proposals which are to be submitted by the General Drafting Committee, I should like to ask the Committee — there is no need to take a vote — to say whether it is fully agreed on this formula. It is not desirable to have a discussion at the plenary Conference.

The Chairman :

Translation : It is understood that we cannot bind the General Drafting Committee. The Chairman of that Committee, however, has urged us to state our own views clearly.

M. Buero (Uruguay) :

Translation : It would be a good thing to emphasise that we have not had time to study the question exhaustively. The proposed formula might appear to indicate that the views of the different delegations are quite decided but that the conclusions are not yet final.

The Chairman :

Translation : The formula states that the Committee has not been able to complete its study of the problem.

M. Buero (Uruguay) :

Translation : Then I am quite satisfied.

The formula proposed by the Chairman was put to the vote and adopted.

38. PUBLICATION OF THE MINUTES OF THE COMMITTEE.

M. Limburg (Netherlands) :

Translation : The Committee's meetings have not been public. Will the Minutes be published?

The Chairman :

Translation : That is a question for the Bureau of the Conference to decide ; the Committee itself cannot do so.

M. Limburg (Netherlands) :

Translation : We must follow the League usage in the matter.

M. Urrutia (Colombia) :

Translation : The point raised by M. Limburg is a most important one. I do not know whether the Committee is competent to take a decision itself or whether the decision must be left to the Conference. In any case I trust the question will be settled before the close of the Conference.

We have not reached agreement on this question of responsibility, just as the Second Committee has been unable to do so on the question of territorial waters, but that is no reason for undersestimating what has been done. Our work, indeed, represents a big advance towards the codification of international law, which should be an accomplished fact within a measurable distance of time. I have already made a similar statement before the Committee on Territorial Waters. Up till now the attitude of the different States towards this point has never been clearly stated at any conference, whether of a political or of a purely legal character. We, however, have stated in concrete and definite form the points on which an effort should be made to arrive at agreement.

Our work should be of real use to those concerned with the progress of international law and to legal associations all over the world. If the Committee's Minutes are not published, valuable documentary material will be wasted.

I would suggest, if it is allowed under the Rules of Procedure, that we ask the League to publish the Minutes of this Committee.

There are League precedents for my suggestion. The Committee for the Revision of the Statute of the Permanent Court of International Justice, for example, held private meetings, as you will remember, but its Minutes have appeared without the Committee ever having asked for them to be published. The League Secretariat took the initiative in the matter.

M. Guerrero (Salvador) :

Translation : There can be no question of the Minutes remaining confidential. Forty-three delegations, consisting of close on 150 delegates, have been present at the Conference and have received the Minutes. We have to submit our reports to our Governments, and in those reports we shall have to explain in detail all the proceedings of the Conference. The reports will reach the Government offices, where, I presume, they will duly be read. The proceedings of this Committee thus cannot conceivably remain confidential.

In fact, I rather think that, if we decide otherwise, instead of ensuring secrecy we should produce exactly the opposite effect, because, whenever an attempt is made to cover up a question it simply whets the curiosity of the Press and everyone else. I think that our Committee, like the Conference, should follow the usage adopted for the proceedings of the League, that is, that the Minutes should be printed and published. We cannot undertake to regard them as confidential.

M. Limburg (Netherlands) :

Translation : On the principle involved I am in complete agreement with M. Urrutia and M. Guerrero. I simply raised the question in order that we might be quite clear on this point.

The Chairman :

Translation : The situation is this : it is not suggested that the Committee should take a vote on the point just raised, while there are precedents for the publication of Minutes. I am not competent to settle the question either way, and must simply confine myself to summing up this brief discussion.

M. Urrutia (Colombia) :

Translation : I asked that the Committee should express an opinion in the matter.

The Chairman :

Translation : I must apologise, I did not realise that you wished for a vote.

M. Urrutia (Colombia) :

Translation : I suggest that the Committee be consulted as to whether it thinks it should ask the League to publish the Minutes.

The Chairman :

Translation : May I suggest a very slight amendment to M. Urrutia's proposal? The point to be voted on is whether the Committee desires to apply not to the League, which is not competent in the matter, but to the Bureau of the Conference or to the Conference itself, to decide this question.

M. Urrutia (Colombia) :

Translation : That is simply a question of procedure, and I am quite prepared to accept your formula. I wish the Committee, however, to take a decision.

The Chairman :

Translation : My attention has been directed to Article XI of the Rules of Procedure :

> " The Minutes of meetings of Committees shall not be published until after the close of the Conference ; the latter may, as an exceptional measure and more particularly when the proceedings in regard to certain questions have not resulted in an agreement, decide to defer the publication of those Minutes."

The position is thus quite clear: according to the Rules of Procedure the Minutes will be published in due course after the close of the Conference. If, however, a delegation wishes for an exception to this rule, I should have to consult the Committee as to whether and to what extent it is in favour of such an exception. If, however, we keep to M. Urrutia's motion, there is no need to take a vote; the rules of Procedure supply the answer he wants. It will be only if we have to consider a proposal — and no proposal has been submitted as yet — with a view to limiting publicity in any way that the Committee will have to take a vote. Does anyone wish to propose an exception to the Rules of Procedure?

I see that no such proposal is made; the question is therefore settled.

M. Cohn (Denmark):

Translation: May I urge, on behalf of the Danish delegation, that we should be given an opportunity of resuming our discussions on the questions with which we have been dealing, at a later Conference to be convened by the League Council whenever it thinks fit, so that the preparatory work of the present Conference may help to facilitate a final agreement on the various problems.

The Chairman:

Translation: The Danish delegation's recommendation will be included in the Minutes of the present meeting.

39. CLOSE OF THE PROCEEDINGS OF THE COMMITTEE.

M. Matter (France):

Translation: I rise to speak at the request of my friends who hold very divergent opinions — I use the words "my friends" expressly — and, although I do not feel specially qualified to do so, I shall act as their interpreter in expressing our deepest, warmest and most cordial thanks to the Bureau for its untiring efforts.

It has spared no endeavour to find a solution, though its efforts, unfortunately, have proved unsuccessful. The whole Bureau, the Chairman and the Vice-Chairman alike, have placed themselves impartially, wholeheartedly and devotedly at the service of the Committee and of each and every member.

What, then, shall I say of the Rapporteur, who has constantly striven at his task, adapting himself with his wealth of knowledge to the fresh situations that continually arose? A score of times we undid the work of yesterday. One version of Homer — not perhaps the most reliable one — relates that, before Penelope had completed her spinning, Ulysses returned to the shore, and that, when he had resumed his place in the peace and calm of his own home, Penelope brought her weaving to an end. Let us hope that peace and calm and the interval of years may enable us also to complete our design.

M. Wu (China):

I am sure that I speak on behalf of all my friends here to-day when I say that we associate ourselves with the remarks of M. Matter in thanking the Chairman, the Vice-Chairman and the Rapporteur for the very good work that they have done.

If I may say so, in a personal way I have special sympathy with the Vice-Chairman being called upon to preside at a most trying time, on the spur of the moment in the absence of the Chairman, because I was in somewhat the same predicament myself.

I do not think that the work of this Committee has been in vain. It is true that we have not arrived at a Convention; it is true that there have been no concrete and tangible results. At the same time we have elucidated certain complicated points. We have made clear the stand of various countries on certain vexed questions of international law, and whenever the work of this Committee is to be continued — and I have no doubt that it will be continued — the spade work that we have done will contribute to future success.

One may allow oneself to doubt whether the subject which has been chosen — international responsibility — is really a subject ripe for codification, but since it has been so chosen I think that the members of this Committee have certainly done all that they could, in the present state of international opinion, in furtherance of that work.

In conclusion, may I say that we have all been impressed by the extremely cordial manner in which various difficult and extremely contentious questions have been discussed by all the members of this Committee. The only thing that we could do under the circumstances is to agree, and cordially agree, to disagree.

M. Guerrero (Salvador):

Translation: I desire to associate myself with the expression of thanks addressed by M. Matter to the Chairman, the Vice-Chairman and the Rapporteur. They have done everything, and that most competently, to assist us in our work.

We need not, I think, blame ourselves for not having arrived at a solution, because, as our Chinese colleague said, we had to deal with a question for which everyone was agreed from the outset that a solution would be extremely difficult to find.

Addressing myself, then, to the Chairman, the Vice-Chairman and the Rapporteur, I ask them to accept my very cordial thanks.

M. Politis (Greece):

Translation: I wish to associate myself most heartily with the vote of thanks just moved by M. Matter, and seconded by the delegates of China and Salvador. We have reason to be most grateful to the Chairman and Vice-Chairman for their impartial conduct

of our proceedings; and I should like to express our very special thanks to the Rapporteur.

We should be really grateful to him both for his constant and unremitting zeal and, I can say without exaggeration, the selfless devotion he has displayed in his attempts to find conciliatory formulas. Knowing as we do the depth, the strength of the principles he holds, we cannot but admire his efforts to arrive at agreement on the delicate, thorny and difficult problems which have been handled here. His example affords a signal proof of the value of good will in international relations, and one of the most noteworthy results of our proceedings, I think, is to have seen a man of learning such as he sacrificing his personal views in order to arrive at an agreement.

I desire to emphasise this point, and I invite you, gentlemen, to associate yourselves with this expression of thanks to M. De Visscher.

May I say lastly, as M. Matter has already said, and as the philosophers of old were never weary of saying, that we must not allow ourselves to be discouraged by difficulties.

To-day we are faced by difficulties which have seemed to us insurmountable. Yet we are parting on the best of terms, and the only vestige of these divergent discussions will be our common desire to arrive at agreement. We have not reached it this time, but let us trust in the future and cherish the conviction that some day we shall succeed in what we have not found possible to-day.

M. Sipsom (Roumania):

Translation: Now that we are nearing the conclusion of our very interesting discussions of the questions selected, with such wisdom and after mature consideration, as a basis for our proceedings, we have to envisage dispassionately the incompleteness — I refuse to employ the word failure — of the agreements we hoped to conclude.

Indeed, were I not afraid of appearing paradoxical, I would even urge that things are best as they stand, for, if we were to crystallise in formulas representing a compromise, rules — subject to dispute — by purely technical means open to legal skill — we should be impeding the mutual adaptation of divergent tendencies: these are part of the process of life, and cannot be artificially arrested, but must follow the natural course of evolution.

We really ought then to congratulate ourselves on not having snatched at the fruit of juridical effort before it was ripe.

I personally feel gratified at having had the opportunity of collaborating with the eminent legal personalities and the distinguished men who have sat as delegates on this Committee, and I gratefully acknowledge my indebtedness to each one of them for what I have gained from this cordial interchange of ideas, and even from the divergence of ideas, invariably expressed in courteous terms and most stimulating in their effects.

We are all agreed, I think, in paying a special tribute to the lucid, eminently competent and learned manner in which our distinguished Chairman, M. Basdevant, has conducted our proceedings. Our very grateful thanks are due also to that friendly conciliator M. Matter, whose intellectual and moral weight have continually been felt as a factor in promoting agreement on this Committeee.

Our thanks are due, too, to M. De Visscher, our Rapporteur, who acted on occasion as Chairman of Sub-Committee and has always been ready to step into the breach; we are most grateful to him for his work, his energy, and his great competence, and for his admirable, able and carefully drafted report, which reflects our proceedings so accurately and in such balanced terms.

It shows how, beneath apparent disagreement and failure a clear and promising advance has been made towards the future and, I trust, the speedy codification of international law. Our work may still be premature, may have been attempted before its time — more particularly our work as regards the responsibility of States — but it is bound to assume more concrete form and ultimately to lead to the clarification of legal principles, which will gradually emerge from established international custom, from the learned doctrine of the great jurists and, first and foremost, from international practice, more particularly the proceeding of that great institution, the Permanent Court of International Justice at The Hague.

M. Giannini (Italy):

Translation: I stand before you to-day a bowman with an empty quiver; I have nothing to offer but flowers. Our Chairman I hardly dare to thank. You all know my feelings towards him, and, were I to add anything to what has already been said, it would simply detract from the expression of our gratitude.

I do desire, however, to thank our Vice-Chairman, M. Diaz de Villar, and to say how greatly I have appreciated the zeal and devotion of my friend and colleague, the Rapporteur. As President of a Court of Appeal he represents a supreme authority in law and civil procedure. As a teacher he is the author of a great treatise, and barristers who appear before the Court of Appeal always quote one authority — the President. The reputation of M. De Visscher, as you have seen, has in no way suffered from his essay on the responsibility of States, in which he stated briefly, but with exquisite lucidity, his attitude towards our present problems. Yet he succeeded in forgetting that he had written that essay, even though it is always so difficult to forget. For when a man passes from the professorial chair to practical work, he has to change his outlook. I have admired the ease with which he has done so, exhibiting as he has a sense of practical and political realities and discriminating between what is and what is not possible.

I readily associate myself with the cordial words addressed to the Bureau. I should like to add my own personal thanks — and I feel sure that I am interpreting the unanimous desire of the Committee — to those of our colleagues who have worked in the interests of conciliation and sought formulas for compromise. First, let me mention our French colleague, M. Matter. He has exhibited the very essence of French subtlety, and listening to his charming utterances, to which not one of us could be deaf, it seemed at times as if agreement were really in sight. Agreement, however, proved to be a will o' the wisp, flitting before us, always just out of reach.

We have to place on record to-day a chapter of defeat. Success will come another time. We should be ungrateful, however, were we blind to the ready spirit of conciliation which has prevailed, and foremost among those I would mention in this connection is our friend and colleague, M. Matter.

I am equally grateful to my other colleagues, for, despite the difficulties apparent in our discussions, we have all managed to co-operate in the same cordial spirit, with the ideal of codification before us. I realised that some of us were, as it were, playing a double rôle : we were anxious to achieve our object, but we felt at the same time that we had to obey our instructions.

We have done our best, and the courteous efforts of every one reflect the cordial feeling which has prevailed throughout.

For these reasons, gentlemen, I think we need not feel pessimistic in bidding each other farewell in this room where we have worked for close on a month, convinced as we are that the ideal of the codification of international law will one day be realised. It will be a difficult task undoubtedly, but without faith we shall never achieve anything.

Mr. Beckett (Great Britain) :

Mr. President, it is very pleasant to end on a unanimous vote of thanks, and I wish to associate myself with all the expressions of gratitude which have already been given to you, Sir, to the Vice-Chairman and to the Rapporteur.

But before we close these motions of thanks I am sure we should none of us wish to forget the Secretariat. I think we shall all agree that the secretarial arrangements here for this Conference have been admirable, and I am sure that we all wish to thank our two Secretaries-General, the Secretary of our Committee, the translators who have had to translate our long speeches, the distribution service which has circulated with admirable promptitude our numerous documents, and the shorthand-writers who have taken down with great care and pains all we have said. I am sure we all wish, in parting, to remember them too.

Mr. Hackworth (United States of America) :

Mr. Chairman, I desire to associate myself with the very fitting tributes paid by M. Matter, M. Wu, M. Politis, M. Giannini and others to the uniformly courteous treatment received at the hands of you, Sir, the Vice-Chairman, the Rapporteur and the personnel generally.

This is the first Conference held under the auspices of the League of Nations which I have had the honour to attend and I have been deeply impressed by the effieient manner in which the work of this Committee has been handled. I do not feel, as some may, that our work here has been in vain.Whilst we have not reached any final conclusions, and are not submitting any draft Convention to the Conference for approval, we have discussed at great length the various important questions which have come before us, and I think we have made great progress towards the classification of many of these difficult questions, and have contributed greatly to the science of international law.

The Chairman :

Translation : I desire on behalf of the Bureau to thank you for your very kind expression of thanks. Speaking in my personal capacity as Chairman, I may say that you have really gone too far; but I should be the first to admit the truth of all you have said about the Vice-Chairman and Rapporteur. I would even go further, for it is a matter of deep regret to me that I should have been obliged, even involuntarily to hand over my work to the Vice-Chairman. I should like, therefore, to take this opportunity of expressing my admiration for the tact, the perception and the skill which he brought to bear in the conduct of his duties, just when the Committee's work was at its most difficult stage.

We are all deeply touched by your thanks, and speaking on behalf of the Bureau I desire to make this acknowledgement. Your good will is such that you have spoken of proposing a vote of thanks. What you have already said is amply sufficient, for such a motion as you suggest would mean revising the constitution of this Committee. We should have to appoint an *ad hoc* Bureau ; pray let us dispense with this formality. I will therefore pass over this motion, if you will forgive my proceeding somewhat rapidly.

I desire to associate myself most heartily with the thanks addressed to the Secretariat. The Secretary-General of the Conference and his collaborators — Mr. McKinnon Wood, who has been present at most of our proceedings, M. Giraud, who has been equally assiduous, and the others whom I shall not stop to mention by name — have afforded most valuable assistance in the work of this Committee. Everything was organised to ensure the smooth working of our proceedings, despite the many sittings we have held and

the immense amount of additional work they have entailed.

Having spoken in the name of the Bureau, I now desire to address myself personally to the Vice-Chairman and Rapporteur, and to associate myself with all that has been said in appreciation of their valuable collaboration.

