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Summary record of the 1457th meeting

Topic:
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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.

2. Mr. AGO (Special Rapporteur), referring to the question of the breach of the obligations dealt with in article 21, said that it was very important to determine how such a breach occurred, for it was only when the existence of a real breach was established that the international responsibility of a State could be engaged. In the case of the obligations of means referred to in article 20, which required a particular course of conduct, it was sufficient to compare the conduct actually adopted with that required in order to determine whether the obligation had been discharged or breached. However, in considering the obligations of result covered by the present article, it was necessary to compare the result actually attained with the result which the State should have attained. If those two results coincided, the obligation had been discharged; if they did not, it had been breached. All that might seem quite simple, but matters were, in fact, more complicated because there were so many possibilities to be taken into account.

3. In the simplest case, that of an international obligation which required a State to achieve a particular result and left it freedom of choice at the outset as to the means of doing so but only that initial freedom, the State was bound by the choice it made. It could achieve the required result by using one means or another—or even by not actually using any means at all if the result could be attained by omission. The restriction of the State's freedom of choice to an initial freedom of choice could derive either explicitly or implicitly from the instrument establishing the international obligation; there was then no room for doubt. If the State adopted conduct which did not lead it to the achievement of the required result, there was definitive failure to achieve it and a breach of the obligation was established. The restriction in question might, however, not derive from the text establishing the obligation, but could be due to an obstacle in the internal legal order which would rule out any possibility of correcting the effects of the course of conduct adopted at the outset. That was the case when a State chose, as the means of fulfilling its obligation, the enactment of a law, which did not lead to the achievement of the internationally required result but which no judicial authority was empowered to repeal; there was little chance of modifying the situation thus created by internal means and the freedom of choice as to means of fulfilling the obligation amounted to nothing more than initial freedom of choice. The same applied if the means initially chosen by the State was the adoption of a judicial or administrative decision from which there was no appeal. In such circumstances, the general conclusion must be that an international obligation was fulfilled if the result attained by the means chosen by the State at the outset corresponded to the result required by the obligation; otherwise it was breached.

4. That conclusion comprised four elements, all of which were confirmed by an examination of State practice, international jurisprudence and doctrine.

5. First, if, at the outset, the State chose a means which in fact enabled it to achieve the required result, there was, of course, no breach of its international obligation; and its international responsibility was not engaged because it had chosen one means rather than another, even if a preference for one particular means had been expressed in the statement of the obligation. What counted was that the result had been achieved, even if the means used might seem the least appropriate.

6. Second, if, at the outset, the State chose a means which did not seem to be the most suitable, until it could be established *in concreto* that the State had failed in its task of achieving the result required, the fact that it had not taken the measure which, *in abstracto*, appeared to be most suitable was not sufficient grounds for concluding that the State had breached its obligation or that its responsibility was engaged.

7. Third, if a State took a measure which was, in principle, likely to obstruct achievement of the required result but did not itself create a concrete situation contrary to that result, there was no breach of the obligation and no responsibility of the State so long as no real failure to attain the required result was established.

8. Fourth, if the situation actually created by the State, by one or other of the means open to it, was contrary to the required result, the State could not claim to have fulfilled its obligation by saying that it had done its best to do so, namely, that it had adopted measures that were, in theory, likely to lead to the achievement of the required result.

9. With regard to the first two elements of that conclusion, he drew attention to the State practice which he had described in his sixth report and, in particular, to the reply of the ILO to the Government of the Irish Free State.[2] He also referred the Commission to the replies of the Swiss and Polish Governments to the request for information made by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930).[3] Those replies confirmed the validity of the second element, which was connected with the first. He quoted the opinions of the writers mentioned in paragraph 31 of his report.

