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Summary record of the 1456th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

(article 20) and the breach of obligations which required the achievement of a particular result by the State (article 21).

44. Mr. DADZIE congratulated the Special Rapporteur on his sixth report and the very instructive introduction to article 20 he had given at the previous meeting. As Mr. Verosta had said, the new members of the Commission were at a disadvantage in discussing a topic with which the Commission had been dealing for some time, but the Special Rapporteur's introductory remarks had removed their difficulties.

45. While he agreed with the minor drafting changes to article 20 suggested by other members of the Commission, he saw no substantive improvements that could be made to that article, which related to the breach of an international obligation requiring a State to adopt a particular course of conduct. He therefore shared the view that article 20 could be referred to the Drafting Committee.

46. He was also grateful for the Special Rapporteur's reply to Mr. Verosta's question. The explanations the Special Rapporteur had given concerning the relationship between article 16 and article 20 had clearly demonstrated the importance of the subject of State responsibility as a whole.

47. Mr. CALLE Y CALLE associated himself with the expressions of appreciation concerning the clarity and accuracy of the Special Rapporteur's analysis of the rule relating to the breach of an international obligation requiring a State to adopt a particular course of conduct. He noted that that rule, which was stated in article 20, formed part of chapter III of the Commission's draft, articles 16 to 19 of which had been discussed at great length by the United Nations General Assembly at its thirty-first session. During that discussion, it had been generally agreed that those articles, and in particular article 19, marked an important turning point in, and made a valuable contribution to, the development of international law and its future application.

48. At the Commission's previous meeting, the Special Rapporteur had described the historical background to the question of the breach of an international obligation and, at the present meeting, he had given an extremely helpful account of the over-all structure of the draft articles relating to that question. Article 16 provided an introduction to chapter III and laid down a general rule, namely, that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation", whereas article 20 provided that an international obligation could entail more than an action or an omission, by requiring a State to adopt a particular course of conduct, which could extend over a period of time. Thus, in article 20, the purpose of the international obligation was to specify the means or, in other words, the course of conduct, by which a State could achieve a certain result. If, however, the State adopted a course of conduct different from that specifically required, it could be said to have breached the international obligation in question.

49. As stated in paragraph 8 of his report, the Special Rapporteur had drawn a distinction, in articles 20 and 21, between the nature of the international obligation which required of the State a specific activity and the nature of the obligation which required only that the State should achieve a certain result, leaving it to choose the means of doing so. Those two articles thus expanded on the very succinct rule embodied in article 16.

50. The wording of article 20, which did not require many changes, should not present any difficulties for the Drafting Committee. In his opinion, the expressions "a particular course of conduct" and "a course of conduct different from that specifically required" could not be clearer or more precise. He therefore supported the suggestion that article 20 should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

1456th MEETING

Friday, 8 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 20 (Breach of an international obligation calling for the State to adopt a specific course of conduct [1] (*concluded*)

1. Mr. QUENTIN-BAXTER said that, like his earlier reports, the Special Rapporteur's sixth report on State responsibility had given him food for thought and illuminated some of the dark areas in his knowledge of the law. It had also caused him some surprise, for he had been under the impression that article 19 [2] was the last in the set of draft articles relating to the breach of an international obligation.

2. As the Special Rapporteur had pointed out, one of the main difficulties of the subject-matter was that, by its very nature, it called for careful study of the most basic situations. Thus, even a rule such as the one embodied in article 20, which might appear to state an

[1] For text, see 1454th meeting, para. 11.

[2] See 1454th meeting, foot-note 2.

obvious truth, definitely had a place in the draft articles. Indeed, in dealing with State responsibility, the Commission sometimes had to play the role of a philosopher and explain even well-known principles and rules. He therefore had no objection to the rule embodied in article 20.

3. He also recognized the validity of the basic distinction which the Special Rapporteur had drawn between obligations of conduct, referred to in article 20, and obligations of result, referred to in article 21. He was, however, somewhat concerned about the apparent absoluteness of that distinction for he was not sure that every international obligation could be satisfactorily classified as either an obligation of conduct or an obligation of result. Indeed, foot-note 27 of the report (A/CN.4/302 and Add.1-3) showed that the distinction between an obligation of conduct and an obligation of result was not always as clear-cut as might be expected.