It is not enough to consider those who have from time to time guided your work and your discussions. Justice demands that we should also remember all who have collaborated, and should pay a tribute to the other members of this Committee. This I do on behalf of the Bureau. Every delegate has brought to bear on the accomplishment of this difficult task a spirit of absolute impartiality, qualifications of the highest order, and unremitting zeal — so unremitting indeed that at one time I was afraid of finding on the Chairman's desk a longer list of speakers than I could cope with.

As Chairman, however, although I have to apologise for having appeared somewhat impatient at times —you must forgive me — I feel, reviewing the past, that all that has been said was both useful and necessary. You have exhibited the most meritorious conscientiousness, first, in setting forth the views of your own delegations, and then in your readiness to understand the views of the other delegations, to penetrate beneath these divergent conceptions, and, lastly, in seeking some formula of compromise, some *media sententia* to satisfy our purpose. This you did in a spirit of conciliation to which M. Giannini so rightly paid a tribute just now. I associate myself with all he said on the subject.

I have only one thing to add : M. Giannini mentioned one conciliator, but he might have mentioned others, and one of them I cannot pass over in silence —I refer to M. Giannini himself. He too has been untiring, persevering and persistent in his conciliatory efforts, while his ready wit has enabled him to discover fresh formulas, formulas which sometimes expressed with added clearness the views set forth by other speakers. All his energy has been at our service, and our most grateful thanks are due to him.

So much for the merits of each and all of us. All this, I know quite well, has not enabled us to achieve the complete results that we had hoped for, that we were entitled to expeet and that each one of us was set upon achieving. Some of the speakers at this meeting have said that, notwithstanding, useful work has been accomplished, and I desire to associate myself with that favourable verdict.

Useful work has indeed been accomplished as the result of the efforts made to define the various aspects of a difficult and complex subject. Its legal conceptions have not yet been completely worked out and they are not yet sufficiently clear-cut for embodiment in conventional rules. A sincere and persevering effort has been made, and you are the artisans of that work. Mine has been the signal honour of presiding over your proceedings, and I desire to thank you for your untiring zeal.

The Committee rose at 12.35 p.m.

ANNEX 1.

BASES OF DISCUSSION DRAWN UP BY THE PREPARATORY COMMITTEE AND ARRANGED IN THE ORDER WHICH THAT COMMITTEE CONSIDERED WOULD BE MOST CONVENIENT FOR DISCUSSION AT THE CONFERENCE.

General Principles.

Basis of Discussion No. 2.

A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations.

Basis of Discussion No. 7.

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power incompatible with the treaty obligations or other international obligations of the State.

Basis of Discussion No. 12.

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

Basis of Discussion No. 13.

A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorised to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State.

Basis of Discussion No. 14.

Acts performed in a foreign country by officials of a State (such as diplomatic agents or consuls) acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State.

Basis of Discussion No. 15.

If by a special legislative or administrative measure a State puts an end to the right to reparation enjoyed by a foreigner against one of its officials who has caused damage to the foreigner, or if it does not permit the right to be enforced, the State thereby renders itself responsible for the damage to the extent to which the official was responsible.

Basis of Discussion No. 16.

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.

Basis of Discussion No. 23.

Where a State is entrusted with the conduct of the foreign relations of another political unit, the responsibility for damage suffered by foreigners on the territory of the latter belongs to such State.

Where one Government is entrusted with the conduct of the foreign relations of several States, the responsibility for damage suffered by foreigners on the territories of such States belongs to such common or central Government.

Basis of Discussion No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that :

(1) He is refused access to the courts to defend his rights ;
(2) A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State ;
(3) There has been unconscionable delay on the part of the courts ;
(4) The substance of judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

Basis of Discussion No. 6.

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.

Application to Special Questions.

A. Concessions or Contracts.

Basis of Discussion No. 3.

A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

Basis of Discussion No. 8.

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.

B. Debts.

Basis of Discussion No. 4.

A State incurs responsibility if, by a legislative act, it repudiates or purports to cancel debts for which it is liable.

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service in whole or in part, by a legislative act, unless it is driven to this course by financial necessity.

Basis of Discussion No. 9.

A State incurs responsibility if the excutive power repudiates or purports to cancel debts for which the State is liable.

A State incurs responsibility if the executive power, without repudiating a State debt, fails to comply with the obligations resulting therefrom, unless it is driven to this course by financial necessity.

C. Deprivation of Liberty.

Basis of Discussion No. 11.

A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty. The following acts in particular are to be considered unwarrantable : maintenance of an illegal arrest ; preventive detention, if it is manifestly unnecessary or unduly prolonged ; imprisonment without adequate reason, or in conditions causing unnecessary suffering.

D. Insufficient Protection afforded to Foreigners.

Basis of Discussion No. 10.

A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilised State. The fact that a foreigner is invested with a recognised public status imposes upon the State a special duty of vigilance.

Basis of Discussion No. 17.

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilised State.

Basis of Discussion No. 18.

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilised State.

Basis of Discussion No. 19.

The extent of the State's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.

Basis of Discussion No. 20.

If, by an act of indemnity, an amnesty or other similar measure, a State puts an end to the right to reparation enjoyed by a foreigner against a private person who has caused damage to the foreigner, the State thereby renders itself responsible for the damage to the extent to which the author of the damage was responsible.

E. Damages resulting from Insurrections, Riots or other Disturbances

Basis of Discussion No. 21.

A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.

The State must, however :

(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities ;

(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts ;

(3) Make good damage caused to foreigners by acts of its armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilised States ;

(4) Accord to foreigners, to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance, the same indemnities as it accords to its own nationals in similar circumstances.

Basis of Discussion No. 22.

A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.

Basis of Discussion No. 22 (a).

Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.

Basis of discussion No. 22 (b).

A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.

Basis of discussion No. 22 (c).

A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.

Basis of discussion No. 22 (d).

A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials.

Circumstances under which States can decline their Responsibility.

Basis of discussion No. 1.

A State cannot escape its responsibility under international law by invoking the provisions of its municipal law.

Basis of discussion No. 24.

A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.

Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined.

Basis of discussion No. 25.

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs.

Basis of discussion No. 26.

An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted ; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in Bases of Discussion Nos. 5 and 6.

Basis of discussion No. 27.

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in Bases of Discussion Nos. 5 and 6.

National Character of Claims.

Basis of discussion No. 28.

A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

Persons to whom the complaint State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested.

Compensation for Damages.

Basis of discussion No. 29.

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 the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

Reparation may, if there is occasion, include an indemnity to the injured persons in respect of moral suffering caused to them.

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

A State which is responsible for the action of other States is bound to see that they execute the measures which responsibility entails, so far as it rests with them to do so; if it is unable to do so, it is bound to furnish an equivalent compensation.

In principle, any indemnity to be accorded is to be put at the disposal of the injured State.

Character of the Agreement to be concluded.

Basis of Discussion No. 31.

The high contracting parties recognise that the provisions set out below are in accordance with the principles of international law as at present in force; they acknowledge their obligatory character and declare their intention to comply therewith.

Jurisdiction.

Basis of Discussion No. 30.

Special Protocol.

A claim made by a State in respect of damage suffered by one of its nationals and based on the provisions of the convention to which the present protocol is attached shall, failing amicable settlement and without prejudice to any other method of settlement in force between the States concerned, be submitted for decision to the Permanent Court of International Justice.

ANNEX II.

OBSERVATIONS AND PROPOSALS REGARDING THE BASES OF DISCUSSION PRESENTED TO THE PLENARY COMMITTEE BY VARIOUS DELEGATIONS.

Austria.

Proposals regarding New Bases of Discussion and Bases of Discussion Nos. 10, 5, 12 and 13, 15 and 22 *(d)*, circulated to the Members of the Committee on March 17th, 1930.

General Principles.

1. Insert a Basis of Discussion worded as follows:

"A State is in every case responsible if the damage suffered by a foreigner is the result of an act or omission on the part of a State authority not in keeping with the treatment that a civilised State might be expected to accord in view of the foreigner's circumstances or standing."

2. Add to the Bases of Discussion, "General Principles", the Basis of Discussion, No. 10 amended as follows:

Instead of: " . . . failure on the part of the excutive power . . . ", read " . . . failure on the part of a State authority . . ."

Basis of Discussion No. 5.

Replace the present text by the following wording:

"A State is responsible for damage suffered by a foreigner as the result of the fact that:

"(1) A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;

"(2) There has been a denial of justice."

Bases of Discussion Nos. 12 and 13.

In Basis No. 12, alter the expression " within the limits " to " within the general limits ". Omit Basis No. 13.

Basis of Discussion No. 15.

Omit this Basis.

Basis of Discussion No. 22 (d).

Insert, after Basis of Discussion No. 22 (*d*), the following new Basis of Discussion :

" A State is responsible for damage caused to the person or property of a foreigner as a result of acts or omissions on the part of a State authority contrary to the internal law of that State if the State has not accorded the foreigner such protection against these acts as a civilised State might be expected to accord. "

PROPOSAL REGARDING BASIS OF DISCUSSION NO. 22 (*b*), CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 24TH, 1930.

Insert, at the beginning of the sentence, the words : " provided that reciprocity is ensured. "

Considerations on which this amendment is based :

According to the text proposed, a State must accord to foreigners to whom damage has been caused by persons taking part in a riot the same indemnities as it accords to its own nationals in similar circumstances. It seems hardly fair, however, to expect States to undertake an obligation in this respect without taking into account the question of reciprocity, and to oblige them in such circumstances to grant to foreigners the same treatment as nationals, even if the State of which the foreigners are nationals would not pay indemnities to foreigners who have suffered similar damage, on the ground for example, that it only grants indemnities to its own nationals in such circumstances as an act of grace.

Belgium.

PROPOSAL REGARDING BASES OF DISCUSSION NOS. 7 AND 27, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 18TH, 1930.

At the end of *Basis of Discussion No. 7*, add the following :

" This responsibility may, in principle, be invoked only after the parties concerned have exhausted the remedies allowed them under the internal law. "

Reasons :

In this part of the Basis of Discussion called " Principles ", the Belgian delegation proposes to enunciate the idea found in Basis No. 27.

An act causing damage may not be definitely ascribed to a State so long as there is reason to believe that the State in question is prepared to make good the damage by allowing the parties concerned the remedies available under its internal law. Only after these remedies have been exhausted can the direct action as between one State and another arise.

A few exceptions may be allowed to this rule — for example, unwarrantable delay on the part of the local courts in settling claims. International responsibility may then be established in accordance with the principles laid down in other Bases of Discussion (Nos. 5 and 6).

China.

PROPOSAL REGARDING BASES OF DISCUSSION NOS. 10, 17 AND 18, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON APRIL 4TH, 1930.

A State is only responsible for damage caused by private persons to the person or property of foreigners if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it had the persons injured been its own nationals.

Colombia.

Observations regarding Bases of Discussion Nos. 5 and 6, circulated to the Members of the Committee on March 28th, 1930.

1. The variety of formulæ suggested to deal with the question of the responsibility of a State for acts of its judicial authorities clearly indicates how delicate and difficult this matter is.

2. We already have before us the suggestions of the report of the Committee of Experts for the Codification of International Law appointed by the League of Nations and the Bases of Discussion prepared by the Codification Committee. The draft of the Institut de Droit international, which was approved at the Lausanne Session in 1927, constitutes a scientific source of high authority. The collective declarations on this subject made at international conferences and the stipulations contained in several international treaties constitute sources of an international diplomatic character which we cannot overlook. The report of the League Committee of Experts differs substantially on the question of judicial responsibility from the Bases of the League's Codification Committee, while these two texts are not in agreement with the draft of the Institut de Droit international. Again, several amendments to Bases Nos. 5 and 6 have been put forward and the texts of these amendments, together with the replies previously sent in by Governments to the Committee's questionnaire and the statements which have been made to us, prove that Bases Nos. 5 and 6 will not be accepted in their present form.

3. The Colombian delegation believes that, generally speaking, it is essential in regard to the responsibility of States to draw a clear line of demarcation between the domestic responsibility of the State and its international responsibility and to devote special attention to the procedure connected with international responsibility, this being perhaps the most important point in the proposed Convention.

4. As a general rule, the intrinsic value under domestic law of a judicial decision in civil or criminal matters rendered after normal proceedings, cannot be called in question. That the judicial power should be independent and not called to account for its decisions are essential conditions in the normal life of properly constituted States and they are conditions usually guaranteed under the Constitution of the country. The necessity of such independence was emphasised in several replies made by Governments to the Codification Committee's questionnaire (see, in particular, the replies made by France, the Netherlands, Chile, Poland, Czechoslovakia, etc.).

5. In an international Convention on the responsibility of States, such as the Convention which is at present contemplated, this general principle of domestic law, respect for which is essential if a good understanding is to exist between the various countries and if their mutual relations are to be marked by feelings of confidence, must be brought into harmony with the principle that, while the national courts may not be called to account for their decisions, the State may nevertheless be internationally responsible in certain cases which should, in the interest of all, be as few as possible. International relations could be largely improved by a satisfactory organisation of international justice and by a clearer definition of the law, but this object would not be attained by multiplying possible causes of dispute or by increasing the contingencies and uncertainties which would be introduced into the ordinary life of States by any attack on the independence of the judicial power and the authority which the *res judicata* should enjoy in the eyes of all the inhabitants of a country.

6. The invoking of the international responsibility of a State when the judicial authorities are concerned, in countries where foreigners are placed on a footing of complete equality with nationals in regard to individual guarantees — the acquisition and enjoyment of civil rights and the bringing of actions in court — must be rejected as a general rule. Actions for damages which foreigners desire to bring against the State, officials or private persons, must be prosecuted by them before the proper national authorities. Any other rule would, in particular, be inadmissible and even preposterous in cases of disputes at private law between persons who are not subject to international law. Whether the dispute arises between foreigners and nationals, or between foreigners *inter se*.

7. Even when a judicial sentence may be held to be contrary to international laws or principles, international responsibility can hardly be admitted unless subject to wide restrictions. Private international law covers almost all the individual's spheres of private activity (nationality, birth, marriage, civil status, inheritance, gifts, contracts, etc.). Law-suits in which the judge must apply or interpret the principles of international private law are manifold and of daily occurrence. The judgment he gives must be taken as final both from the internal and from the international point of view. It must be presumed that the judge's award is a sound one, that he has properly applied the law. If international responsibility is conceivable in certain cases, it is rather because the law is inadequate, with the practical result that international responsibility may be involved. If cases occur in which a final sentence is manifestly inconsistent with international obligations, the State will be responsible in virtue of the general responsibility of itself and its organs, which

we have accepted as one of the bases of the Convention. Even in that case, however, the sentence must be executed. The reparation due for violation of international law does not mean that the sentence must be annulled.[1]

8. Subject to reciprocity, the State has an international obligation to afford foreigners judicial assistance equal in principle to that which it grants to its own nationals. If it does not fulfil this obligation, there is a *denial of justice (justicia denegata)* in accordance with Roman law, and the State becomes internationally responsible.

9. Unconscionable delay on the part of the courts may constitute a denial of justice, but international responsibility should not be invoked on this account. A remedy should be sought under the municipal law of the country. Delay is always relative. In some cases, justice is normally easy to administer, and there are fewer delays in a small village than in a large town. The judgment of the chief of a tribe is more expeditious than that of the court of a great country with an age-long civilisation.

10. If we agree that the State's international responsibility may be invoked as a result of a charge of ill will towards foreigners in judicial decisions, we open the door to claims which might be described as rather psychological than legal in character, and which, moreover, are almost unknown in international practice. We all know how deeply and widely national feeling is aroused at times, and during such periods there will be an inclination to believe that a general sentiment of ill will prevails towards particular groups of foreigners, and that this sentiment will inevitably affect the various judicial bodies. Possibly judges may not always succeed in banishing personal feelings of good will or ill will, but such a risk is universal and inevitable in judicial affairs, since judges are only men, and we cannot bring down the gods from Olympus to do justice for us. In any case, from what mythology tells us, even they were not free from passions and prejudice.

11. As regards Basis of Discussion No. 6, I support the very sound criticisms expressed by other delegations, more particularly those of Roumania, Portugal, Poland and Spain. I think that there is already a general agreement to reject this Basis, and the objections to it are so evident that it is needless to repeat them.

12. In conclusion, I will add certain general considerations on this question and to the Convention which we contemplate adopting.

In some of the Government replies to the Codification Committee's questionnaire, mention is made of certain treaties of arbitration or of conciliation and arbitration (Germany, Switzerland and others) in which a very wide measure of international responsibility is accepted in judicial matters. Other countries have concluded Conventions where the contrary is the case. It will be agreed, I think, that the Convention which we are to sign will not be inconsistent with these provisions and that the signatories may, in all cases, determine by joint agreement the sphere of responsibility which they accept in their mutual relations. Moreover, the provisions of these treaties constitute a definite body of law, and undoubtedly States may allow each other certain concessions in order to mitigate the rigidity of the principles laid down, provided that the procedure of conciliation, arbitration, etc., is so organised as to provide a solid assurance that international justice will be done.

13. If some of the points such as that we are discussing are so difficult that, despite all our efforts and our genuine desire to reach an agreement, they cannot be wholly settled by this conference, we must, in my opinion, allow such reservations to be made as will facilitate the signing of the Conventions. Such a procedure, indeed, has already been adopted at other conferences convened by the League of Nations.

14. The League of Nations hopes to carry out this work of codification gradually — gradually, not only because it must necessarily be effected step by step, but also because it must reflect the gradual but constant progress made in the evolution of international law.