10. The third element of the conclusion related to the specific case in which the achievement *in concreto* of a result required by an international obligation had not yet been rendered definitely impossible, but the State had taken action, such as the enactment of a law, which made its achievement difficult. An example was the case of an international treaty obligation requiring one State to refrain from confiscating without compensation the property of the nationals of another State. If the State which had assumed the obligation enacted a law providing that foreigners in general could be subjected to confiscation without compensation, it would obviously be moving towards a breach of its obligation, but there would not in fact be any breach until the nationals of the State to which the undertaking had been given actually became victims of the application of that law and were subjected to confiscation without compensation. Among the cases cited in his report, he drew particular attention to the *Tolls on the Panama Canal* case, which had been brought by the United Kingdom against the United States,[4] and

[2] See A/CN.4/302 and Add.1-3, para. 29.

[3] *Ibid.*, paras. 29-30.

[4] *Ibid.*, para. 34.

the *Mariposa Development Company* case.[5] Those cases showed that, so long as there had been no effective concrete acts incompatible with the internationally required result, but only the adoption of a law making such acts possible, there was no breach of an international obligation.

11. The fourth element of the conclusion related to the fact that a State which had not achieved the required result could not take refuge behind the excuse that it had nevertheless adopted measures by which it had hoped to achieve that result. Thus there was a breach of the international obligation precisely by reason of the conflict between what the State had actually achieved and what it ought to have achieved.

12. He then went on to consider other cases. The one he had been discussing until now was the simplest but, as he had said at the previous meeting, it was not the most frequent. It was undoubtedly more usual for a State which had freedom of choice as to the means of achieving the internationally required result to have such freedom not only at the outset but also subsequently and to be able to achieve the required result by redressing, if necessary, the situation which was incompatible with that result and which had been created by its initial conduct. Most international obligations of result were of that type. States were still often unable to discharge their obligations by remedying, by subsequent conduct, the situation created by their initial conduct because such conduct had in fact made the result definitively unattainable or, as he had already said, because there were obstacles in their internal legal systems, such as the absence of a right of appeal, which prevented them from remedying the situation created.

13. Lastly, there was the type of case in which the international obligation was so permissive that it allowed the State to discharge its international duties by achieving an alternative result instead of the originally required result: for example, a result that was the economic equivalent of the original result.

14. He outlined the substance of the two paragraphs of the text he was proposing for article 21. The first paragraph related to the first case to which he had referred, and the second to the two other cases.

15. Mr. TABIBI said that the numerous examples cited by the Special Rapporteur in his brilliant report and oral presentation made it easier to endorse the principles underlying article 21. The first feature of the text, as it stood, was that it simply required a State to ensure the achievement of a particular result. The second, and very interesting, feature was that it left the State free to choose the means of achieving that result and thus respected the State's internal freedom of action. Indeed, the great value of the proposed article was that it would command acceptance by two schools of jurists: that which believed in the supremacy of international law and in international co-operation, and that which defended the interests of the State itself. Fortunately, the article protected the interests of the international community and international law, but at the same time allowed the State to adopt whatever means it thought fit in the light of its own particular situation and its economic, social and other requirements.

16. The Special Rapporteur had explained very lucidly the conclusion he had reached after studying the different types of case, namely, cases in which it was left entirely to the State to choose between the means available to it and cases in which the international obligation did at least indicate a preference. The important factor to bear in mind, however, was the way in which a State achieved the required result and fulfilled its international obligations. Gilberto Amado, a former member of the Commission, had once observed that States were like wild beasts. They did many things to satisfy their own needs but they also did many things to avoid international blame. One of the great difficulties, in the present instance, was to determine how a State could be held responsible when it deliberately sought to evade its international obligations by using delaying tactics or by advancing political, social or other pretexts. Fortunately, article 21 comprised two elements: it gave a State which adopted a reasonable attitude an opportunity of choosing the means of achieving a particular result, since only the State itself was fully acquainted with its own political and economic difficulties, and it also safeguarded the interests of the international community. Nevertheless, the text would require careful scrutiny, both by the Commission and by the Drafting Committee, in order to ensure that the interests of the State and those of the international community were equally protected.

17. Mr. VEROSTA said that the Special Rapporteur's introduction of article 21, although excellent, had not been entirely convincing. He wondered whether the rule stated in paragraph 1 of the article was valid in all cases. It might, for example, lead to difficulties in regard to the protection of diplomatic missions or agents. Was there a breach of an international obligation in the event of an assault on a diplomatic agent if the State which had been required to protect him proved that it had done its best in accordance with customary or written international law? To make embassies totally safe, it would be necessary to convert them into veritable fortresses which no one could enter without the permission of the head of mission. He therefore believed that the draft articles should contain a provision derogating from the strict rule set out in article 21, paragraph 1.