4. Another example in which the distinction between the two types of obligation was not immediately apparent was that in which a coastal State had an obligation to grant the right of innocent passage through its territorial sea. In his opinion, blocking the innocent passage of foreign ships by the navy of the coastal State would be a case of breach of an obligation of conduct, whereas if the State, for example, failed to prevent its oil industry from setting up derricks which completely blocked an international strait, that would be a case of breach of an obligation of result, for the State in question would have had freedom to choose the means by which the right of passage through the strait could be ensured. In both cases, the obligation was the same but it could be viewed from two different angles.

5. If one of the examples given by the Special Rapporteur in paragraph 5 of his report, namely, that of article 1, paragraph 1, of the Convention relating to a uniform law on the international sale of goods (The Hague, 1964), which imposed on the contracting States the obligation to incorporate in their own legislation the uniform law on the international sale of goods, was contrasted with the example of the introductory provision of the section of the four 1949 Geneva Conventions,[3] which related to the repression of breaches of the Conventions and which stated:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article,[4]

it could be seen that, in both cases, a particular course of conduct had been enjoined upon the States in question. In the case of the Hague Convention, the required conduct was very narrowly defined while, in the case of the Geneva Conventions, the States concerned were free to decide what was necessary in order to bring their internal law into conformity with the requirements of the latter. Both of those cases thus came within the scope of article 20. In the second case, however, the States concerned would not have to enact specific legislation in order to achieve the required result. The article might thus also be said to involve an obligation having some of the characteristics of an obligation of result.

6. The contrast between those two examples could be further sharpened by reference both to the principle embodied in article 20 and to the principle embodied in article 21. In terms of article 20, it could be said that, in the first case, the States concerned had an obligation to enact legislation which was in conformity with the provisions of the uniform law whereas, in the second case, they had a duty to decide which obligations the Geneva Conventions laid down and to ensure that those obligations were fulfilled through the enactment of internal legislation. In terms of article 21, it could thus be said that, in both cases, a result had been required.

7. He had cited those examples in order to indicate that, although the rules embodied in articles 20 and 21 were important and deserved a place in a future codification instrument, he was not sure that the Special Rapporteur's distinction between an obligation of conduct and an obligation of result would be very helpful to those who would look to a future convention for guidance. He therefore suggested that, in order to take better account of the complexities of the law and of international life, the Commission should treat the distinction between the two types of obligation as one of degree rather than of kind. A solution of the problem of the absoluteness of that distinction might be simply to state that the provisions of article 20 applied when an international obligation specifically called for a State to adopt a particular course of conduct and that the provisions of article 21 applied when an international obligation required a State to achieve a particular result.

8. Mr. SUCHARITKUL said that he much appreciated the clarity and precision of the statement by the Special Rapporteur, whose position he could only endorse. Like the Special Rapporteur, it was his belief that the legal concept of State responsibility in international relations should be extended to all spheres of State activity and should no longer be confined to traditional areas, such as the treatment of aliens.

9. He agreed with article 20 both as to substance and form and, like the Special Rapporteur, considered that, in the case covered by that article, the essential criterion for breach of the obligation was the adoption by the State of a course of conduct different from that which was specifically required. He would, however, point out that, if the different conduct which the State adopted was superior to the conduct required, there was no breach of the obligation incumbent on the State. There was only a breach of that obligation if the conduct of the State was inferior to the conduct required. It would therefore perhaps be preferable to replace the words "different from" by the expression "not in conformity with", as Mr. Sette-Câmara had suggested.[5]

10. He was grateful to the Special Rapporteur for having introduced into article 20 the new dimension of time. In his view, the temporal element was essential for determining whether there had been a breach of the obligation, since the duration of the course of conduct required

[3] Geneva Conventions of 12 August 1949 for the protection of war victims.

[4] United Nations, *Treaty Series*, vol. 75, pp. 62, 116, 236 and 386.

[5] 1455th meeting, para. 21.

should be taken into account, as well as the point at which the different course of conduct had been adopted.