One of the chief steps forward that has been made in modern times in this field — a step taken at the Hague Peace Conference and by the League of Nations and confirmed in the pacts signed under its auspices — is the reaffirmation of the legal personality of the State, a personality inseparable from the independence of its courts and from their jurisdiction. The administration of justice may be more perfect in one country than in another; the law of relativity comes into play here as in all spheres of national activity. From the international point of view, however, a country which possesses a well-organised system of administration of justice may say that its own is the best, and in any case is the only one which it can offer to foreigners, since it is what it provides for its own nationals.

Observations regarding Bases of Discussion Nos. 30 and 31, circulated to the Members of the Committee on April 1st, 1930.

1. The object of the proposed Convention on the Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners cannot merely be the enunciation of certain principles of international law on the subject, which principles are, incidentally, not absolute in character. The Convention must take the form of a body of

[1] See German Government's reply to the List of Points (document C.75.M.69.1929.V — Questions juridiques, 1929. V. 3, page 42).

stipulations whereby the signatory States undertake to accept, subject to certain conditions, the rules drawn up by mutual agreement on the question of responsibility. What we have to do is to negotiate an agreement as representatives of our Governments, and not merely to make declarations of principle as if we were a learned society.

2. Of greater importance than the actual principles on which the international responsibility of States is based, from a practical and objective point of view, are the invoking of this responsibility and the procedure which may be employed. That certain questions relating to the international responsibility of States have led to so much discussion on the part of writers on international law and in the chancelleries is mainly due to this question of procedure.

3. The Colombian delegation regards its acceptance of the rules to be embodied in the Convention on the International Responsibility of States as conditional on the general recognition of an authority which will obligatorily take cognisance of disputes regarding questions touching this responsibility. As the Swiss Government stated in its reply to the Codification Committee :

> " Experience has indeed shown that there are very few domains of international law where disputes between States can arise so suddenly and with so little warning, or where the originating causes of the dispute can be so keenly contested. We should therefore endeavour to obtain general recognition of the jurisdiction of certain impartial tribunals which could immediately decide the contested facts and give judgment accordingly. The more we can reduce juridical insecurity in this domain the easier it will become for States to accept definite and comprehensive rules on their responsibility in international relations."

The Government of the Netherlands, in its reply to the questionnaire (point 15), said that the suggested clause of the Convention regarding an authority which would be bound to hear disputes " might always be regarded as the most important part of the agreement to be reached ". The replies of the other Governments to the questionnaire would seem to indicate that several of them share this opinion.

4. It is agreed that, in accordance with a precedent which already constitutes a general rule, the compulsory jurisdiction clause will for purposes of interpretation, be embodied in the Convention on responsibility. That clause, however, will not be enough. What is perhaps still more important is the clause on compulsory arbitration or jurisdiction for all cases of claims lodged against a State for damage to the person or property of foreigners, that is to say, all cases in which international responsibility may be invoked under the Convention.

5. For a clause such as that for which we are asking, there may be cited as precedents — and they are of great and undeniable value — the large number of treaties and Conventions concluded in recent years on the principle of the arbitral or judicial settlement of all legal disputes, and indeed of all disputes whatever. Several of the countries represented at our Codification Conference are linked together by agreements of this kind. Colombia also has signed such agreements with several European and American States, and is bound by the Convention of the Fourth Pan-American Conference (that held at Buenos Aires in 1910), which modified the Conventions of the Second and Third Pan-American Conferences and by which almost all the American States accepted the jurisdiction of the Hague Court of Arbitration for all financial claims where the parties failed to reach an agreement regarding the establishment of a special tribunal.

6. Much of the work of the authority which is to be established will consist of conciliation procedure, the advantages of which are already universally recognised. Conciliation procedure, however, like the procedure of enquiry, may be optional, while arbitration or *judicial* procedure must be compulsory. In certain cases, according to the experience gained in international legal practice, arbitration committees will be not only useful but essential. As a general rule, however, the Permanent Court of International Justice should be given preference. In this way, a uniform legal practice will be established in a domain which is of immense importance in international relations. Moreover, as a number of States have already accepted the optional clause of the Court, the latter already possesses jurisdiction in respect of a large number of States for cases of responsibility.

7. Basis of Discussion No. 31 may be eliminated. There is no need to make a declaration to the effect that the provisions adopted are in accordance with existing principles of international law. Those provisions are accepted as international rules by the signatory States, which, by mutual agreement, will, in their mutual relations, give to international legal principles the actual character of international laws. It is in this sense that the Colombian delegation envisages the work of codification.

The Colombian delegation does not share the view that the provisions relating to the international responsibility of States must be embodied in a document which is to be separate from the Convention itself, but to which the Convention will refer. The provisions on responsibility must consist of the articles of the Convention; they may include other articles as well, if necessary, but there must not be a special protocol for individual articles, etc.

Danzig.

(See Poland and Danzig).

Denmark.

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 14, 23, 5, 6, 3, 8, 4, 9, 10, 17 and 18, 19, 20, 22 (*a*), 22 (*d*), 24, 25, 28, 29, 30, 31, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 25TH, 1930.

Basis of Discussion No. 14.

Omit this Basis, or add the words : " when these acts are contrary to the international obligations of the State. "

Basis of Discussion No. 23.

The first paragraph to be worded as follows :

" Where a State is entrusted with the conduct of the foreign relations of another political unit, the decision whether the State or the political unit should be materially responsible for damage done to a foreigner on the territory of that political unit depends on the existing juridical relationship between the State and the political unit in question. In such case, the State cannot avoid the material responsibility which it might incur at international law, by pleading that it is merely entrusted with the conduct of the foreign affairs of the political unit in question. "

Omit the second paragraph.

Basis of Discussion No. 5.

Omit paragraph 3.

Add a new paragraph, worded as follows :

" The claim against the State must, in these cases, be submitted within twelve months at the latest as from the date on which the final judicial decision was given by the national courts, or, if no such decision has been given, after the fact which involves the responsibility of the State has come to the notice of the injured party. "

Basis of Discussion No. 6.

Add a new paragraph couched in the same terms as that proposed for Basis of Discussion No. 5.

Basis of Discussion No. 3.

Insert in the first paragraph, before the word " legislation ", the word " special. " The second paragraph to read as follows :

" The enactment of general legislative provisions incompatible with the operation of a concession which it has granted or the performance of a contract made by it involves the responsibility of the State if the legislative provisions in question place foreigners in a less favourable position than nationals ".

Basis of Discussion No. 8.

After the word " infringes " add " in a special degree ".

Add, after the first paragraph :

" Unless there is a presumption that the State, in granting the concession or concluding the contract, has reserved its freedom of action in connection therewith ".

The second paragraph should be drafted in accordance with the amendment proposed to the second paragraph of Basis of Discussion No. 3.

Basis of Discussion No. 4.

The following wording is proposed :

" A State cannot, by unilateral action, cancel, suspend or modify the service of the debts it has contracted with a foreign State, corporate body or private individual.

" With regard to public securities transferred in the ordinary course of business without any special contract having been concluded with the State in question, foreign creditors are subject to moratorium laws or other similar provisions enacted as a result of exceptional circumstances of necessity in the debtor State, provided such laws or provisions are applied without any discrimination as between nationals and foreigners."

Basis of Discussion No 9.

In view of the amendment proposed to Basis of Discussion No. 4, Basis No. 9 might be omitted.

Basis of Discussion No. 10.

The following wording is proposed :

" A State is responsible, if the damage suffered by a foreigner is due to the fact that the laws or executive organs of the State only afford to the person or property of foreigners a degree of protection inferior to that afforded to the person or property of nationals.

" Responsibility is also incurred if, on account of the special circumstances in which the foreigner in question entered the country — if, for instance, he was on an official mission — there were reasons why special diligence should have been exercised for his protection, and if such diligence was not exercised. "

Bases of Discussion Nos. 17 and 18.

In view of the amendment proposed to Basis No. 10, Bases Nos. 17 and 18 might be omitted.

Basis of Discussion No. 19.

The following text is proposed :

" A State is responsible if the offence committed against the person or property of foreigners, on account of the fact that they were foreigners or nationals of a certain State, should have been foreseen by the authorities of the accused State, and if that State failed to take such steps as might, according to the circumstances, have been possible and necessary with a view to avoiding, or opposing the commission of the offence ".

Basis of Discussion No. 20.

It is proposed that the words " an amnesty " should be omitted and that the words " in a particular case " should be added after the word " measure. "

Basis of Discussion No. 22 (a).

It is proposed that the last sentence of this Basis of Discussion should be replaced by the following words :

" . . . if it has not taken the steps which were possible and necessary to prevent or oppose the commission of the damage. "

Basis of Discussion No. 22 (d).

Omit this Basis.

Basis of Discussion No. 24.

The following wording is proposed :

" The right of legitimate defence and necessity may be invoked in the circumstances recognised in this connection by the municipal law of the State, provided that that law is applicable without discrimination both to nationals and to foreigners. "

Basis of Discussion No. 25.

Omit this Basis.

Basis of Discussion No. 28.

Substitute for the words " the damage was caused ", the words : " the claim was lodged ".

Basis of Discussion No. 29.

In the first paragraph, substitute for the words " when this consequence follows from the general principles of international law ", the words : " in the case of a premeditated or intentional offence ".

Add the following rule :

" Interest may be claimed only for the period beginning at the time when the claim is lodged. "

Basis of Discussion No. 30.

It is proposed that this Basis of Discussion should be embodied as an article in the Convention itself.

Basis of Discussion No 31.

Insert between the words " are in " and " accordance " the word " general ".

Egypt.

PROPOSAL REGARDING BASIS OF DISCUSSION NO. 1, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

Add to Basis of Discussion No. 1 the two following paragraphs :

" A State shall not, however, be held responsible under the preceding provision if its internal law includes special guarantees established by treaty or custom to the advantage of certain Powers with a view to ensuring adequate protection for the person and property of the nationals of these Powers.

" This shall also apply to the cases in which, even without any treaty, these guarantees are, in actual practice, extended to other Powers. "

Explanatory Note.

The rules of international law with regard to the responsibility of States for damage caused in their territory to the person or property of foreigners were intended to ensure that States which form part of the international community should establish and maintain an organisation and framework of the State similar to those which Europe has evolved during the last century, notwithstanding the considerable dissimilarity which still exists in the internal mechanism of the various States. That was the static purpose of these rules. But they have also had a dynamic purpose — namely, to cause this organisation to operate in such a way as to ensure smooth and peaceful international relations.

In point of fact, the community of nations is based on a conception of mutual confidence and esteem as between all the component States. Such confidence and esteem are not and cannot be accorded blindly. Every State must continue to merit such consideration and must scrupulously observe the rules in order to ensure the equilibrium indispensable to international life. When, therefore, the action of any State tends to disturb the equilibrium, the rules on responsibility, acting by reflex or natural repercussion, tend to restore that equilibrium.

Applied as between countries that are more or less homogeneous, owing to the similarity of their intellectual development and institutions (because those derive from the same sources and civilisation), these rules have practically attained the object for which they were established. " Practically ", we say, for this is not always the case, and the various countries have not yet agreed to grant to foreigners a treatment equal to — but never more favourable than — which they grant to their nationals. Nevertheless, these rules have resulted in a fairly satisfactory treatment of foreigners and a relatively adequate degree of protection.

They are not, however, the only formulæ by which this object can be attained. They do not exclude other formulæ and certainly do not guarantee a privileged position for foreigners. There is one other formula which is at least as effective as these rules. We refer to what is known as the System of Capitulations in non-Christian countries.

This system, which was brought into being by the clash of two mutually irreconciliable civilisations and juridical conceptions, has served as a kind of connecting-link that has enabled the two civilisations, in spite of their dissimilarity, to exist side by side.

We do not propose to retrace the evolution of this system even in its main lines and successive phases. It is sufficient to mention the fact that, in the eyes of the Powers enjoying Capitulations, the Egyptian State at the present time may not subject the nationals of the Powers to any taxes or laws which the Powers have not approved either direct or through the intermediary of the mixed courts. Nor may these nationals be tried for delicts by any authority other than their own Consular or national courts, or for offences against the regulations or in any civil or commercial matters (whether they be plaintiffs or defendants) by any tribunal other than the mixed courts consisting of a majority of foreigners (two-thirds in the courts of first instance and three-fifths in the court of appeal). As a remedy against acts of the administration, they may appeal to these same courts, which can award damages for every infringement by such acts of a right acquired by a foreigner recognised either by treaty or by law or by contract (Article 11 of the rules for the organisation of the mixed courts).

In these circumstances, could any further addition to such a body of guarantees be imagined — guarantees which, though excellent from the point of view of foreigners, nevertheless greatly hinder the free development of national intrests ? As every claim by a foreigner gives rise to an action in the mixed courts, it is difficult to see what the foreigner would gain by admitting the concept of diplomatic responsibility. When such action is taken and the two States do not reach an agreement, the matter is, after all, settled by arbitrators — and very serious obstacles have to be overcome before this result can be attained. What are mixed courts if they are not (in fact, if not in form) a commission of arbitration far more accessible and convenient than any other ?

As a matter of fact the System of Capitulations and the rules concerning international responsibility are two alternative systems starting from different points but aiming at the same object — namely, the protection of the person and property of foreigners — with this difference: that the Capitulations ensure the attainment of this object in a more advantageous, complete and direct manner for the foreigner, who is thus fully protected within the country against any injustice, without setting into motion the complicated system of international responsibility.

Accordingly, the object of the proposed amendment is to avoid the overlapping of these two systems. Where the system of Capitulations operates, there can be no international responsibility. Each system excludes the other by reason of sheer incompatibility. An appeal to the international responsibility of a country subject to Capitulations would simply amount to the disavowal and condemnation of the guarantees on the creation of which the capitulatory Powers have expended so much effort and which they guard so jealously.

All foreigners, however, do not receive the advantages of the régime of Capitulations. In addition to the foreigners who benefit by it either as a result of existing treaties or a *de facto* situation under which they have access to the mixed courts, in spite of the abolition of the Capitulations regarding them (Germans, Austrians), there are all the other foreigners who are governed by the rules of international law. Egypt is therefore doubly interested in participating in the definition of these principles as regards this latter category of foreigners and in avoiding the application of such principles where these would overlap with the system of Capitulations. This is the scope of the proposed amendment, seeing that the capitulatory régime forms part of the internal law of Egypt.

PROPOSAL CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 21st, 1930 : AMENDMENT TO THE BELGIAN PROPOSAL ON BASES OF DISCUSSION NOS. 7 AND 27.

The amendment proposed by the Egyptian delegation is as follows:

> " Such responsibility, however, arises only after the persons concerned have exhausted all the remedies afforded by the internal law of the State and only in so far as there has occurred a denial of justice within the meaning of Article . . ."

PROPOSAL CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 27th, 1930: AMENDMENT TO PARAGRAPH 2 OF THE FRENCH PROPOSAL REGARDING BASIS OF DISCUSSION NO. 5.

The amendment proposed by the Egyptian delegation is as follows:

> " 2. A judicial decision, after all remedies have been exhausted, clearly disregards the existence of an international obligation. "

Note. — The main purpose of this amendment is to ensure that the State will not be responsible whenever a judicial decision which does not dispute the existence of a definite international obligation interprets it or appraises the facts relating thereto in a manner not admitted on concurred in by the State of which the injured foreigner is a national.

Finland.

OBSERVATIONS CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

It is important to determine precisely what should be understood by the responsibility of States. When responsibility for damage caused to the person or property of foreigners is dealt with in the " schedule of points ", it seems obvious that this involves *culpability* on the part of the State or, in other words, refers to a wrong done by the State in question. This would appear to be fully confirmed by the conclusion of the Rapporteur:

> " Since international responsibility can only arise out of a wrongful act, contrary to international law . . . damage caused to a foreigner cannot involve international responsibility, unless the State in which he resides has itself violated a duty contracted by treaty . . . " (page 252).

Responsibility as such, in the widest sense of the term — *i.e.*, the obligation to accept the consequences of any act whatsoever — is not necessarily dependent on the fact that a State has failed to fulfil an international obligation. This point of view, which is of capital importance, was clearly brought out by the Finnish Government in its observations on point II of the " Schedule of Points ". For example, when the questionnaire asks whether a State becomes responsible if it enacts legislation restricting the acquired rights of foreigners, the answer must be in the negative, provided always that international responsibility is regarded as arising only from an act contravening the law. A State may, indeed, extend the effects of an expropriation law to foreigners who possess property

in its territory. It would be entirely wrong to infer from this that the absence of responsibilty in the sense described or, in other words, the absence of any *culpability*, would exempt the State from the obligation to compensate foreigners who have been expropriated. It is no answer to the question to say that expropriation applicable to foreigners is not contrary to the international obligations of the State, and that such measures therefore do not constitute a wrongful act. The question is still to be settled whether a State is bound to compensate foreigners, regardless of the attitude it adopts to its own nationals.

On this point, the wording of the questionnaire is liable to lead to some confusion ; this confusion actually appears in the replies of certain States.

