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Efforts to Codify the Law of State Responsibility for Damage to the Person or Property of Foreigners at the First Conference for the Codification of International Law

Jennifer Thornton (US Department of State) · Friday, August 6th, 2010 · American Society of International Law (ASIL)

In 1924, the League of Nations launched a worldwide effort to codify three important subjects of public international law: Nationality, Territorial Waters, and the Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners. These efforts culminated in the First Conference for the Codification of International Law, which took place at The Hague from March 13 to April 12, 1930 and was attended by representatives of forty-seven States. In the view of the United States Delegate to the Conference, Green H. Hackworth, then Solicitor for the Department of State, the need for codification of the principles of State responsibility that govern the treatment of aliens was vital, in light of its significance for the development of international trade, commerce, and travel at that time. See Green H. Hackworth, Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners: The Hague Conference for the Codification of International Law, 24 AM. J. INT'L L. 500 (1930). Furthermore, given the numerous mixed-claims commissions of the 19th and 20th centuries, there was more international jurisprudence to guide the efforts of the "Third Committee" charged with codifying these principles of State responsibility, than there was available to the other two committees. See Manley O. Hudson, The First Conference for the Codification of International Law, 24 AM. J. INT'L L. 447, 459 (1930).

Notwithstanding these facts, as well as four years of preparatory work that elicited commentary from over thirty States on the subject, the Third Committee "confessed its inability to arrive at a convention" on the eve of the closing of the Conference. Edwin M. Borchard, "Responsibility of States," at the Hague Codification Conference, 24 AM. J. INT'L L. 517 (1930). The reasons for this failure are varied, but the preparatory materials and minutes of the Third Committee are useful for identifying the principles of State responsibility that were accepted and disputed by the delegations at that time, which is relevant for investment arbitration practitioners trying to discern the limits of State responsibility today. See LEAGUE OF NATIONS, ACTS OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW, Vol. IV, Minutes of the Third Committee (1930).

On the first day of the conference, the French delegation proposed a foundational

article that revealed deep disagreement among the delegates about the sources of international law from which the principles of State responsibility could be derived. The proposed article, which became Article 1 of the tentative convention, established simply that international liability in this area flows from a failure "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." Borchard at 518 (emphasis added). Even though this principle was adopted unanimously, the Salvadoran and Romanian delegations subsequently insisted that the concept of "international obligation" to which it referred be defined. Id. at 520-21. They proposed further that the sources of international law from which those obligations could be derived be limited to "those arising from treaty or from established custom recognized as law by all states," because they feared that "existing law had gone beyond what they considered just." Id. at 521 (emphasis added).

A considerable number of delegates objected to this proposition on the grounds that any attempt to define "international obligations" would unnecessarily limit the evolution of those obligations and their application by courts. See Borchard at 521. The U.S. Delegate, Green Hackworth, noted that the proposed limiting language on sources was also untenable, as very few rules of international law were universally accepted by the international community. See Hackworth at 504. In the end, an overwhelming majority of the delegates approved the following compromise, which became Article 2 of the tentative convention: "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." Minutes of the Third Committee, Annex IV, "Texts Adopted By the Committee in the First Reading as Revised by the Drafting Committee" at 236 ("Tentative Convention"). The Italian delegate indicated that he supported the article only because he believed it to be meaningless, but Professor Borchard characterized it as designed to identify the sources of law from which the minimum standard of civilized treatment owed to foreigners could be divined at that time. See Borchard at 522.

The Committee was able to adopt several additional foundational principles by simple majority, including that international responsibility: implies a duty to make reparation for damage sustained (tentative Article 3); cannot be avoided by the invocation of municipal law (tentative Article 5); and can flow from the acts and omissions of the legislative, executive, and judicial branches of government (tentative Articles 6, 7, and 9). See Tentative Convention at 236-37. The Article codifying the local remedies rule (tentative Article 4) was adopted almost unanimously, but not without controversy, which the delegates ultimately resolved by creating an express exception for denial of justice claims in which local remedies cannot be exhausted because access to judicial review is hindered or refused. See Borchard at 527; Tentative Convention at 236-37.

Negotiations became more heated when the delegates took up the issue of international responsibility for damage sustained by foreigners due to the acts or omissions of officials. The question of whether international responsibility should lie for unauthorized acts of officials, acting within the scope of their employment, but in contravention of a State's international obligations, was among the most contentious.

See Hudson at 460. At the time, such liability was recognized in the French and German civil codes, but expressly disavowed in the municipal law of many countries, including the United States and England. See Borchard at 529-30. Notwithstanding this fact, many countries that expressly disavowed the rule in their municipal codes actually supported its inclusion in the tentative convention, because they recognized that it had been embraced in international practice by claims commissions. See Hackworth at 507; see also Borchard at 530, n.17. Consequently, the rule was adopted in tentative Article 8(2) by a significant majority, with numerous abstentions. See Borchard at 530.

Negotiations subsequently ground to a halt when the delegates considered the circumstances under which States can be responsible for damage to the person or property interests of foreigners caused by private persons. A slight majority of the Committee proposed that a State is responsible for such injury only in such instances "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." See Tentative Convention at 237 (tentative Article 10) (emphasis added). While in the view of Professor Borchard the article merely enacted "the due diligence rule which claims commissions have applied on innumerable occasions," numerous delegations objected to it on the grounds that the only level of diligence owed by States in such circumstances is the one they extend to their own nationals. Borchard at 536-38.

In Professor Borchard's view, this position was clearly inconsistent with international law, which had already "properly established the rule that certain exceptional types of injury transgressing the requirements of civilized justice or administration would justify an international claim, even though nationals might for lack of a remedy have to tolerate them." Borchard at 537. A slim majority of the delegates appear to have agreed with Borchard's assessment, and the principle was codified in Article 10 of the tentative convention. But the debates that preceded the vote revealed such divisions that the delegates feared the tentative convention would not be approved by the requisite two-thirds majority. See Hackworth at 514-15. After several days of horse-trading designed to keep the negotiations going, the Committee unanimously agreed that they could provide no report to the Conference and that the Chairman would simply announce at the plenary session "that the Committee on Responsibility of States had been unable to complete its work." Id. at 515.

The Rapporteur of the Third Committee, Charles de Visscher, attributed this failure to a lack of time and noted that the continued settlement of cases by international tribunals would ultimately lead to a convention on the issue. See Minutes of the Third Committee, Annex V, at 238. Others speculated that the Third Committee simply lacked a sufficient number of skillful negotiators to bridge the "sharp divergence of views" on fundamental aspects of the subject. Hudson at 459. Regardless of the reason for the Third Committee's failure to arrive at a convention, it was not able to take up a number of important issues of State responsibility on which numerous governments had opined in preparation for the Conference, which are extremely relevant today. These included State responsibility for (1) the wrongful acts of political subdivisions, (2) repudiation of contracts and public debts, and (3) damage resulting from civil disturbances; as well as various grounds for disclaiming responsibility such

as necessity. See Minutes of the Third Committee, Annex I, "Bases of Discussion Drawn up by the Preparatory Committee" at198-202. Nevertheless, in the preparatory work and minutes of the Third Committee one can still glean a significant amount about the principles of State responsibility that were widely, if not universally, accepted at that time.

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