11. He shared the view expressed by Mr. Francis at the previous meeting, regarding the distinction to be drawn between a positive or active course of conduct and a negative or passive course of conduct. The nature of the conduct depended on the nature of the obligation, which required the State to achieve a positive result or to avoid a negative result. In order to achieve a positive result, the State could adopt either a single act of conduct or a whole series of acts; consequently, its course of conduct was of more or less limited duration. On the other hand, a passive obligation was of virtually unlimited duration since, to avoid a particular harmful result, the State had to continue to refrain from certain acts.

12. In conclusion, he thought that article 20 could be referred to the Drafting Committee.

13. Mr. EL-ERIAN said he wished to join the other members of the Commission in congratulating the Special Rapporteur on the clarity and precision of his sixth report and the explanations he had given concerning article 20.

14. Articles 20 and 21, which were the logical consequence of articles 16 to 19, dealt with the substantive aspects of international obligations from the point of view of the form of the obligation. Although article 20 stated such an obvious rule that several members of the Commission had questioned whether it was really necessary to include it in the draft articles, he was of the opinion that its inclusion was necessary and that it was quite appropriate for the Commission to formulate articles of an expository nature, to make the draft as complete and as clear as possible. Such expository articles had, moreover, been included in the Vienna Convention on the Law of Treaties [6] and in the draft articles on succession of States in respect of treaties.[7]

15. The wording of article 20 was acceptable and the words "a particular course of conduct" took fully into account the concepts of active and omissive conduct. With regard to the important distinction between obligations of conduct and obligations of result made in articles 20 and 21, he noted that, in foot-note 27 of his report, the Special Rapporteur had acknowledged that the distinction between those two types of obligation could sometimes become blurred, especially when concepts proper to civil law were applied to international law. Accordingly, he was not certain that the Special Rapporteur had been right in stating that, in positive international law, the obligation of a State to protect foreigners should be characterized as an international obligation of result. The reason why such an obligation could also be described as an obligation of conduct could, however, be discussed in connexion with article 21.

16. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur in his sixth report had, as usual, led the Commission through many examples of precedent and doctrine to a conclusion with which it was difficult not to agree. He was thus fully convinced that articles 20 and 21 were necessary and that the distinction between international obligations of conduct and international obligations of result was an important one, for experience had often shown that, when a breach of an obligation occurred, it was first necessary to determine exactly what type of obligation was involved.

17. In order to bring out the importance of that distinction, he need only mention the example of the public discussion which had been going on for several years in the United Kingdom concerning legislation to give effect to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[8] also known as the European Convention of Human Rights. It had been argued in some quarters that the Convention provided that States had to enact legislation to give effect to the obligations it laid down. In the United Kingdom, it had, however, been argued that the Convention required only that States should guarantee to all persons the rights and freedoms provided for in the substantive articles of the Convention. From the point of view of observance of the Convention, it was of crucial importance to decide which of those arguments was right. It might have been wise for the United Kingdom to take the view that the European Convention on Human Rights laid down an obligation of conduct rather than an obligation of result because, in supporting the view that the States parties were concerned only with an obligation of result, it ran a considerable risk of an unintentional breach of the obligations laid down in the Convention.

18. Another example of the distinction made in articles 20 and 21 was that in which one State enacted customs legislation in order to give effect to the provisions of a customs treaty, and another State party to that treaty enacted legislation giving its executive authorities power to vary its customs duties in ways that were not in conformity with the obligations laid down in the treaty in question. In a case involving the payment by the first State of customs duties on a large shipment of wheat, the question whether the second State had committed a breach of an obligation of conduct or a breach of an obligation of result would be of critical importance if, for example, it changed its customs duties when the ship carrying the wheat was already on the high seas.

19. Although he was of the opinion that the distinction between those two types of obligation was essential, he shared the concern expressed by Mr. Reuter and by Mr. Quentin-Baxter that a very strict distinction might have the result of creating a gap between the obligations covered by article 16 and those covered by articles 20 and 21. The wording of articles 20 and 21 and the commentaries thereto should therefore make it clear that the Commission had had no intention of leaving any such gap in the draft articles.

20. As regards the wording of article 20, he noted that there was a problem involved in translating the words *comportement déterminé* into English. He was of the

[6] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereafter referred to as the Vienna Convention.

[7] *Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

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

opinion that the words "specific conduct" would be closer to the meaning of the French words than the words "a particular course of conduct" now to be found in article 20. He therefore suggested that the Commission might consider a text drafted along the following lines:

> A breach by a State of an international obligation requiring specific conduct on the part of that State occurs when the conduct of the State is not in conformity with the conduct specifically required.