In answering the question, the Finnish Government points out that a State, while retaining the right to expropriate foreigners, cannot disregard its duty to compensate them. In its reply, however, it did not indicate the *amount* of the *compensation* (full or partial or fair compensation). The text-writers on the subject have as a rule upheld the view that foreigners are entitled to *full* compensation. A fairly marked change of opinion has, however, taken place even in doctrine, not to mention actual policy, as a result of the violent upheavals which have occurred in political and economic life. The concrete cases which may arise are apt to be complicated and difficult to decide. Owing to a variety of causes — the depreciation of the currency, the force of circumstances, in particular the financial straits to which certain countries may be reduced, the disguised forms which measures of expropriation and even confiscation may assume, the enactment of legislation imposing unduly heavy taxation — it is often very difficult to decide with complete impartiality and with a full knowledge of the facts. The argument that a State is not bound to treat foreign nationals better than its own subjects would lead to the most flagrant inequality and unfairness and cannot be upheld in view of the exigencies and realities of international life. Apart altogether from other considerations, it is desirable to apply a common measure and general material principles by which the treatment of foreigners could be determined. It is impossible to take here as a criterion either the treatment which a State accords to its own subjects (national treatment) or reciprocity. Suppose a State carries out a far-reaching measure of confiscation affecting the property both of its own nationals and foreigners ; it would be a very poor consolation for the latter to know that they were receiving the same treatment as the country's own nationals. Again, would the State to which the expropriated foreigners belonged rest satisfied with noting the fact that the State which expropriated, or perhaps confiscated, the property both of its own nationals and foreigners was only applying national treatment to the latter? Or would treatment based on principles of material and actual reciprocity be preferable? Would the State whose nationals had been injured by measures of confiscation imposed by a foreign State actually decide to apply, by way of reciprocity, measures of equal severity and unfairness to the foreign nationals of the State carrying out the confiscation? We do not think that it would do so. A State desirous of respecting individual rights would hold that there was an obvious difference between its method of treating foreigners and the method adopted by its neighbour, although in both cases national treatment might be pleaded. It would, however, hardly consider it consonant with justice and equity to subject the nationals of a foreign State, on the ground of reciprocity or of reprisals, to treatment which must necessarily be condemned as infringing just international principles.

If that is so, we come to the conclusion that international law should require, first of all, that foreigners shall not be treated in a manner less favourable than nationals, and then that, even if the latter in cases of expropriation receive only nominal compensation or none at all, foreigners must, under a rule of international law, receive *fair compensation*. Opinions, however, differ considerably with regard to the actual nature of such compensation. Two interested parties may in this connection put forward diametrically opposed opinions and claims. There is only one possible solution — namely, that any dispute as to what constitutes fair compensation should be submitted to some judicial authority authorised to take into account all the circumstances, particularly any financial necessities which may be pleaded by a State.

It would seem that in the new Bases of Discussion there is no longer any reference to the general question whether a State incurs responsibility if it adopts legal provisions affecting the acquired rights of foreigners. In Basis of Discussion No. 3, it is said that responsibility may, *according to the circumstances*, be incurred if the State has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it. In Basis of Discussion No. 4, it is said that a State incurs responsibility if, without repudiating a debt, it suspends or modifies the service in whole or in part by a legislative act *unless it is driven to this course by financial necessity*. As regards the obligation to accord compensation when the State has adversely affected the acquired rights of foreigners, no general principles are enunciated. The absence of provisions concerning the protection of proprietary rights is noticeable. In these circumstances, it is important either to seek a reply to this very comprehensive question or to note explicitly that certain points and aspects of the problem have been avoided. If it is decided to deal with the problem of acquired rights in all its length and breadth, we think the above suggestions should be considered, particularly the possibility of taking attendant circumstances into account as implied in Basis No. 3 (" according to circumstances ") and Basis No. 4 (" unless it is driven to this course by financial necessity "). We should also mention the special point expressed in Basis No. 24 to the effect that " *the State may be responsible to an extent to be determined* ".

All these considerations lead to the conclusion that, in the matter of protecting the acquired rights of foreigners in the widest sense of the term, we cannot apply strict and categorical rules of law. We must take into account all the relevant circumstances including the consequences of the principle of reciprocity.

In this connection, the following consideration should be taken into account; when a foreigner has suffered damage as a result of an act contrary to the international obligations of the State and committed by one of its officials, it is quite right that full and complete compensation should be granted for the damage suffered. *A fortiori*, therefore, this should be so if the foreign national has been denied justice or has in general suffered a wrong of the kind defined in Basis of Discussion No. 5. Moreover, there are certain cases in which a State undoubtedly incurs responsibility, but where compensation strictly equivalent to the damage caused could not rightly be required. Certain suggestions indicated above in Bases of Discussion Nos. 3, 4 and 24, as well as the other arguments set out above, lead us to this conclusion.

Would it be too dangerous to admit the relativity of responsibility or rather of the obligation to compensate for damage caused, a relativity which can hardly be avoided as soon as we come to consider the concept of responsibility in its widest sense. It seems that the objections which may be raised against taking into consideration the different circumstances of any disputes that may arise, or against admitting differential treatment according to circumstances, will lose most of their force and value if, in the last resort, as provided in Basis of Discussion No. 30, all claims for damage suffered by foreigners are left to be examined and assessed by an impartial judicial tribunal — preferably the Permanent Court of International Justice.

With regard to Basis of Discussion No. 23, it should be observed that the criterion defined by the words " Government entrusted with the conduct of the foreign relations of several States " may lead to some uncertainty. A State belonging to some sort of union, a dominion (and even a colony) may be a Member of the League of Nations, provided it enjoys self-government. In these conditions, the community is always, to a very considerable extent, able itself to conduct its own foreign affairs. It cannot decline all international responsibility by pleading its relationship with another international organism. Should this be brought forward as a counter-argument to the thesis that the " common or central " Government is alone responsible for damage suffered by foreigners in the territory of the annexed or subordinate community? This is a question which merits consideration.

Proposal regarding Basis of Discussion No. 23, circulated to the Members of the Committee on March 19th, 1930.

As account must be taken of any State, dominion or colony which, even though it may be, to a certain extent, a member of a community, if not in a position of dependence may nevertheless be or become a Member of the League, and as every Member of the League must, as such, recognise individual responsibility, at all events in respect of certain international relations, the Finnish delegation proposes the following amendment to Basis of Discussion No. 23 :

> " The circumstances in which a State may be invested with power to conduct the foreign relations of another political unit may involve the exclusion of the latter's individual responsibility in respect of damage suffered by foreigners in its territory so that such responsibility devolves upon the former State alone.
>
> " A common or central government may be invested with the power to conduct the foreign relations of several States in such a way that the responsibility for damages suffered by foreigners in the territory of any one of the States devolves upon that government alone."

France.[1]

Proposal regarding the General Principle of the Responsibility of States, circulated to the Members of the Committee on March 17th, 1930.

The French delegation considers that the following principle underlies the bases proposed :

> " Any failure on the part of the organs (legislative, executive or judicial) of a State to carry out the international obligations of that State involves its responsibility."

The general discussion would be facilitated if an agreement could be reached in the first place on that principle itself.

[1] See also the joint proposal regarding Bases of Discussion Nos. 10, 17 and 18, printed as an appendix to this Annex.

AMENDED TEXT OF ABOVE PROPOSAL, CIRCULATED TO THE MEMBERS OF THE COMMISSION ON MARCH 18TH, 1930.

A State is responsible for any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.

PROPOSAL REGARDING BASES OF DISCUSSION NOS. 5 AND 6, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 27TH, 1930.

Basis of Discussion No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that :

(1) He has wrongfully been refused access to the courts or there has been, on the part of the courts, wilful and unjustifiable delay, such as to be equivalent to a denial of justice ;

(2) A judicial decision which is final, every process of appeal having been exhausted, is incompatible with the international obligations of the State.

Basis of Discussion No. 6.

(To be suppressed.)

Germany. [1]

GENERAL OBSERVATIONS CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

The German delegation desires to refer to the general observation submitted by the German Government in regard to the scope of the problem relating to the responsibility of States. In accordance with that general observation, the German delegation would suggest that the problem should be defined and delimited. In its opinion, the present discussions should relate to the question of the general conditions of responsibility, that is to say, should lay down the general conditions under which a State incurs responsibility for damage suffered by a foreigner in its territory. The authors of the questionnaire and the Basis of Discussion also seem to have considered this aspect of the problem as being the most important. In point of fact, only a few Bases of Discussion go beyond the limits thus marked out and aim at imposing certain special obligations with regard to the treatment of foreigners.

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 5 AND 6, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 29TH, 1930.

I.

Bases of Discussion Nos. 5 and 6 deal simultaneously with acts and omissions of the judicial power, the legislative power and the excutive power. In point of fact, in the cases contemplated in Basis No. 6, damage is the result either of defective legislation or the defective operation of the executive organs called upon to ensure and supervise the proper application of the law. Similarly, in the cases referred to in paragraph 1 of Basis No. 5, a foreigner may find himself debarred from access to the courts either by the courts themselves, which refuse to entertain his application, or by the legislator, who has provided no tribunal available for foreigners, or by the executive power, which prevents a foreigner from exercising the rights of redress accorded to him by the law.

In view of the fact that the previous bases defined successively the conditions under which international responsibility arises as a result of acts accomplished by the legislator, by the executive power and by administrative officials, the subject of Basis No. 5 should be limited to the acts and omissions of the judiciary, leaving on one side, for the moment, those cases in which it is the legislator, the executive power or an administrative official that prevents the foreigner from invoking judicial protection.

---

[1] See also the joint proposal regarding Bases of Discussion Nos. 10, 17 and 18, printed as an appendix to this Annex.

II.

Acts and Omissions of the Courts.

A. *Principle.*

Under what conditions does the State incur international responsibility owing to an act or omission of its courts ?

The reply may be found in the general principle contained in new Basis of Discussion No. 1, which was adopted as the starting point of our work :

> " A State is responsible for any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State."

In applying this principle to the acts of the judiciary, it is important that it should be stated in the same terms as those employed when defining the conditions governing international responsibility resulting from the acts of the executive power and of officials. Paragraph 2 of Basis No. 5 and the amendments connected therewith only refer to judicial *decisions*, whereas, in dealing with the executive power and with officials, mention is made of acts and omissions. It might thus be concluded that there existed judicial acts and omissions contrary to the international obligations of the State which did not involve the international responsibility of the State. In order to remove this doubt, the word "decisions" should be replaced by the expression " acts and omissions ". Moreover, the word " *final* " may be omitted. The question of the exhaustion of remedies is a question of a general nature which will be settled elsewhere.

We therefore propose that the following principle should be laid down in Basis No. 5 :

> " A State is responsible for the damage suffered by a foreigner as the result of an act or omission on the part of the judiciary incompatible with the international obligations by which the State is bound."

When this principle has been laid down, we should consider whether certain exceptions should be allowed and whether a schedule should be given of certain special cases in which it applies.

B. *Exceptions to the Principle.*

1. With regard to the first question concerning exceptions, the German delegation is of opinion that the principle formulated above is an absolute one admitting of no exception. A State cannot avoid the international responsibility incurred as a result of an act of its judicial authorities by pleading that the courts are independent. Consequently, we cannot admit that the acts of the judiciary do not entail the responsibility of the State except in the case of a denial of justice.

In this connection, however, we should carefully define the scope of the principle that every act of the judiciary incompatible with international obligations involves the international responsibility of the State.

2. The Egyptian delegation raised the question whether a judicial decision might be incompatible with international obligations even apart from the case of a denial of justice. The answer is : Yes. The case of a denial of justice is only one particularly serious case of failure on the part of the State to fulfil its international obligations. There are other instances in which a State can fall in its international obligations through the inermediary of its courts. We venture to indicate, as an example, the case of a foreigner being sentenced contrary to a provision of an extradition treaty or contrary to the rules established by custom with regard to diplomatic immunity. We consider that, in these cases, the State cannot escape its international responsibility by pleading that its laws are in conformity with its international obligations. We consider that, in the above cases, the obligation is an absolute one, the non-fulfilment of which involves the international responsibility of the State without there being any need to ascertain whether non-fulfilment was due to the legislator or to the courts.

Moreover, it should be specified that there are international obligations concerning the treatment of foreigners which are not thus absolute. What, for instance, is the international obligation deriving under a Convention for the establishment of uniform rules for the solution of the conflict of laws? The object of such a Convention may be restricted. Its sole object may be to cause each contracting country to promulgate uniform rules at private law or at international private law without any attempt being made, in the Convention itself, to protect foreigners from the danger of an erroneous application of international rules by the court. Consequently, if this view is correct, a State party to one of these Conventions only assumes one single international obligation — namely, to promulgate and maintain as an internal law the rules laid down in the Convention. It follows that the non-application or the erroneous application of these rules by the courts in a particular instance cannot be regarded as tantamount to the non-fulfilment of an international obligation.

The question whether the international obligation is absolute or not also arises with regard to other Conventions to be applied by the courts, for instance, with regard to Conventions on judicial co-operation, the *cautio judicatum solvi*, or legal assistance.

We need not, however, press this point further. It is sufficient to have noted that there exist international obligations connected with the treatment of foreigners which are absolute, their non-fulfilment involving the responsibility of the State even when its legislation is in keeping with these obligations and that, moreover, there exist international obligations of a less absolute character, the State only being bound to adapt its internal law to the international rules in question. It will have to be decided in each particular case whether a given obligation falls within one or other of these categories.

The German delegation is of opinion that the question discussed above is so important that it should be fully dealt with in the report and that the report should be approved by the Conference.

3. The British delegation has stated that the appreciation of the facts by the court can only be questioned in the case of denial of justice. We think that this argument is not correct. As a matter of fact, when non-fulfilment of international obligations does not amount to a denial of justice, the international judge should be called upon to decide both as to the law and as to the facts, without being bound by the decision of a national court. In the case of the non-fulfilment of an absolute national obligation, we think that it is of little consequence whether non-fulfilment is due to an erroneous application of the law or to an erroneous appreciation of the facts.

C. *Special Applications.*

1. In the light of the above considerations, it is clear that the principle enunciated in Basis No. 5, according to the text we propose, is of an absolute character; it admits of no exceptions. This principle is also absolute in that it covers all cases which can involve international responsibility. There can be no international responsibility unless there has been non-fulfilment of an international obligation. This holds good particularly in the case of denial of justice. A denial of justice involves international responsibility, because it is an instance of the non-fulfilment of international obligations deriving from a convention, custom, or the general principles of law. It is, therefore, not correct to say—as has been said in several amendments—that the responsibility of the State on account of the acts of its courts is the result, either non-fulfilment of international obligations, or of a denial of justice.

2. As the general rule covers all cases, it is not indispensable to establish special rules concerning the denial of justice. Such rules need only be drawn up for the sake of convenience, if, for instance, it is thought the general formula is too vague and that it would therefore be desirable to make quite clear that it applied to certain specific cases. In this connection, it should be remembered that the definition of international obligations, as adopted by the Committee, includes obligations deriving from custom and the general principles of law. It may be asked whether this definition is not sufficient to show that a denial of justice amounts to the non-fulfilment of international obligations and whether it would not be preferable to leave the international courts to decide in each particular case the special facts which amount to a denial of justice. That would be in keeping with the method proposed in document No. 9.

The German delegation, however, is fully aware that it might be desirable to insert in the Convention an express rule regarding the denial of justice and we are prepared to assist in drafting this rule.

3. With regard to fundamental questions, the German delegation accepts, as representing existing international law, paragraphs 1, 3 and 4 of Basis of Discussion No. 5. It is necessary, however, to point out:

(*a*) That, apart from some conventional provision to the contrary, paragraph 1 does not cover the case in which the courts reject a request as being non-admissible, where, before giving their decision, they demand a *cautio judicatum solvi*, or refuse legal aid to the foreigner;

(*b*) That unconcionable delay (paragraph 3) should be taken to mean a delay which really amounts to a refusal to give a decision.

III.

Acts and Omissions of the Legislative Power and of the Executive Power with regard to Judicial Functions.

The German delegation does not think it desirable to lay down any special rules on this subject. We therefore propose that Basis No. 6 should be omitted.

IV.

The German delegation supports the Danish proposal to fix a definite period for the submission of a claim based on a judicial decision. The treaties of conciliation and arbitration concluded by Germany have provided for this time limit, which is fixed at 6 months.

Great Britain and Northern Ireland.[1]

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 15 ; 5 AND 6 ; 15 AND 20 ; 11 ; 18 AND 19 ; 22, 22 *(a)*, 22 *(d)* AND 22 *(b)* ; 22 *(c)* ; 26 ; 28, AND 29, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

These amendments are submitted in response to the desire expressed by the Bureau that delegations should formulate their views as early as possible. They should not be taken as representing an attempt to submit a text in the form of a final draft, and the delegation wish to reserve the liberty of amending or withdrawing any of the amendments proposed during the course of the discussion.

Delete *Basis of Discussion No. 15* (see Bases Nos. 15 and 20 below).

Bases of Discussion Nos. 5 and 6.

Substitute the following texts for those contained in these Bases (in Bases Nos. 5 and 6 the expression " courts " shall be deemed to include administrative tribunals or any person or body exercising judicial or quasi-judicial functions) :

" 5. — A State is reponsible for damage suffered by a foreigner as a result of a decision of its courts which, being final and without appeal, is incompatible with a treaty obligation or other rule of international law ; provided that, in so far as questions of fact are concerned, the decision of the court can only be questioned on the grounds set out in Basis No. 6.

" 6. — A State is responsible for damage suffered by a foreigner as the result of the fact that, by reason of defects in its laws of procedure or in the action of its courts in applying them :

" (1) He is not afforded in the courts a reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals ;

" (2) A procedure is followed, or a judgment final and without appeal is rendered, vitiated by faults so gross as to be incompatible with the obligation of the State to provide a reasonably efficient judiciary and the guarantees indispensable for the proper administration of justice ;

" (3) A decision is given which has manifestly been prompted by ill will towards foreigners as such or as nationals of a particular State, or was due to corruption or pressure from the executive organs of the Government ;

" (4) There has been unconscionable delay on the part of the courts."

N.B. — The imposition of a punishment which is unreasonably harsh is covered by paragraph 3 and/or 4 paragraph above, but it may be desirable to mention it expressly.

Bases of Discussion Nos. 15 and 20.

Substitute the following text for Bases Nos. 15 and 20 :

" If, without justification, by any special legislative or administrative measure, a State puts an end to the right to reparation enjoyed by a foreigner in respect of damages suffered by him against the State itself, an official or corporate entity or autonomous institution exercising public functions of a legislative or administrative character,[2] or a private person, the State thereby renders itself responsible for the damage."

Basis of Discussion No. 11.

Substitute the following text for that contained in the Basis of Discussion :

" 1. A State is responsible for damage suffered by a foreigner as the result of any acts of the executive power or of its officials, as defined in Bases of Discussion Nos. 12, 13 and 16, depriving him of his personal liberty or detaining or depriving him of his property, which are not justified under the municipal law of the country.

---

[1] See also the joint proposal regarding Bases of Discussion Nos. 10, 17 and 18, printed as an Appendix to this Annex.

[2] This phrase is taken from the Preparatory Committee's draft. It is, however, unfamiliar in English legal terminology and might, perhaps, be rendered by the words: "local authorities". The choice of terms is, however, left for further consideration.

“ 2. A State is responsible for damage suffered by a foreigner if, by reason of acts of the executive power or of its officials as defined in Bases of Discussion Nos. 12, 13 and 16 :

“ *(a)* He is arrested without reasonable cause ;

“ *(b)* He suffers a preventive detention or imprisonment which is manifestly unnecessary, unduly prolonged or accompanied by conditions which are unnecessarily harsh ;

“ *(c)* His property is confiscated, sequestrated or otherwise seized without justification, of (if there is a justification) to an extent or for a period which is manifestly unnecessary. ”

Bases of Discussion Nos. 18 and 19.

Substitute the following text [1] :

“ A State is responsible if, when a foreigner has been injured in his person or property by the criminal act of any person (whether a private individual or an official, either acting independently, or taking part in mob violence, riot or insurrection) it fails to show such diligence in apprehending and punishing the wrongdoer (or in restoring the property, if property has been taken and is capable of being restored), as, having regard to the circumstances, could be expected from a civilised State. ”

Bases of Discussion Nos. 22, 22 (a), *22* (d) *and 22* (b).

Substitute the following text for the above-mentioned Bases of Discussion :

“ 1. A State is not responsible for damage caused to foreigners by persons taking part in an insurrection or riot, or by mob violence, unless it has failed to use such diligence as was due in the circumstances in preventing the insurrection, riot, or mob violence, or the resulting damage, as the case may be.

“ 2. In cases where such damage was caused by persons taking part in a riot or by mob violence directed particularly against foreigners as such, or against persons of a particular nationality, the burden of proof rests on the State to prove affirmatively that there was no negligence on its part in failing to prevent the riot or mob violence or resulting damage as the case may be.

“ 3. In cases where the foreigners injured have themselves participated in the insurrection, riot or mob violence, the State is under no liability.

“ 4. The extent of the State's liability under paragraphs 1 and 2 above must be estimated in the light of all of the circumstances of the case, and provocative conduct or unnecessary self-exposure to risks on the part of the foreigner are relevant circumstances in this connection.

“ 5. A State, whether or not its responsibility is engaged under the preceding rules must in any case accord to foreigners suffering injuries at the hands of persons taking part in insurrections, riots, or mob violence, indemnity not less favourable than that accorded to its nationals in similar circumstances.

Basis of Discussion No. 22 (c).

Substitute the following text for that contained in Basis of Discussion No. 22 *(c)* :

“ 1. When an insurrectionist party which is not successful is recognised as a belligerent either by the legitimate Government of the State or by the Government of the foreigner in question, the State is not responsible for failure to prevent any damage done by the insurrectionist after the date of such recognition.

“ 2. A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.

“ 3. Where an insurrectionist party, whether recognised as belligerent or not, which is not finally successful has established itself temporarily as the *de facto* Government or authority in any part of the State's territory, the State is responsible for damage suffered by a foreigner as the result of the fact that the legitimate Government, after regaining control, fails to recognise acts of the administration set up by the insurrectionnists, in so far as such administration was acting in the capacity of carrying on the normal government of the territory and the foreigner was obliged to submit or have recourse to such *de facto* administration, by threat or fear of force, or for the purposes of the ordinary conduct of his affairs ; in particular, if the State does not give the foreigner credit for Customs duties or taxes, levied under the normal law of the country, which the foreigner was compelled to pay to the insurrectionists as the *de facto* Government.

[1] It seems preferable to place this basis *after* Basis No. 22.

" 4. If, after regaining control, the State appropriates to itself the property of foreigners (or the proceeds thereof) wrongfully taken by an insurrectionist party while exercising *de facto* control, it is responsible to the extent that it is thereby enriched.

Basis of Discussion No. 26.

Substitute the following text for that contained in the basis [1] :

" An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is, and does not release the State with which the contract is made from its international responsibility.

" If, in a contract, a foreigner makes an agreement that the local courts shall alone have jurisdiction, it is a breach of contract if he declines to submit his differences to the local courts and immediately invokes the diplomatic interposition of his Government, provided always (1) that the State itself has, in conformity with the contract, been ready to submit to the jurisdiction of the courts and has not put an end to the contract by legislative or executive action, and (2) there are local courts in a position effectively to deal with such differences on their merits.

" In the case of such contracts, the State is only responsible for damage suffered by the foreigner in the cases defined in Bases of Discussion Nos. 3 and 8, and in Bases Nos. 5 and 6."

Basis of Discussion No. 28.

Substitue the following text for that contained in the basis :

" 1. A pecuniary claim based on the damage suffered by a private person in the territory of a State may not be presented unless :

" *(i)* At the moment when the damage was caused, the person who suffered the injury out of which the claim arises was a national of the claimant State (or, in the case of joint claims, of one of them) [2] and was not a national of the State against which the claim is made ; and

(ii) At the moment when the claim is presented, the person in whom the interest in the claim is vested is a national of the claimant State (or, in the case of joint claims, of one of them) [2] and the interest in the claim has never at any time, between the time when the damage was caused and the date of the presentation of the claim, been vested in a national of the respondent State.

" 2. In cases where, at the moment when the claim is presented, the interest in the claim is vested in more than one person, the claimant State (or States) has the right to receive a proportion of the pecuniary indemnity due under the claim, equal to the proportion of the interest in the claim vested in its (or their) nationals at that moment, which interest has never at any time, between the time when the injury was caused and the time when the claim is presented, been vested in a national of the State against whom the claim is made.

" 3. Where, at the time of presentation, the interest in the claim is not vested (in whole or in part) in the person who suffered the injury, and is vested (in whole or in part) in persons possessing neither the nationality of the respondent State nor the nationality of the person who suffered the injury, a joint claim may be made by the State whose national the person who suffered the injury was at the time of the injury, and by the State (or States) whose nationality the persons, in whom the interest in the claim is vested, possess.

" 4. After the presentation of the claim, changes in the nationality of the persons in whom the interest in the claim is vested are immaterial.

" 5. The possession by persons in whom the interest in the claim is vested of nationalities in addition to that of the claimant State (or States) and other than that of the respondent State is immaterial.

" 6. For the purposes of the preceding rules :

" *(i)* The expression " person " and " private person " shall be deemed to include company, foundation, institution, corporation and other associations possessing seperate personality in law ; neverthless, any partnership or *société* (association) *en nom collectif* shall not be considered to be a " person ", and damage suffered by, or interests vested in, any partnership or *société* (association) *en nom collectif* shall be deemed to be suffered by, or vested in, the partners in proportion to their share in the partnership or *société*.

---

[1] This Basis would come more logically immediately after Bases of Discussion Nos. 3 and 8.

[2] See paragraph 3 below.

"*(ii)* The expression "national of a State" shall be deemed to include: *(a)* All natural persons to whom the State is entitled to extend its diplomatic protection; *(b)* all associations (whatever the nationality of their shareholders or associates) possessing a separate legal personality (other than partnerships or *sociétés en nom collectif)* incorporated under the law of any part of the territory of the State, or in any of its colonies, protectorates, protected States, possessions, overseas territories or territories under suzerainty or mandate, and having its seat in any of those territories, provided that, where the law of the territory in which any such association is incorporated does not recognise the conception of the "seat" of an association, the requirement that the seat of such association shall be situated in the territory does not apply.

"*(iii)* The moment of presentation of a claim shall be deemed to be: *(a)* in all cases where the claim is submitted to an international tribunal (whether a judicial tribunal or a tribunal of arbitration or conciliation), the date on which an application is first made to such tribunal; *(b)* in all cases where the claim is not submitted to a tribunal, the date on which a formal diplomatic claim is made.

"*(iv)* The person in whom the interest in a claim is vested shall be deemed to be: *(a)* Subject to the rules set out under *(b)*, *(c)* and *(d)* below, any person to whom such interest has passed by voluntary or involuntary assignment or by operation of law; *(b)* where the person in whom the claim was vested has died, his heirs of next of kin, provided that, where his estate is still being administered, the interest shall be deemed to be vested in his personal representative *(i.e.*, executor or administrator or heir as the case may be), who shall be deemed to continue the personality of, and therefore possess the nationality of, the deceased: *(c)* where the person in whom the interest was vested is a bankrupt or in liquidation, or his affairs are being administered for the benefit of his creditors the interest shall be deemed to be vested in the trustee in bankruptcy, liquidator or administrator, who shall be deemed to take the place of, and to possess the nationality of, such person; *(d)* where the interest in any claim is vested in a person as trustee for another person, the interest in the claim shall be deemed to be vested in the *cestui que trust (i.e.*, person possessing the beneficial interest); *(e)* where the person who suffered the injury was insured against such damage, the interest in the claim shall be deemed to be vested in such person, unless he has recovered for the damage under the insurance; but, if he has so recovered, the interest shall be deemed to be vested in the insurer."

Basis of Discussion No. 29.

Substitute the following text:

"1. In any case where, under any of the preceding bases of discussion, the responsibility of a State is engaged in respect of damage suffered by a foreigner, such State is under an obligation to make reparation to the State of which such foreigner is a national for the injury which the latter State has thus suffered in the person of its national.

"2. Without prejudice to any further obligations under paragraphs 4 and 5 below, the reparation which must be made consists in the payment to the claimant State of a pecuniary indemnity for all damage of a material character to the person in whom the interest in the claim is vested, directly resulting from the breach of the international obligation which is the ground of the claim. No indemnity can be claimed for damages resulting only indirectly from such breach. In appropriate circumstances, such reparation may also include the restitution of property.

"3. Where the claim is based upon the repudiation of cancellation of a contract concluded by the State with a foreigner under Bases of Discussion Nos. 3 or 8, a pecuniary indemnity may be claimed in respect of all expenses sustained by such foreigner under, or on account of, such contract which have become losses owing to the repudiation, cancellation or invalidity of a contract, but an indemnity may not be claimed in respect of the profits which would have been gained under the contract if its fulfilment had been permitted.

"4. Where the damage or losses in respect of which a pecuniary indemnity is payable under paragraphs 2 and 3 above are either of a liquidated amount or of an amount capable of being ascertained precisely by calculation, as at the date when the injury was suffered or the losses occurred, the pecuniary indemnity will consist of such amount, to which may be added interest thereon, as from the date when the claim was made. Where such damage or losses are not of a liquidated amount or of an amount so capable of being ascertained by calculation, interest is payable only as from the date on which they have been determined by agreement or by a judgment or an award up to the date of payment.

"5. Where the circumstances justify it, the reparation which must be made includes a pecuniary indemnity in respect of mental or physical suffering or moral injury caused by the breach of the international obligation, which forms the subject of the claim.

" 6. In addition to the payment of a pecuniary indemnity as provided in the preceding paragraphs circumstances of special gravity connected with the breach of an international obligation under the preceding Bases of Discussion, may create an obligation to afford further satisfaction, pecuniary or otherwise, to the claimant State.

" 7. Delay in making or prosecuting a claim may be a valid ground for the rejection of the claim or a reduction of the reparation payable."

Observations regarding Basis of Discussion No. 27 and the Proposals of the Belgian Delegation, circulated to the Members of the Committee on March 19th, 1930.

In the answer to the Questionnaire of the League of Nations with regard to point XII, the Government of Great Britain and Northern Ireland made the following reply :

" In general, the answer to point XII is in the affirmative.

" If a State complies with the obligations incumbent upon it as a State to provide tribunals capable of administering justice effectively, it is entitled to insist that, before any claim is put forward through the diplomatic channel in respect of a matter which is within the jurisdiction of those tribunals and in which they can afford an effective remedy, the individual claimant (whether a private person or a Government) should resort to the tribunals so provided and obtain redress in this manner.

" The application of the rule is thus conditional upon the existence of adequate and effective local means of redress. Furthermore, in matters falling within the classes of cases which are within the domestic jurisdiction of the State, the decisions of the national courts in cases which are within their competence are final, unless it can be established that there has been a denial of justice (see answer to point IV)."

The delegation of Great Britain does not desire to put forward any text upon this subject, but would like to call the attention of the Committee — and, in particular, of the Drafting Committee — to the above answer, which it believes states the legal position correctly.

Greece. [1]

Proposal regarding Bases of Discussion Nos. 2, 7, 12 and 13, circulated to the Members of the Committee on March 18th, 1930.

Replace Bases of Discussion Nos. 2, 7, 12 and 13 by the following Basis :

" A State is responsible for damage suffered by a foreigner as the result :

" (1) Of an unjustifiable act or omission of the executive or legislative power which is incompatible with the State's international obligations ;

" (2) Of unjustifiable acts or omissions of officials of the State acting within the limits of their authority, when such acts or omissions are incompatible with the State's international obligations ;

" (3) Of acts of officials of the State, even if they were not authorised to perform them, if the officials purported to act within the scope of their authority and their acts were incompatible with the international obligations of the State."

Proposal regarding Basis of Discussion No. 29, circulated to the Members of the Committee on March 29th, 1930.

Paragraph 1 of Basis of Discussion No. 29 to be drafted as follows :

" Responsibility involves for the State concerned the obligation to make good the damage suffered to the precise extent to which that damage is attributable to the incidents giving rise to the right to reparation. "

Hungary.

Observation regarding Bases of Discussion Nos. 3 and 4, circulated to the Members of the Committee on March 17th, 1930.

If the Committee does not adopt a general rule concerning the responsibility of States for damage caused to property of all kinds belonging to foreigners, the delegation reserves the right to submit amendments supplementing the list of cases in which the State incurs responsibility.

---

[1] See also the joint proposal regarding Bases of Discussion Nos. 10, 17 and 18, printed as an appendix to this Annex.

Proposal regarding Bases of Discussion Nos. 7 to 9 and 11 to 14, circulated to the Members of the Committee on March 19th, 1930.

Replace Bases of Discussion Nos. 7 to 9 and 11 to 14 by the following text:

"If the damage suffered by a foreigner is the result of acts or omissions of the administrative organs, the State is only responsible if it does not afford the foreigner a possibility of enforcing his claims as against the organs at fault and if the State has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilised State."

India.

Proposals regarding Bases of Discussion Nos. 2, 7, 12, 13 and 15, 14, 16, 23, 5 and 6, circulated to the Members of the Committee on March 19th, 1930.

Bases of Discussion Nos. 2, 7, 12, 13 and 15.

Substitute for Bases 2, 7, 12, 13 and 15:

"A State is liable for the damage suffered by a foreigner within its territory by the act or omission of any of its organs (executive, legislative or judicial) in contravention of the State's international obligations, any provision of the municipal law to the contrary notwithstanding.

"*Explanation A:* The liability shall be deemed to be incurred when such act purports to be within the scope of the State organ's functions, even though it is *ultra vires* under the municipal law.

"*Explanation B:* Except where another State has jurisdiction, vessels or aircraft shall, for the purposes of this article, be deemed everywhere to be territory of the State whose flag they fly."

Basis of Discussion No. 14.

(Omit.)

Basis of Discussion No. 16.

Substitute for Basis No. 16:

"The expression 'organ of the State', in Article 1, shall be deemed to include public corporate bodies, such as municipal and provincial authorities, railway administrations and port trusts that are invested with administrative or legislative functions."

Basis of Discussion No. 23.

Substitute for Basis No. 23:

"Where a State is entrusted with the conduct of the foreign relations of a component political unit such as a constituent State or of a separate political unit such as a colony or a protectorate or a mandated area, it shall be liable in respect of such component or separate unit in the same manner as for its own territory under Article 1."

Bases of Discussion Nos. 5 and 6.