21. Mr. VEROSTA said that he shared the Chairman's concern regarding the gaps that might result from the dichotomy established under articles 20 and 21. In his opinion, the Drafting Committee could not find a definitive solution to the problems to which article 20 gave rise without having first examined the problems to which article 21 gave rise. He would therefore reserve his position on article 20 until article 21 had been considered.

22. Mr. AGO (Special Rapporteur) said he felt that the concern expressed by Mr. Quentin-Baxter, the Chairman and Mr. Verosta about possible gaps that might result from the dichotomy established under articles 20 and 21 was a little exaggerated. The Commission was, in any case, still only at the stage of first reading and the comments of Governments would certainly be helpful in determining whether or not such gaps existed.

23. With regard to the order of the articles, when the draft was considered on second reading, articles 20, 21 and 22 might be placed after articles 16, 17 and 18, since that was the logical sequence, and, at any rate, before article 19, which dealt with a problem of a different kind.

24. Mr. Quentin-Baxter had questioned whether the distinction drawn between the obligation of conduct and the obligation of result was really necessary. The Chairman had shown clearly that such a distinction was essential for determining in each case, whether there was a breach of an international obligation and when that breach occurred. For example, if a State was simply required to ensure that children did not work at night —an obligation of result—there would only be a breach of the obligation if it was established that there were actually cases in that State of children being employed on night work. On the other hand, if a State was required to pass legislation prohibiting night work for children—an obligation of conduct or of means—failure to pass such legislation would, of itself, be a breach of that obligation.

25. The Commission's work on responsibility should also prove useful to States which adopted international treaties because, when they realized that the establishment of a breach could differ according to the nature of the obligation, in other words, according to whether the obligation required the State to adopt a particular course of conduct, or merely required it to achieve a particular result but left it free to choose the means of doing so, they might follow a different course from the one they would otherwise have chosen.

26. In that connexion, the Chairman had said that it was often preferable to impose an obligation of conduct in an international treaty. That was probably true, but the sovereignty of States also had to be taken into account, which meant respecting as much as possible their freedom of choice at the internal level and, thus, merely requiring them to achieve a particular result, provided that such a requirement did not involve any serious disadvantages. It was not for the Commission but for States to say whether it was better to provide, in a convention, for an obligation of conduct or an obligation of result. States, moreover, had not always been logical in that respect, as was clear from ILO conventions on similar subjects, which sometimes provided for obligations of conduct and sometimes for obligations of result. The Commission, for its part, should merely note that, in that respect, there were two types of obligation and confine itself to determining how the breach arose in each case.

27. Mr. Quentin-Baxter had introduced a new dichotomy within the dichotomy already established by pointing out that an international treaty, such as the 1964 Hague Convention relating to a uniform law on the international sale of goods, came within the scope of article 21 as well as of article 20, since it provided both for an obligation of conduct, namely, the enactment of legislation, and for an obligation of result, namely, the achievement of uniformity in the internal laws relating to the sale of goods. However, the objective pursued by States whenever they adopted a treaty—which, in the case in point, was standardization of private law—should not be confused with the fact that that objective was pursued by imposing on the States an obligation of result and leaving them free to choose the means of fulfilling it. In the case of an international treaty which provided for a uniform law, the requirements for fulfilling the obligation were so strict that there was a breach of the obligation if the State adopted a law that did not conform entirely to the model proposed. The obligation imposed by that kind of treaty was thus the most typical example of an obligation of conduct, not of an obligation of result.

28. The other treaty to which Mr. Quentin-Baxter had referred also imposed on the State an obligation of conduct of a legislative nature, since it called upon the State to adopt the necessary legislation to provide for adequate penal sanctions, even though it left it more freedom than the first kind of treaty since it did not require it to reproduce a model law word for word. In that case as well, there was nevertheless a breach of the obligation if the required legislation was not adopted; the obligation was thus one of conduct.