Substitute for Bases Nos. 5 and 6:

"The international obligations of a State in respect of a foreigner within its territory shall be deemed to be contravened in the following cases among others:

"(1) If he is denied reasonable facilities for prosecuting his case before the State's tribunals;

"(2) If the procedure followed by such tribunals is so dilatory or otherwise defective as to fall below the minimum expected from a civilised State;

"(3) If the final order or decision of the tribunal, after such appeal, revision or review as may be allowed by the municipal law, is *(a)* manifestly biassed or corrupt, or is *(b)* incompatible with the State's international obligations."

Proposal regarding Basis of Discussion No. 23, circulated to the Members of the Committee on March 22nd, 1930.

As the result of a consultation with other delegations, the Indian delegation now proposes the following, instead of the text proposed on March 19th, 1930 (see above).

Substitute for Basis of Discussion No. 23 :

" Where a State controls the foreign relations of any political unit by virtue of a federal constitution, or in its capacity of a suzerain or protecting State, or in the exercise of its colonial jurisdiction, or by virtue of a mandate, the State shall be liable in respect of such political unit in the same manner as for its own territory under Article 1."

Italy.[1]

PROPOSAL CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 22ND, 1930 : AMENDMENT TO THE BELGIAN PROPOSAL ON BASES OF DISCUSSION NOS. 7 AND 27.

In principle, proceedings to enforce the responsibility may not be taken until after exhaustion of the remedies provided by the internal law *(subject to drafting changes).*

PROPOSAL REGARDING BASES OF DISCUSSION NOS. 10, 17 AND 18, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON APRIL 1ST, 1930.

A State is only responsible for damage caused by a private person to the person or property of a foreigner if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it.

Japan.

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 13, 14 AND 16, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 20TH, 1930.

Basis of Discussion No. 13.

For " within the scope ", read : " in virtue ".

Basis of Discussion No. 14.

Add at the end : " when such acts are contrary to the international obligations of the State ".

Basis of Discussion No. 16.

Omit the words : " or autonomous institutions ".

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 5, 4 AND 9, 11, 24 AND 25 AND 26, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 22ND, 1930.

Basis of Discussion No. 5.

Insert, in paragraph 2, the word " manifestly " between the words " is " and " incompatible ".

Add, at the end of paragraph 3, the following :

" . . . prompted by ill will toward a foreigner as such or as a subject of a particular State. "

Bases of Discussion Nos. 4 and 9.

Add the following at the end of the second paragraph :

" . . . by financial necessities, such as a moratorium, which are deemed to be urgent and unavoidable in consequence of disasters, calamities or wholly exceptional events, and of which the duration must be limited and reasonable. "

Basis of Discussion No. 11.

In the first sentence, replace the word " unwarrantably " by " illegally ", and add after " his liberty " the words : " or caused damage to his person or property ".
Omit the second sentence.

---

[1] See also the joint proposal regarding Bases of Discussion Nos 10, 17 and 18, printed as an appendix to this Annex.

Bases of Discussion Nos. 24 and 25.

Omit these Bases.

Basis of Discussion No. 26.

Omit paragraph 2.

Mexico.

PROPOSAL REGARDING BASIS OF DISCUSSION NO. 27, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 19TH. 1930.

Basis of Discussion No. 27 should be placed among the general principles, with the following wording :

"It is a prerequisite to the existence of international responsibility of the State that the alien exhaust all municipal resources without obtaining redress."

Reasons.

The broad scope of the principle requires that it be placed among the general principles which determine the imputability of the act to the State.

It is preferable that it be adopted as a general principle and not as a principle covering only the act of the executive power as proposed by the Belgian delegation, because the rule refers to all acts of the organs of the State, including those of the legislative power. It should not be forgotten that some States place at the disposal of individuals remedies even against acts of the legislative power.

Two conditions are required for the existence of State International responsibility :

(a) That the act be one of the State, that is, imputable to it ;

(b) That the act entail a breach of international obligation of the State.

If the municipal means of redress have not been exhausted, the act cannot be imputed to the State, since there are reasons to believe that the State is willing to offer reparation by placing at the disposal of the interested parties the resources of its internal law. And if the act is not imputable to the State prior to the exhaustion of its municipal legal remedies, there is no international responsibility as between State and State.

The formula here advocated seems therefore preferable to that proposed in Basis of Discussion No. 27, which leads to the belief that there is an international responsibility which remains in suspense while domestic legal remedies are not exhausted.

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 12, 13 AND 14, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 19TH, 1930.

Basis of Discussion No. 12.

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its subaltern officials acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State, and the State has failed to discipline the official.

Basis of Discussion No. 13.

To be omitted.

Basis of Discussion No. 14.

To be omitted.

OBSERVATIONS REGARDING THE DEFINITION OF THE SOURCES OF INTERNATIONAL OBLIGATIONS, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON APRIL 1ST, 1930.

Though agreeing with the essence of the definition proposed by the First Sub-Committee (see Annex III, No. 1) for the sources of international obligations, the Mexican delegation regrets to state that it will be unable to vote for its adoption as an article of our Convention.

Its reasons are the following :

1. The proposed text would seem to indicate that the principles accepted by the community of nations are those which define the treatment that a State should accord to foreigners, whereas, in the opinion of the Mexican delegation, foreigners are subject to the jurisdiction of the national laws, and the State incurs responsibility only when these laws violate a prohibitive provision of international law. In other words, municipal law determines the conditions governing foreigners, and international law merely points out the limitations of the State's freedom in this respect. The wording accepted by the Committee appears to suggest that the situation of foreigners is determined by international law.

2. The proposed text seems to indicate that a State must grant the same treatment to foreigners as that which other States grant them under the provisions of their domestic law, and that it incurs responsibility if it does not do so. This suggestion is inaccurate, because every State is free to grant to a foreigner treatment different from that which all others concede, provided it does not violate a universally accepted international principle. We do not suppose that any State of those which form the international community imposes on resident foreigners any taxes levied on the sole ground that these persons are foreigners. If a State thought fit to institute such taxes, however, it would not incur any responsibility towards other States, notwithstanding the fact that its treatment of foreigners differed from the treatment accorded by other States to foreigners, because such action would not infringe any principle of international law.

The proposed text implies the idea that States should govern their behaviour towards foreigners by adopting the same standards as those which have been adopted by the other peoples in their laws. This is an erroneous and dangerous thesis, since it is not possible to unify the domestic legislation cf the various States, each of which has to meet so many different problems of its own.

If the Drafting Committee can discover a formula which would obviate these objections, laying down, for instance, that international obligations are those derived from treaties, custom and general principles universally accepted as law, my delegation will raise no further objection to the principle adopted.

Letter to the Chairman of the Third Committee concerning Bases of Discussion Nos. 10, 17 and 18, circulated to the Members of the Committee on April 1st, 1930.

As I have been unable to reach agreement with my distinguished colleagues on the Second Sub-Committee regarding Bases of Discussion Nos. 10, 17 and 18, I feel I ought to submit the reasons for my dissentient view.

1. In my opinion, it is a principle of international law that the State is in no case responsible for acts committed by private individuals, and that principle ought, I submit, to appear in a Convention which is intended to comprise the rules accepted as constituting the law on the responsibility of States.

2. The State may, if an act is committed by a private individual, incur responsibility if its agents omit through negligence to take, in respect of the person or property of a foreigner, the measures of protection afforded to nationals.

In such cases, however, the State is responsible, not for the act of the individual, but for the omission on the part of its organs contrary to one of the State's international obligations. Such is the case of responsibility laid down in Basis of Discussion No. 12, and there is no need to repeat it. If, however, it is desired to adopt any text in place of Bases Nos. 10, 17 and 18, the following concepts should, in my opinion, be taken into account.

(a) The State is not responsible for the act of an individual, but only for an omission on the part of its officials. Consequently, it is not obliged to make reparation for the consequences of an individual's act. Contrary to a doctrine formerly advanced by Wattel, but successfully refused by Triepel and Anzilotti, we believe that the State is bound only to make reparation for damages caused to a foreigner through *culpa* on the part of State. When, for example, the State leaves unpunished a crime committed against a foreigner, it is not obliged to pay compensation, because the actual omission on the part of the State has not caused any damage to the foreigner who is the victim of the offence. The State punishes the guilty party in the general interest, and not through any desire to avenge the victim.

(b) The State cannot accord special protection to foreigners as such ; it can only grant them the normal protection which it grants to the inhabitants of the country.

(c) The State is responsible for its omissions when it is itself at fault.

In this connection, I venture to propose the following text :

Single Text for Bases of Discussion Nos. 10, 17 and 18 (subject to drafting modifications).

" A State is not responsible for acts of private individuals.

" Nevertheless, a State may incur responsibility for damage caused by a private individual to the person or property of a foreigner if it has neglected to take the precautions that it usually adopts in regard to its own nationals ; but, in this case, it is only bound to make good the consequences which such neglect has caused to the foreigner. "

In asking you to be good enough to read this dissentient opinion immediately after the reading of the texts proposed by the Second Sub-Committee, and to insert it in the Minutes, I beg to renew to you the assurance of my highest consideration.

(Signed) Eduardo Suarez.

Norway.

PROPOSAL REGARDING BASIS OF DISCUSSION No. 11, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

Substitute the following text for *Basis of Discussion No. 11:*

"A State is responsible for damage suffered by a foreigner as the result of the executive power depriving a foreigner of his liberty by acts contrary to the international obligations of the State,

"In particular the State is responsible for damage suffered as the result of the following acts :

"(1) Deliberate maintenance of an illegal arrest ;
"(2) Preventive detention, if manifestly unnecessary or unduly prolonged ;
"(3) Imprisonment under conditions which have caused unnecessary suffering :
"(4) Deprivation of liberty manifestly prompted by ill will toward foreigners as such or as subjects of a particular State."

Reasons :

The principles laid down by the Preparatory Committee clearly state in several places that for a State to incur responsibility, the acts or omissions of the State authorities must be contrary to that State's international obligations. A State does not incur responsibility simply because it has acted towards a foreigner in a manner contrary to its own laws.

It does not appear that this essential condition for international responsibility has been taken sufficiently into consideration in the particular applications of the general principles, especially as regards Basis of Discussion No. 11.

The first point of this Basis of Discussion is worded as follows :

"A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty."

It will be desirable to point out more clearly that the State does not incur international responsibility simply as the result of the illegal arrest of a foreigner. The State only incurs international responsibility if such arrest is contrary to the international obligations of that State — for instance, when the foreigner is arrested as a result of unlawful discrimination.

The necessary harmony between the sound principles which form the basis of the Committee's work and the special rule for the Basis of Discussion No. 11, point 1, would be obtained if, in the last provision, instead of the word "unwarrantably", were inserted the phrase : "by acts contrary to the international obligations of the State".

The first point of the Basis of Discussion No. 11 would then read as follows :

"A State is responsible for damage suffered by a foreigner as the result of the executive power depriving a foreigner of his liberty by acts contrary to the international obligations of the State."

The second point of this Basis of Discussion quotes as examples certain cases in which the arrest of a foreigner should invariably entail international responsibility.

As the above observations show, however, it cannot be admitted that international responsibility is incurred in the case of "maintenance of an illegal arrest" and "imprisonment without adequate reason".

In principle, the question whether an arrest has been made without adequate reason or has been unduly prolonged depends on the law of the country concerned and must be decided by the national courts. Whether the State is responsible in these cases will also be settled in the same way.

On the other hand, the State incurs international responsibility if a foreigner, on being arrested and on bringing the case before the national courts, is treated in a manner contravening the rules of international law concerning acts relating to the operation of the tribunals *(cf.*, Basis of Discussion No. 5). Similarly, international responsibility is incurred if the arrest is effected under circumstances which are at variance with the principles of law recognised by civilised States.

The second point of Basis of Discussion No. 11 might be worded as follows :

"In particular the State is responsible for damage suffered as the result of the following acts :

"(1) Deliberate maintenance of an illegal arrest ;
"(2) Preventive detention, if manifestly unnecessary or unduly prolonged ;
"(3) Imprisonment under conditions which have caused unnecessary suffering ;
"(4) Deprivation of liberty manifestly prompted by ill will toward foreigners as such, or as subjects of a particular State."

Poland.

Proposal regarding Bases of Discussion Nos. 25 and 30, circulated to the Members of the Committee on April 1st, 1930.

The Polish delegation proposes to add to *Basis of Discussion No. 30* a new paragraph worded as follows:

> "Damage caused to the person or property of foreigners cannot in any case justify the application of measures of coercion by the State whose nationals have suffered damage, to the State on whose territory the act giving rise to the damage took place."

At the same time, the Polish delegation proposes to omit *Basis of Discussion No. 25.*

Poland and Danzig.

Joint Proposal regarding Bases of Discussion Nos. 5 and 6, circulated to the Members of the Committee on March 27th, 1930.

Basis of Discussion No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that:

(1) The judicial authorities illegally resist the foreigners exercising his right (denial of justice);

(2) A judicial decision not subject to appeal constitutes an evident breach of a precisely determined obligation of international law.

Basis of Discussion No. 6.

(Suppressed).

Portugal.

Observations and Proposals regarding Bases of Discussion Nos. 2, 7, 12, 13 and 14, 23, 5 and 6, 3 and 8, 4 and 9, 24 and 25, 28, 30, circulated to the Members of the Committee on March 18th, 1930.

I.

In offering a general criticism of the scheme proposed by the Preparatory Committee, we should like to divide our observations into two categories. The first relates to certain points which were omitted or are incomplete; thus, there is no mention of questions relating to *war and neutrality*, and the Bases of Discussion do not give sufficient prominence to the capital problem of fundamental principles, in other words, the *characteristics determining the illicit nature of acts from the international point of view.*

As regards the second category of observations, we consider that, for the application of the future Convention to colonial or other domains, *special accession* will be necessary. Indeed, this was found both desirable and legitimate in the Draft regarding the Treatment of Foreigners submitted to the Paris Conference (1929).

II.

General Principles.

Basis of Discussion No. 2.

(a) Substitute the words "governmental authority" for the words "executive power".

(b) Provision should be made for the concentration of governmental powers in the form of a dictatorship.

Bases of Discussion Nos. 7, 12, 13 and 14.

Without prejudice to any other observations that may be made as occasion arises during the discussion of particular points, the problem of the *characteristics determining* the *illicit nature of an act* should perhaps be raised in connection with these Bases.

Basis of Discussion No. 23.

Should not *mandated* territories — particularly in the case of B and C mandates — be included in the legal system *ad constituendum*?

Bases of Discussion Nos. 5 and 6.

It seems to us dangerous, and even subversive, to adopt any clause which covers all the claims formulated in these Bases, save in very exceptional cases, such as *authentically proved ill will towards foreigners and, above all, towards subjects of a particular State.*

Application to Special Questions.

Bases of Discussion Nos. 3 and 8.

In our opinion, the text should be confined to the condemnation of any legislation *prompted by ill will* — that is to say, any provision directed specifically against the subjects of a particular State and not based on any requirement of national security.

Bases of Discussion Nos. 4 and 9.

As regards the responsibility of the State arising out of the repudiation of debts, the following circumstances should, in our opinion, be taken into account.

(a) While there is no objection to the argument that a State should honour its engagements of all kinds, it is not equitable to give creditors *greater guarantees* in the international field than they would possess as private persons ;

(b) The question arises as to what *relationship of domicile* or local jurisdiction must necessarily exist at law between the debtor State and the creditor entity ;

(c) Account must be taken, not only of the *various kinds of bonds and debts*, but also of certain contingencies such as the *repatriation of a debt or the exportation of a debt for a particular purpose* ;

(d) In *extreme circumstances* a State may find itself in an exceptional situation where sacrifices must be borne by *nationals and foreigners alike.*

Circumstances under which States can decline their Responsibility.

Bases of Discussion Nos. 24 and 25.

We think that special prominence should be given to the three determining factors recognised by leading authorities — namely, *legitimate defence, a state of emergency,* and *self-defence.*

National Character of Claims.

Basis of Discussion No. 28.

In our opinion, the *distinction between the claim and the claimant* cannot be ignored either as regards the substance of the problem or the solutions found for it. Why is there no mention either of *stateless persons* or persons having *double nationality*?

Jurisdiction.

Basis of Discussion No. 30.

In our opinion, it is highly desirable that efforts should be made, in the international sphere as elsewhere, to secure *uniformity in judicial affairs.* Even if other intermediary jurisdictions were accepted, the best solution would still be to *bring questions for final judgment before the Permanent Court.*

Roumania.

OBSERVATIONS REGARDING BASES OF DISCUSSION NOS. 2, 7 AND 12, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 18TH, 1930.

In spite of all that may be said — including arguments in favour of caution and the necessity of obtaining definite results — the work of codification must, if it is to be true to its name, include the work of formulating the law by sifting it out from custom and case-law and doctrine *(i.e,* the deduction of existing rules) or by a constructive process (creative provisions). The Roumanian delegation therefore ventures to ask, in connection with Bases of Discussion Nos. 2, 7 and 12, that the Conference be good enough (without laying the

burden, in principle and from the outset, on future case-law, which should only come into play in a subsidiary capacity in cases for which the law makes no provision), to define what are (part from such rules as may be embodied in treaties and Conventions) the international rights of foreigners which, if they are affected by some legislative act of the executive power adopted in regard to them in a given State, would involve the responsibility of the State. In the opinion of the Roumanian delegation, international responsibility can arise only when damage has been caused to a foreigner by the violation or disregard of a recognised rule of international law, which necessarily and primarily implies the definition of such international (and as regards nationals, differential) law recognised as belonging to a foreigner. As this is an exception, it can be established only by enumerating the cases recognised by generally accepted international law. It is for legislation to state this law and for codification to define it and put it into words. However difficult the task may be, it is a necessary one, and would not seem to be beyond the capacity of this Conference, which will only accomplish a truly useful — though indeed less ambitious — work of conciliation if it proceeds along these lines.

Salvador.

PROPOSAL REGARDING BASIS OF DISCUSSION NO. 2, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 18TH, 1930.

A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from the law as established by treaty or from a custom accepted as law, or of failure to enact the legislation necessary for carrying out those obligations.

South Africa.

PROPOSAL FOR A NEW BASIS OF DISCUSSION, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

General Principles (see point 2 (page 20) of Preparatory Committee's report).

Insert a Basis of Discussion worded as follows:

"A State must conform to the standards and rules which the accepted principles of International Law regard as incumbent upon States, and must make reparation for damage suffered by a foreigner in his person or property in consequence of its failure to comply with this obligation."

PROPOSALS REGARDING BASIS OF DISCUSSION NO. 13, BASES 17, 18 AND 19, AND BASIS NO. 24 CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 24TH, 1930.

Basis of Discussion No. 13.

It is proposed to substitute the following:

"A State is responsible for damage suffered by a foreigner as the result of unauthorised acts of its officials incompatible with the international obligations of the State if the acts were committed under colour of authority or in the exercise of official power, or if the excess of authority might have been prevented by the State acting with such diligence in the administration of its affairs and the control of its officials as could be expected from a civilised State having regard to the circumstances."

Bases of Discussion Nos. 17, 18 and 19.

It is proposed to delete these and to substitute the following:

"A State is responsible for damage caused to the person or property of a foreigner by a private individual, including an official in respect of whose conduct the State does not incur responsibility under any other article of this Convention:

"*(a)* If it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilised State; or

"*(b)* If it has failed to show such diligence in detecting and punishing the wrongdoer and, if property was taken from the foreigner which is capable of being restored procuring its restoration, as, having regard to the circumstances, could be expected from a civilised State.

" The extent of the State's liability in respect of the damage depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude or unduly exposed himself or his property to risk of damage."

Basis of Discussion No. 24.

It is proposed to delete this Basis and to substitute the following :

" If the conduct of a foreigner has rendered it necessary for a State to take special measures for the preservation of the public peace or security, the State, in respect of any damage caused to the foreigner by such measures, is free from responsibility to the extent to which its action has not exceeded the reasonable requirements of the situation."

Spain.

PROPOSAL REGARDING BASES OF DISCUSSION NOS. 2, 7, 12 AND 13, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 19TH, 1930.

The Spanish delegation proposes that Bases Nos. 2, 7, 12 and 13 should be replaced by the following Basis :

" A State is responsible for damage suffered by a foreigner as a result of :

" (1) An unjustified act or omission on the part of the executive or legislative power incompatible with its international obligations ;

" (2) Any act or omission of its officials acting within the limits of their authority — and even outside those limits, if claiming to act in an official capacity — when such acts or omissions are incompatible with its international obligations.

" It is understood that the international obligations which involve the responsibility of States as specified above, are those which derive :

" (1) From the provisions of codified international law ;
" (2) From obligations under conventions or treaties ;
" (3) From the principles of international customary law, whether incorporated or not in the internal law of each country, regarding the legal guarantees afforded to the lives, freedom and property of foreigners.

" Such responsibility, however, may not be pleaded until the interested persons have exhausted all remedies open to them under the internal legislation of the State."

Switzerland.

PROPOSAL REGARDING BASES OF DISCUSSION NOS. 12, 13, 14 AND 15, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 18TH, 1930.

With a view to facilitating the discussion on the responsibility of the State for *acts or omissions of officials*, and in order to meet the desire expressed at the second plenary session of the Conference, the Swiss delegation ventures to submit to the Committee a draft article containing in as succinct a form as possible the rules which, in the opinion of the Federal Government, might govern this matter.

These rules are, in the main, based on the principles laid down in the Bases of Discussion Nos. 12 to 15. They differ from these Bases to a certain extent, however, in that they adopt a criterion of responsibility other than that set out in Basis of Discussion No. 13. Moreover, they apply without distinction to all officials acting in the national territory and to officials acting abroad. They also do not take into account the rule laid down in Basis of Discussion No. 15, as the special case foreseen by the Preparatory Committee might be solved by applying the general principles regulating the international responsibility of the State.

The draft article proposed by the Swiss delegation would read as follows :

" A State is responsible for damage suffered by a foreigner as the result of acts contrary to its international obligations done by its officials whether they were authorised to perform such acts or not ; if, however, the official is deemed to have acted outside the scope of his authority, the State will not incur responsibility if the official was obviously not authorised to perform the act or if the act committed by him had no connection with his office.

" The same rules shall apply to officials exercising their authority abroad. "

It should be pointed out that this draft article, like the Bases of Discussion which have led to its formulation, is based on the idea that there has been a *direct fault* on the part of the State, because it promulgated laws or regulations or issued instructions which led the official to infringe international law, or an *indirect fault* (subject to certain conditions) owing to the fact that the official has exceeded his powers or did not comply with his instructions. In these two cases, the responsibility of the State may be different from a psychological or moral point of view, but it is the same from the legal point of view. Whether the State has knowingly or unwittingly violated international law, it must, in a measure to be determined, if necessary, by the judge or arbitrator, be responsible for the damage caused by the illicit act. But who is responsible if the act committed is not the consequence of any fault of the State or its organs? Can it be said that the State is still internationally responsible in this case? Might it not be argued, on the contrary, that, at international law, responsibility only exists — apart, naturally, from treaty obligations — if there has been a fault somewhere — some kind of a fault, however slight, but a fault nevertheless — and that, failing all trace of fault, the State can no longer be held responsible? This point was left undecided by the Preparatory Committee, but the question of responsibility without any fault is too important a one to be passed over in silence ; it should be settled one way or the other. At its session at Lausanne in 1927, the Institute of International Law dealt with this point by deciding definitely for the exclusion of the idea of responsibility without fault. Whatever conclusion the Committee may reach after considering this question, the article in the Convention concerning acts or omissions of officials should, to avoid all misunderstanding, be supplemented by a provision defining the rule which would apply in cases of responsibility without fault. The Swiss delegation would be extremely grateful if the various delegates would, in the course of the discussion, express their views on this subject.

United States of America. [1]

PROPOSALS CONCERNING BASES OF DISCUSSION NOS. 29, 1, 2 AND 7, 12 AND 13, 14, 15 AND 20, 16 AND 23, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 17TH, 1930.

In response to the desire expressed by the Bureau that the delegations formulate their views and submit any suggested amendments as early as possible, the delegation of the United States of America submits the suggestions set forth below. These suggestions should not be understood as representing an effort to formulate the text of a final draft and the right is therefore reserved to suggest changes in or to withdraw any of the proposed amendments during the discussion in the Committee. With the exception of Bases 1 and 1 *(a)*, which are intended to define at the outset the term " responsibility " in the international sense, and to announce the principle that failure to comply with the international obligation cannot be excused by invoking the municipal law, the amendments are, in general, submitted in the order of the re-arranged Bases of Discussion (Annex I) :

Basis of Discussion No. 1.

The term " responsibility " as used in this Basis involves a duty on the part of the State concerned to make reparation for damage suffered by a foreigner in its territory as the result of its failure to comply with an international obligation.

(This is a redraft of the first sentence of Basis of Discussion No. 29.)

Basis of Discussion No. 1 (a).

A State cannot justify its failure to comply with an international obligation or escape responsibility incurred under international law or treaty by invoking the provisions of its municipal law incompatible therewith.

(This is a redraft of Basis of Discussion No. 1.)

Basis of Discussion No. 2.

A State is responsible for damage suffered by a foreigner as the result of a wrongful act or omission of its legislative or executive authorities incompatible with its international obligations.

(This represents a combination of Basis 2 and Basis of Discussion No. 7.)

Basis of Discussion No. 12.

A State is responsible for damage suffered by a foreigner as the result of wrongful acts or omissions of its officials within the scope of their office or functions, when such acts or omissions are incompatible with the international obligations of the State.

(This represents a combination of Bases of Discussion Nos. 12 and 13.)

---

[1] See also, the joint proposal regarding Bases of Discussion Nos. 10, 17 and 18, printed as an Appendix to this Annex.

Basis of Discussion No. 14.

(It is believed that this Basis, which has to do with the liability of a State for acts of its diplomatic and consular officers in foreign countries, is outside the scope of this subject which deals with damages " caused in their territory " and should be omitted.)

Basis of Discussion No. 15.

If, without justification, a State, by any special legislative or administrative measure, puts an end to the right to reparation enjoyed by a foreigner, or if it does not permit the right to be enforced, the State thereby renders itself responsible for the damage suffered by the foreigner from the act of the State.

(This represents a combination of Basis of Discussion Nos. 15 and 20.)

Basis of Discussion No. 16.

A State is responsible for damage suffered by a foreigner as the result of wrongful acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.

(The only change made in this Basis is the insertion of the word " wrongful ".)

Basis of Discussion No. 23.

Where a State is entrusted with the conduct of the foreign relations of another political unit, such as a protectorate, a colony, a dependency or a community under mandate, such State is responsible for damage suffered by foreigners in the territory of such political unit as the result of wrongful acts or omissions which contravene international obligations.

Where a State is entrusted with the conduct of the foreign relations of the component units thereof, that State is responsible for damage suffered by foreigners within the territories of such units as the result of wrongful acts or omissions which contravene international obligations.

(This Basis has been redrafted with a view to greater clarity.)

Suggestions with respect to other Bases of Discussion will be submitted at a later date.

PROPOSALS REGARDING BASES OF DISCUSSION NOS. 5, 3 AND 8, 10, 17, 18, 19, 20, 21, 22, 1, 24, 25, 26, 28 AND 29, CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 19TH 1930.

Basis of Discussion No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that :

(1) He is refused access to the courts to defend his rights ;
(2) There has been unconscionable delay on the part of the courts ;
(3) The courts have followed a procedure or rendered a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable to the proper administration of justice.

(Redrafted, by omitting paragraph 2 which is covered by proposed Basis of Discussion No. 1, and by omitting paragraph 4 now covered in paragraph 3 as changed.)

Basis of Discussion No. 3.

A State is responsible for damage suffered by a foreigner as the result of a wrongful act or omission of its legislative or executive authorities which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation or taken measures general in character incompatible with the operation of a concession which it has granted or with the performance of the contract made by it.

(Redrafted, by combining Bases of Discussion Nos. 3 and 8.)

Basis of Discussion No. 8.

(Omit. Included in Basis of Discussion No. 3 as changed.)

Basis of Discussion No. 10.

A State is responsible for damage suffered by a foreigner as the result of failure on its part to show such diligence in the protection of foreigners, as having regard to the

circumstances and to the status of the persons concerned, could be expected from a civilised State. The fact that a foreigner is invested with a recognised public status imposed upon the State a special duty of vigilance.

(Basis of Discussion No. 10 refers to damages resulting from a lack of diligence on the part of the executive power. This has been redrafted by omitting the words " of the executive power " and thus leaving the Basis applicable to a lack of due diligence by any branch of the Government.)

Basis of Discussion No. 17.

(Omit. Covered by Basis of Discussion No. 10 as changed.)

Basis of Discussion No. 18.

A State is responsible for damage caused to the person or property of a foreigner if it has failed to show such diligence in apprehending and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilised State.

(Basis of Discussion No. 18 has been redrafted by omitting the phrase " by a private individual " and by omitting " detecting " and substituting " apprehending " therefor.)

Basis of Discussion No. 19.

(This Basis of Discussion should be omitted, since it has to do with matters of evidence and measures of damages, which are comprehensive subjects worthy of separate consideration at a future time. Moreover, there would seem to be no reason for laying down a rule with respect to acts of private individuals as distinct from acts of officials.)

Basis of Discussion No. 20.

(Omit. Included in Basis of Discussion No. 15 as changed.)

Basis of Discussion No. 21.

A State is responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot, mob violence or other disturbance if :

(1) The damage is caused by the requisitioning or occupation of his property by its armed forces or authorities ; or

(2) The damage is caused by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is a necessary result of military operations ; or

(3) The damage is caused by acts of its armed forces or authorities where such acts manifestly went beyond the requirements of the situation ; or

(4) It accords indemnities to its own nationals in similar circumstances.

(This Basis of Discussion has been changed from the negative to the affirmative form with certain omissions and additions which should be readily apparent. Paragraph 4 goes beyond the requirements of existing law, but is not objectionable.)

Basis of Discussion No. 22.

A State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence :

(1) If it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors ; or

(2) If it accords indemnities to its own nationals in similar circumstances ; or

(3) If the damage was caused by an insurrectionist party which has been successful and has become the Government, to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops ; or

(4) If the movement was directed against foreigners as such, or against persons of a particular nationality, unless it is apparent that there was no negligence on its part or on the part of its officials.

(First paragraph should be omitted as unnecessary.)

(Paragraphs *(a)*, *(b)*, *(c)* and *(d)* have been redrafted.)

Basis of Discussion No. 1.

(Omit. Covered by Basis of Discussion No. 1, contained in the suggestion submitted by this delegation on March 17th, 1930.)

Basis of Discussion No. 24.

(Omit. It has to do with matters of evidence and measure of damages, which are comprehensive subjects worthy of separate consideration at a future time.)

Basis of Discussion No. 25.

(Omit. Hardly appropriate in a statement on responsibility.)

Basis of Discussion No. 26.

An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

(Unchanged.)

If, in a contract, a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon him ; the State can then only be responsible for damage suffered by the foreigner in the case of denial of justice (Basis of Discussion No. 5).

(This paragraph redrafted.)

Basis of Discussion No. 28.

A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and the claim is continuously owned by a national or nationals until it is decided.

(First paragraph redrafted.)

Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

(Paragraph 2 remains unchanged.)

In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested.

(Paragraph 3 remains unchanged.)

Basis of Discussion No. 29.

(It is suggested that this Basis of Discussion should be omitted for the following reasons : (1) The first sentence is incorporated in Basis of Discussion No. 1, contained in the suggestion submitted by this delegation on March 17th ; (2) That part of the second sentence which has to do with an apology is political in character ; (3) The question of punishing the guilty persons in appropriate cases is covered by Basis of Discussion No. 18.)

PROPOSAL CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON MARCH 22ND, 1930 : AMENDMENT TO THE BELGIAN PROPOSAL ON BASES OF DISCUSSION NOS. 7 AND 27.

Where the foreigner has a remedy open to him in the courts of the State (which term includes administrative courts), international responsibility cannot ordinarily be invoked until the local remedy has been exhausted and a denial of justice or other breach of international law established.

Appendix.

JOINT PROPOSAL REGARDING BASIS OF DISCUSSION NOS. 10, 17 AND 18 BY THE DELEGATIONS OF GREECE, ITALY, GREAT BRITAIN, FRANCE AND THE UNITED STATES OF AMERICA ; CIRCULATED TO THE MEMBERS OF THE COMMITTEE ON APRIL 3RD, 1930.

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, make reparation for, or inflict punishment for the acts causing the damage.

ANNEX III.

REPORTS OF SUB-COMMITTEES

1. Nature of the Obligations referred to the Convention.

(a) *Proposal of the Drafting Committee, circulated to the Members of the Committee on March 19th, 1930.*

The international obligations referred to in the present Convention are those obligations resulting from treaty or customary law which have for their object to ensure for the persons and property of foreigners treatment in conformity with the requirements recognised to be essential by the community of nations.

(b) *Proposal of the First Sub-Committee, circulated to the Members of the Committee on March 27th, 1930.*

The expression " international obligations " in the present Convention means obligations resulting from treaty, custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

2. Bases of Discussion Nos. 19 and 29: Report of the Third Sub-Committee, circulated to the Members of the Committee on March 29th, 1930.

I. It was unanimously voted to suppress Basis No. 19.

The reasons for this conclusion were various. Some thought that the Basis was an annex to Basis No. 18 and therefore could not be dealt with separately. Others thought that the first clause — namely, that the extent of the State's responsibility depends upon all the circumstances — was self-evident and therefore unnecessary. It was also thought that the clause that the extent of the responsiblity depends upon " whether the act of the private individual was directed against the foreigner as such " and the clause " whether the injured person had adopted a provocative attitude " involved questions of evidence which must be weighed by a court and therefore were probably unsuited to codification at this time. Other objections to the Basis were also expressed.

II. So far as concerns Basis No. 29, it was agreed that everything following the first sentence should be struck out.

It was suggested, however, that the next to the last paragraph, to the effect that " a State which is responsible for the action of other States is bound to see that they execute the measures which responsibility entails ", might be considered in connection with Basis No. 23.

It was agreed that the first sentence, namely, that responsibility imports an obligation to make reparation for the failure to comply with the international obligation was essential to the Convention, and it was suggested that, subject to drafting, this definition of responsibility, which embodies proposals made by several delegations, might be moved toward the beginning of the Convention.