29. When a treaty imposed on the State an obligation of result, it might leave the State completely free to choose the means to be used to achieve that result or it might express a certain preference in the matter, although such a preference was not, in the final analysis, binding on the State. In order to determine whether there was a breach of an obligation, it was necessary to compare the specifically required action or omission with the action or omission actually adopted in the case of an obligation of conduct, and the required result with the result actually achieved in the case of an obligation of result. In his view, the dichotomy between the obligation of result and the obligation of conduct could be extremely useful and it would be unwise to blur it unduly in order to take account of every possible aspect of a multifaceted reality.

30. Mr. Sucharitkul had pointed out that he (the Special Rapporteur) had introduced into all the articles in chapter III the dimension of time, which was essential where responsibility was concerned.

31. With regard to the treatment of aliens, there were also obligations which called for a specific course of conduct and obligations which merely required the State to achieve a particular result. That was because two different factors came into play: on the one hand, custom, which was extremely cautious about everything that came within the internal domain of the State, and, on the other hand, treaties, which sometimes revealed the growing concern of international law for man's well-being. In any event, there was no doubt that, with regard to the treatment of aliens, obligations of result were absolutely predominant.

32. With regard to the drafting, he noted that he had already suggested that, when the draft was considered at second reading, articles 20, 21 and 22 should be placed before article 19 so that they would be closer to article 16. He agreed with Mr. Verosta that the Drafting Committee should consider articles 20 and 21 together because those two articles were closely linked. He thanked Mr. Ushakov and the Chairman for the texts which they had proposed for article 20 and which would undoubtedly assist the Drafting Committee in arriving more rapidly at a satisfactory solution.

33. Mr. USHAKOV said that, while he was very satisfied with the Special Rapporteur's explanations, he would point out that, in some cases, an obligation could be an obligation of conduct as well as an obligation of result. There was a need for extreme caution in the case of obligations of conduct, and it should be made quite clear in the commentary that the course of conduct imposed by the obligation was "particular" only within certain limits. For example, if a treaty required the State to adopt legislation, that legislation could take very different forms: it could be a law in the strict sense, but also a decree or an administrative act.

34. Mr. AGO (Special Rapporteur) said that there were admittedly cases where it was hard to say whether the obligation was one of conduct or of result since, as he had stressed, reality had many facets. But it was still necessary to formulate a rule, leaving it to the practice of States and to international tribunals to decide, in case of dispute, whether an obligation fell within the scope of article 20 or within that of article 21.

35. He agreed with Mr. Ushakov regarding the need for caution in the case of obligations requiring action of a legislative nature; paragraph 14 of his report stated that a legislative obligation "requires that the legislative organ, or at any rate some organ having a normative function, issue or revoke certain rules". The form of the legislation mattered little: what mattered was that rules of internal law were created.

36. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 20 to the Drafting Committee.

It was so agreed.[9]

[9] For the consideration of the text proposed by the Drafting Committee, see 1462nd meeting, paras. 18-24, and 1469th meeting, paras. 1-6.

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result)

37. The CHAIRMAN invited the Special Rapporteur to introduce draft article 21, which read:

Article 21. Breach of an international obligation requiring the State to achieve a particular result

1. A breach of an international obligation requiring the State to achieve a particular result *in concerto*, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.

2. In cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the originally required result through new conduct or by achieving an equivalent result in place of it, a breach of the obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct.

38. Mr. AGO (Special Rapporteur) said that article 20 covered cases where the international obligation required a State to perform or refrain from a particular act. In such a case, the State did not have the choice of means; they were indicated by the international obligation itself, which made it fairly easy to determine when there was a breach of the obligation. All that was needed was to compare the course of conduct adopted by the State with the course of conduct required of it. The difference, if any, between those two courses of conduct constituted the essence of the breach of the international obligation, according to the definition of a breach given in article 16. He had already given several examples of international obligations requiring a State to enact or repeal a law, or calling upon its executive or judicial organs to perform or refrain from a particular act. In all such cases, a breach of the obligation occurred if the required act had not been performed.

39. Article 21 dealt with more subtle cases, when international law came to a halt, as it were, at the frontiers of the State: it left the State free, in the exercise of its sovereignty, to choose the means of fulfilling its obligation, provided that, by such means, it achieved the desired result. Several possibilities came to mind. Sometimes, international law might leave the State freedom of choice as to means but, once the choice was made at the outset, it would be possible to determine immediately, once and for all, whether or not the result had been achieved and, consequently, whether or not there was a breach. Also, as was frequently the case, international law might adopt a more permissive attitude, not only leaving the State free to choose at the outset the means of fulfilling its obligation but also permitting it, if it did not obtain the required result by that first means, to have recourse subsequently to other means. The obligation might even be so liberal that the State could regard itself as having discharged it by achieving an equivalent result, for example, by offering the economic equivalent of the result that had become impossible to attain because of the State's initial conduct.