It was thought by some that the last sentence of the Basis — namely, that " in principle, any indemnity to be accorded is to be put at the disposal of the injured State " — is probably embodied in the definition of international responsibility, for which reason some of the members of the Committee, who desired to express this thought in sentence 1, withdrew their request for its express insertion in sentence 1.

It was thought that the statement in the second sentence that " reparation might take the form of apology given with appropriate solemnity " might be deemed political in its nature and was perhaps inappropriate to the Convention.

The last clause of paragraph 1, requiring " in proper cases the punishment of the guilty persons ", was deemed already covered by Basis No. 18.

It was thought that the second and third paragraphs relating to compensation for " moral suffering " and confining the amount of compensation in certain cases of post-act obligations to the damage caused by the State's failure to take appropriate measures after the act, dealt with the measure of damages and were probably not yet ripe for codification. The question of measure of damages, it seemed to the Committee, had best be left to the jurisprudence of the courts for the present, until there had been a sufficient crystallisation of principles to warrant codification.

The First Sub-Committee had previously proposed that the provision for the exhaustion of local remedies should follow Basis No. 29, of which, under the present recommendation of the Third Sub-Committee, only the first sentence is now left. Whether Basis No. 29, with its additional paragraph covering the local remedy rule, should be embodied in one or two articles or combined with other articles to be placed at the head of the Convention, should be left to the Drafting Committee.

Conclusions.

1. The Sub-Committee proposes to suppress Basis of Discussion No. 19.

2. The Sub-Committee proposes that Basis of Discussion No. 29 should be drafted as follows :

> " Responsibility involves for the State concerned an obligation to place at the disposal of the injured State reparation for the damage suffered, in so far as it results from failure to comply with the international obligation.
>
> " The State's responsibility may not be invoked as regards reparation for damage caused to a foreigner until after exhaustion of the remedies afforded to the injured person by the internal law of the State. This rule does not include application of the provisions set out in Bases of Discussion Nos. 5 and 6.[1] "

3. Bases of Discussion Nos. 10, 17 and 18 : Text proposed by the Second Sub-Committee, circulated to the Members of the Committee on April 1st, 1930.

A State is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it.

Commentary.

It was recognised that a State is, in principle, not internationally responsible for damage caused by a private person to the person or property of a foreigner. In such a case, the State can only become responsible through its own act.

This is the case where the State has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it.

The text submitted to the Committee is the result of reciprocal concessions between different points of view. It has been intentionally drafted in very wide terms so as to leave to international tribunals the full freedom of judgment which they must have in order to take account of the varying circumstances of particular cases.

4. Bases of Discussion Nos. 12 and 13 : Text proposed by the Drafting Committee circulated to the Members of the Committee on April 1st, 1930.

1. A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

2. A State is also responsible for damage suffered by a foreigner as the result of acts of its officials which contravene its international obligations where the officials did not have authority to perform the acts in question but performed them under cover of their official character.

3. The State shall, however, not be responsible if the official's lack of authority was so evident that the foreigner must have been aware of it and could, in consequence, have avoided the damage.

5. Bases of Discussion Nos. 5 and 6 : Text proposed by the First Sub-Committee, circulated to the Members of the Committee on April 2nd, 1930.

A State is responsible if a foreigner suffers damage as result of the fact :

(1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State ;

(2) That, in a manner incompatible with the said obligations, the foreigner has been hindered in the exercise of his rights by the judicial authorities or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice.

The claim against the State must be lodged not later than one year after the judicial decision has been given.

---

[1] This reference may be altered after the full Committee has pronounced upon Bases of Discussion Nos. 5 and 6.

6. Basis of Discussion No. 27 : Proposal by the First Sub-Committee as revised by the Drafting Committee and circulated to the Members of the Committee on April 3rd, 1930.

1. The State's responsibility may not be invoked as regards reparation for damage caused to a foreigner until after exhaustion of the remedies afforded to injured persons by the internal law of the State.

2. This rule is inapplicable when the employment of local remedies is impaired in the cases mentioned in the article replacing Bases of Discussion Nos. 5 and 6.

ANNEX IV.

TEXTS ADOPTED BY THE COMMITTEE IN FIRST READING AS REVISED BY THE DRAFTING COMMITTEE.[1]

Article 1.

International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.

Article 2.

The expression "international obligations" in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

[The Drafting Committee proposes to replace the words in parentheses by the following words :

" . . . obligations which result from treaties as well as those which are based upon custom or the general principles of law . . . "]

Article 3.

The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.

Article 4.

1. The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.

2. This rule does not apply in the cases mentioned in paragraph 2 of Article 9.

Article 5.

A State cannot avoid international responsibility by invoking (the state of) its municipal law.

[The Drafting Committee proposes to suppress the words in parentheses.]

Article 6.

International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations.

Article 7.

International responsibility is incurred by a State if damage is sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the State.

---

[1] These texts were circulated to the Members of the Committee on April 4th, 1930, but no further discussion of them took place.

Article 8.

1. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

2. International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.

International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage.

Article 9.

International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact :

(1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State ;

(2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice.

The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period.

Article 10.

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment for the acts causing the damage.

ANNEX V.

DRAFT REPORT DRAWN UP BY THE RAPPORTEUR, M. DE VISSCHER (BELGIUM) AT THE REQUEST OF THE CHAIRMAN.[1]

The Third Committee was instructed to consider the Bases of Discussion drawn up by the Preparatory Committee regarding the responsibility of States for damage caused in their territory to the person or property of foreigners.

The Committee appointed Professor Jules Basdevant (delegate of France) as Chairman, His Excellency M. Diaz de Villar (delegate of Cuba) as Vice-Chairman, and Professor Charles De Visscher (delegate of Belgium), as Rapporteur.

At its plenary meetings, the Committee examined, in addition to the general problem of responsibility at international law, the conditions under which this responsibility may be incurred as a result of acts or omissions of various organs of the State — the legislative power, the executive power and the judiciary — and also the general duty to make reparation consequent upon the non-fulfilment of its international obligations.

Moreover, the Committee appointed three Sub-Committees. The first studied the sources of the obligations which form the basis of the international responsibility of States. It also prepared the way for the discussion in plenary session of the questions raised by the attitude of courts in connection with such responsibility (Bases of Discussion Nos. 5 and 6).

The second Sub-Committee studied Bases of Discussion Nos. 10, 17 and 18, concerning inadequate protection accorded to foreigners, and Bases Nos. 15 and 20 concerning the consequences of certain measures by which a State puts an end to the right of reparation enjoyed by a foreigner against the author of the damage. The third Sub-Committee examined Bases Nos. 19 and 29 concerning the principle and extent of reparation.

---

[1] This draft was distributed to the Members of the Committee on April 10th, 1930, but was not discussed (see Minutes of last meeting).

In the course of its discussions, the Committee was obliged to recognise that the time assigned for its work was not sufficient to allow it to bring to a conclusion the studies which it had pursued with such assiduity. In point of fact, owing to the comprehensive nature and extreme complexity of the problems raised, it was only able to discuss ten out of the thirty-one Bases submitted to it. The fact, moreover, that the various questions were closely interdependent, each being subordinated to the others, precluded any attempt to reach a partial settlement. The Committee accordingly, though in agreement as to certain fundamental principles, was unable, owing to lack of time, to determine the exact limits of their application. It therefore decided to refrain from any endeavour to embody them in definitive formulæ.

The importance of the methods of pacific settlement was unanimously recognised. Recourse to these methods, as laid down in general or particular treaties to which most of the States represented at the Conference are parties, is calculated to minimise the acuteness of disputes caused by claims concerning damage suffered by foreigners. The development of international case law will thus contribute most effectively to the gradual definition of the scope and limits of the principle of international responsibility. The settlement of actual cases by international tribunals — first among which must be placed the Permanent Court of International Justice — will provide one precedent after another, each helping to consolidate still further the foundation for an ultimate conventional settlement of this question.

PUBLICATIONS OF THE LEAGUE OF NATIONS

Vol. I. ADVISORY COMMITTEE OF JURISTS. Documents presented to the Committee relating to Existing Plans for the Establishment of a Permanent Court of International Justice. (English and French texts) £3 5/- $13.00

Vol. II. ADVISORY COMMITTEE OF JURISTS. Procès-verbaux of the Proceedings of the Committee, June 16th to July 24th, 1920, with Annexes. (English and French texts) £3 10/- $14.00

Vol. III. DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court (not including Material collected for, or the Minutes of the Advisory Committee of Jurists). (English and French texts) £3 5/- $13.00

* * *

CONFERENCE OF STATES SIGNATORIES OF THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. Final Act of the Conference. (French and English texts). (Ser. L.o.N. P. 1926.V.24). *5d.* $0.10

CONFERENCE OF STATES SIGNATORIES OF THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. Report by M. Pilotti, Rapporteur, presented to the Conference on September 23rd, 1926. (French and English texts). (Ser. L.o.N. P. 1926.V.25) *3d.* $0.05

MINUTES OF THE CONFERENCE OF STATES SIGNATORIES OF THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, held at Geneva from September 1st to 23rd, 1926. (Ser. L.o.N. P. 1926.V.26) 3/3 $0.80

ELECTION OF MEMBERS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. NOTE BY THE SECRETARY-GENERAL concerning the Relevant Provisions of the Court's Statute and the Procedure for the Election of the Members of the Court. (Ser. L.o.N. P. 1930.V.13) *6d.* $0.15

* * *

QUESTION OF THE REVISION OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. Report of the First Committee to the Tenth Assembly and Draft Protocol. (Ser. L.o.N. P. 1929.V.16) *6d.* $0.15

QUESTION OF THE ADHERENCE OF THE UNITED STATES OF AMERICA TO THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. Report of the First Committee to the Tenth Assembly and Draft Protocol. (Ser. L.o.N. P. 1929.V.15) *6d.* $0.15

QUESTION OF THE ACCESSION OF THE UNITED STATES OF AMERICA TO THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. Report to the Council by the Representative of Italy and Resolution adopted by the Council on August 31st, 1929. (French and English texts). (Ser. L.o.N. P. 1929.V.14) *6d.* $0.15

MINUTES OF THE CONFERENCE REGARDING THE REVISION OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE and the Accession of the United States of America to the Protocol of Signature of the Statute, held at Geneva from September 4th to 12th, 1929. (Ser. L.o.N. P. 1929.V.18). 88 pp. 3/3 $0.80

Committee of Jurists on the Statute of the Permanent Court of International Justice. REPORTS ADOPTED by the Committee at its Session held at Geneva from March 11th to 19th, 1929. (Ser. L.o.N. P. 1929.V.4) *9d.* $0.20

Committee of Jurists on the Statute of the Permanent Court of International Justice. MINUTES of the Session held at Geneva, March 11th-19th, 1929. (Ser. L.o.N. P. 1929.V.5) 4/9 $1.20

* * *

CODIFICATION OF INTERNATIONAL LAW

Reports of the Committee of Experts for the Progressive Codification of International Law

REPORT to the Council of the League of Nations on the Questions which appear ripe for International Regulation (Questionnaires Nos. 1 to 7), adopted by the Committee at its Third Session in March-April 1927. (Ser. L.o.N. P. 1927.V.1). 10/- $2.50

SECOND REPORT to the Council of the League of Nations on the Questions which appear ripe for International Regulation (Questionnaires Nos. 8 to 11), adopted by the Committee at its Fourth Session, held in June 1928. (Ser. L.o.N. P. 1928.V.4) 3/6 $0.90

PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW. Report by the Committee of Three Jurists appointed by the Council on December 14th, 1928. (Ser. L.o.N. P. 1929.V.6) *6d.* $0.15

Complete catalogue sent free on application

PUBLICATIONS DEPARTMENT, LEAGUE OF NATIONS, GENEVA (Switzerland)

AUTHORISED AGENTS FOR THE PUBLICATIONS OF THE LEAGUE OF NATIONS

ARGENTINE
Librería "El Ateneo", calle Florida 371, BUENOS AIRES.

AUSTRALIA (Commonwealth of)
H. A. Goddard, Ltd., 255A, George Street, SYDNEY.

AUSTRIA
Manz'sche Verlags- und Universitätsbuchhandlung, Kohlmarkt 20, VIENNA I.

BELGIUM
Agence Dechenne, Messageries de la Presse, S.A., 18-20, rue du Persil, BRUSSELS.
Albert Dewit, Rue Royale, 53, BRUSSELS.

BRAZIL
Livraria Vieira Souto, Praça Mauá 7, Sala 620, RIO DE JANEIRO.

BULGARIA
Librairie Française et Etrangère, S. & J. Carasso, Bd. "Tsar Osvoboditel", No. 4*a*, SOFIA.

CANADA
League of Nations Society in Canada, 381, Wilbrod Street, OTTAWA.

CHILE
Carlos Niemeyer, Librería Universal, Cas. 293. VALPARAISO.

CHINA
Commercial Press Ltd., 26*a*, Paoshan Road, SHANGHAI.

CZECHOSLOVAKIA
Librairie F. Topic, 11, Narodni, PRAGUE.

DANZIG (Free City of)
Georg Stilke, Buchhandlung, Langgasse, 27, DANZIG.

DENMARK
Levin & Munksgaard, Publishers, Nörregade, 6, COPENHAGEN.

DUTCH EAST INDIES
Algemeene Boekhandel G. Kolff & Co., BATAVIA-WELTEVREDEN.

ECUADOR
Victor Janer, GUAYAQUIL.

ESTONIA
J. G. Krüger, Ant.-Ges., 11, Rüütli t., TARTU.

FINLAND
Akateeminen Kirjakauppa, HELSINKI.

FRANCE
Librairie universitaire J. Gamber, S. A., 7, rue Danton, PARIS (VIe).

GERMANY
Carl Heymanns Verlag, Mauerstrasse 44, BERLIN W.8.

GREAT BRITAIN, NORTHERN IRELAND AND THE CROWN COLONIES
George Allen & Unwin, Ltd., 38, Gt. Ormond Street, LONDON, W.C.1.

GREECE
"Eleftheroudakis", Librairie internationale, Place de la Constitution, ATHENS.

HAITI
Librairie-Papeterie Mme. D. Viard, angle des rues du Centre et des Casernes, PORT-AU-PRINCE.

HUNGARY
Librairie Grill, Dorottya utca 2, BUDAPEST.

ICELAND
Peter Halldorsson, REYKJAVIK.

INDIA
The Book Company, Ltd., College Square, 4/4A, CALCUTTA.

IRISH FREE STATE
Eason & Son Ltd., 79-82 Middle Abbey Street, DUBLIN.

ITALY
Anonima Libraria Italiana, Direzione Generale, Via Palermo 12, MILAN. Branches: FLORENCE, GENOA, NAPLES, PADUA, PALERMO, PAVIA, ROME, TRIESTE, TURIN.

JAPAN
League of Nations Tokio Office, Marunouchi-C.-13, TOKIO.
Maruzen Co., Ltd. (Maruzen-Kabushiki-Kaisha), 6, Nihonbashi Tori-Nichome, TOKIO.

LATVIA
Latvijas Telegrafa Agentura, K. Barona Iela, 4, RIGA.

LUXEMBURG (G.-D.)
Librairie J. Heintzé, M. Hagen, Successeur, Place Guillaume, 8, LUXEMBURG.

NETHERLANDS
Martinus Nijhoff, Boekhandelaar-Uitgever, Lange Voorhout 9, THE HAGUE.

NEW ZEALAND
The Clarté Bookshop, Walter Nash, 126, Vivian Street, P.O. Box 310, WELLINGTON.

NORWAY
Olaf Norli, Universitetsgaten, 24, OSLO.

PARAGUAY
Librería Internacional Santiago Puigbonet, Casilla de Correo 581, ASUNCIÓN.

POLAND
Gebethner & Wolff, ulica Zgoda 12, WARSAW.

PORTUGAL
J. Rodrigues & Ca., Rua Aurea 186-188, LISBON.

ROUMANIA
"Cartea Românească", 3-5, Boul. Academiei, BUCHAREST, I.

SAAR BASIN
Gebr. Hofer A.-G., Sortimentsabteilung, SAARBRUCK.

SOUTH AFRICA (Union of)
Maskew Miller, Ltd., 29, Adderley Street, CAPE TOWN.

SPAIN
Centro Editorial "Minerva", Apartado 555, Tudescos 39-41, MADRID, E.12.

SWEDEN
C. E. Fritze, Hofbokhandel, Fredsgatan, 2, STOCKHOLM.

SWITZERLAND
Librairie Payot & Cie, GENEVA, LAUSANNE, VEVEY, MONTREUX, NEUCHATEL, BERNE and BALE.
Librairie Dr. H. Girsberger & Cie., Kirchgasse 17, ZURICH.

TURKEY
Librairie Anadolou Méarif, Boîte postale 45, ANKARA.

UNITED STATES OF AMERICA
World Peace Foundation, 40, Mt. Vernon Street, BOSTON 9, Mass.

YUGOSLAVIA (Kingdom of)
Librairie Internationale François Bach, 8, rue Knez Mihailova, BELGRADE.
Librairie de l'Université et de l'Académie Yougoslave, St. Kugli, Ilica 30, ZAGREB.
Knjigarna Schwentner, Presernova ulica, LJUBLJANA.

For other countries, apply:

Publications Department of the League of Nations, Geneva (Switzerland).