40. As examples of what he meant by leaving the State "free to choose at the outset the means" of fulfilling its international obligation, he mentioned article 14 of the Treaty establishing the European Coal and Steel Com-

munity, which expressly stated that "the choice of appropriate means for achieving" the objectives should be left to the Parties; and the International Convention on the Elimination of All Forms of Racial Discrimination, article 2, paragraph 1, of which declared that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms".[10] In that case, international law respected the freedom of States to the maximum; it did not, as in other cases, even make any suggestion as to the means considered most appropriate. The same applied to articles 22, paragraph 2, and 29 of the 1961 Vienna Convention on Diplomatic Relations and articles 31, paragraph 3, and 40 of the 1963 Vienna Convention on Consular Relations.[11] In other cases, the freedom of the State was implicitly clear from the fact that only the result was indicated, without any reference to means. That was the case with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[12] the States parties to that Convention being left free to choose the appropriate means to guarantee the rights and freedoms defined therein. Apart from international treaty obligations, of which he had given examples, there were many international obligations of customary origin. International custom usually respected the State's freedom to choose the means of achieving the required result, particularly when it was seeking a result that was to be achieved in the internal domain of the State.

41. International obligations were sometimes formulated in such a way as to give suggestions concerning the means to be used to achieve the required result, but such suggestions were in no way binding. He mentioned the International Covenant on Economic, Social and Cultural Rights, article 2, paragraph 1, of which declared that each State party undertook to take steps "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[13] Despite the reference to the adoption of legislative measures, the formula used in no way restricted the freedom of the State. The State was not in breach of its obligation if it achieved the required result by a means other than the adoption of legislative measures. The legislative method was mentioned merely by way of advice but, in the final analysis, it was only the result that mattered. The same could be said of the International Covenant on Civil and Political Rights, which also provided, in article 2, paragraph 2, that States could give effect to the rights in question by adopting "legislative or other measures".[14] He reminded the Commission of the reply given in 1929 by the ILO to the Government of the Irish Free State when it had asked whether legislation was specifically required for the implementation of Convention No. 14 (Convention concerning the application of the weekly rest in industrial undertakings), since a weekly rest period of 24 hours for industrial workers was already standard Irish practice. While observing that the most usual method would be to pass legislation making the weekly rest compulsory, the ILO had pointed out that the Convention left Governments free to apply any system which met with their approval and would secure the effective application of the Convention. It did not conceal its view that the most appropriate method was the passing of legislation to give the force of law to existing practice,[15] but the conclusion to be drawn from the reply was that, in its view, the only criterion for the fulfilment or breach of the obligation was whether or not the weekly rest had been effectively secured.

42. He had given examples of the cases in which the State's freedom of choice with regard to the fulfilment of its obligation extended over a period of time. Sometimes, the State already enjoyed initial freedom of choice between different means of fulfilling its obligation but, in other cases, there was, at the outset, no real freedom of choice with a view to achieving the required result. For example, a State which contracted an international obligation relating to the administration of justice could usually act only through its courts. In either of those two cases, since the situation created by the initial course of conduct was not considered final, it could not yet be concluded that the obligation had been breached. If a court of first instance, in giving a decision or failing to give a decision when it should have done, created a situation incompatible with the required result, international law would not thereupon consider that the result had not been definitively achieved. In fact, through its courts of second and third instance, the State could expunge the consequences of the decision at first instance, so that the obligation would then be regarded as having been fulfilled. If, however, the courts of second and third instance confirmed the situation which was incompatible with the required result and the latter could no longer be achieved, there would be a breach of the international obligation, which would, of course, exist as from the time of the decision of the court of first instance. That was one of the cases mentioned during the drafting of article 18. The internationally wrongful act of the State was constituted by the aggregate of the decisions of the courts; it was thus a complex act.

43. In paragraph 19 of his report, he had pointed out that recourse to a subsequent course of conduct designed to remedy the internationally unacceptable effects of an initial course of conduct was a feature of the "pathology" rather than the "physiology" of the fulfilment of international obligations. It would be inadmissible if States which were required to achieve a particular result adopted the habit of usually doing so merely by rectifying *ex post facto* an initial unacceptable situation.

44. That having been made clear, there was no doubt that, if the international obligation so allowed, when the initial organ involved in the case did not achieve the required result but remedies were available, it was possible for the State to fulfil the international obligation by other, less normal means than those which should have been employed from the outset. States parties to a

[10] See A/CN.4/302 and Add.1-3, para. 17.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*, para. 18.

[14] *Ibid.*

[15] *Ibid.*

treaty might, for example, be requested to place aliens on the same footing as their nationals with regard to the grant of a mining concession. The usual means of achieving that result was for the competent administrative authority to grant such concessions to aliens who applied for them. If an alien who had not obtained a concession appealed to a higher court, however, and the latter granted the concession to him, with compensation, where appropriate, for the delay incurred, the result was also achieved. There was thus no breach of the obligation in question because it did not require the result to be achieved by the decision of a particular organ. That was why it was always necessary to take into account, not only the terms in which the international obligation was stated in the instrument providing for it, but other clauses in the same instrument which might shed light on it, the object and purpose of the instrument and even customary law. Interpretation could be of decisive importance in that respect.

45. When the International Covenant on Civil and Political Rights laid down that "Everyone shall be free to leave any country, including his own" (article 12, paragraph 2) or that "Everyone shall have the right to recognition everywhere as a person before the law" (article 16),[16] it was clear that every State was free to achieve those results by the means of its choice. There would only be breach of those obligations if the freedom to leave a particular country or the right to recognition as a person before the law was not reflected in the facts. Bearing in mind the spirit of the Covenant, it was evident not only that contracting States enjoyed full freedom of choice as to the means to be used to achieve the required result but also that, if the conduct of one of their organs created a situation incompatible with that result, they could rectify that situation. In such a case, there would be no breach of the international obligation if the final result was achieved thereby. There was no doubt about the possibility of remedying an initial situation when a treaty providing for a specific obligation contained a clause requiring the individuals concerned by the fulfilment of the obligation to exhaust all local remedies before the State could be regarded as being in breach of that obligation. It should, however, not be concluded that the possibility of remedying the situation existed only when there was such a clause and, in particular, only when the international obligation in question related to the treatment of individuals, for it was then that a clause of that kind was to be found. As had already been said, the question whether or not the State could fulfil its obligation by remedying, where necessary, a situation incompatible with the internationally required result created by the conduct of one of its organs was to be answered by reference to the text, to the context, to other international instruments or to customary international law.

46. Under paragraphs 1 and 2 of article III of GATT,[17] each contracting party was required to ensure that foreign products were not placed at a disadvantage on the domestic market because heavier taxes were applied to them than to domestic products. There was no doubt that, in the event of an unjustified taxation being applied, the result at which those obligations were aiming would be achieved if the State took steps to abolish the discriminatory charge, even if no clause of the Agreement expressly required it to do so.

47. Summing up, he said that certain obligations did not go so far as to require a specific course of conduct of the State, but merely required it to achieve a particular result. Those obligations were characterized by a varying degree of permissiveness, depending on whether they simply left the State free to choose the means at the outset, in which case it was considered that there was a breach of the obligation if the result was not achieved by that means, or on whether they permitted the result to be achieved later, the negative effects of an initial action being remedied by a subsequent action.

The meeting rose at 1 p.m.

1457th MEETING

Monday, 11 July 1977, at 3.30 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Statement by the Chairman

1. The CHAIRMAN said that one of the factors contributing to the delay in starting the meeting was that, although they carried official passes on their motor cars, at least two members of the Commission had not been allowed to enter the garage and use the parking space available. Unfortunately, it was not the first time that there had been such an occurrence. The members of the Commission, who had important meetings to attend, should be provided with the necessary facilities for doing so, and a firm protest must be made to the appropriate authorities.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result) [1] (*continued*)

[16] *Ibid.*, para. 20.

[17] *Ibid.*, para. 21.

[1] For text, see 1456th meeting, para. 37.