18. Practice showed that terrorism was not new. Many Heads of State had been the victims of assault in foreign territory in the relatively recent past. For example, in 1934, King Alexander I of Yugoslavia had been assassinated at Marseilles on his arrival in France for a three-day official visit at the invitation of the French Government. Clearly, the case did not come under paragraph 2 of article 21 since there was so possible remedy to the situation. It was open to question, however, whether the rule stated in paragraph 1 would have been applicable if France had been able to prove that it had taken appropriate measures. Consequently, he wondered whether the Special Rapporteur considered that, in such cases, a host country which failed to ensure the safety of its guests breached an international obligation, even if it was able to prove that it had taken all the necessary precautions.

[5] *Ibid.*, para. 35.

If not, what were the exceptions to the rule stated in paragraph 1?

19. To sum up, while he agreed that it was the result that counted, he wished some account to be taken of cases in which a State was unable to attain the required result for reasons beyond its control and in spite of having employed all appropriate means in an evident desire to fulfil its international obligations.

20. Mr. AGO (Special Rapporteur) said that he intended to deal in a subsequent article (article 23) with the case of what might be termed, by analogy with municipal law, "wrongful acts conditional on an event". Such wrongful acts were characterized by the occurrence of an external event, such as an attack by individuals on an embassy or a foreign dignitary, which thereby revealed the wrongful nature of the conduct of the State. The purpose of the international obligation was to ensure that the State exercised vigilance to prevent the event from occurring and to protect certain persons from such an occurrence. The event itself was obviously not an act of the State; it could be occasioned by nature or by a third party—an individual or a crowd. The current wave of terrorism gave that situation a special significance, which Mr. Verosta had been right to point out. The act of the State was negligence. So long as no event occurred, such negligence had no effect and it was impossible to determine that the obligation had been breached. But if the event occurred, there was definitely a breach if it could be established that the State could have prevented the event from occurring by exercising greater vigilance.

21. Accordingly, he thought there was no reason for concern about the relationship between the future article 23 and the articles which the Commission was now considering. Obligations whose purpose was to ensure that the State exercised vigilance to prevent certain occurrences could be obligations requiring vigilance to be exercised by a particular organ as well as obligations which left the State free to choose the means by which to exercise such vigilance. It should also be borne in mind that, regardless of the occurrence to be prevented, such prevention could not be absolute. The State could not be required to prevent the event from occurring in any circumstances whatsoever; the obligation merely required it to take every possible step to prevent the occurrence of the event. In other words, the State was not required to do the impossible if the event could not be prevented. It should be noted that the amount of vigilance to be exercised varied according to the importance of the event whose occurrence was to be prevented; an attack on a Head of State in the course of an official visit was not the same as an attack on a private individual. It was thus above all a matter of determining in each case the exact content of the primary obligation breached. There was no contradiction therefore between articles 20 and 21, and the rule on obligations of that nature.

22. Mr. FRANCIS said that he had no basic difficulties with the rules embodied in article 21, which provided that a State was free to choose the means of achieving an internationally required result. He did, however, object to the use of the words "at the outset" in paragraph 1, for in his opinion the State could not be said to have a choice of means only at the outset. It could exercise its freedom to choose from the great variety of means available to it for the achievement of the internationally required result on a continuing basis.

23. For example, in giving effect to the provisions of article 22, paragraph 2, and article 29 of the 1961 Vienna Convention on Diplomatic Relations,[6] a State could, as an initial step, launch a public relations campaign to inform people of its obligation to protect the premises of diplomatic missions and to prevent any attack on the person, freedom or dignity of diplomatic agents. Subsequently, however, it might decide that such a campaign was not sufficient. It could then provide additional protection, for example, by assigning special security guards to some or all of the diplomatic missions in its territory. It would thus be exercising a continuing choice of means of implementing the Convention.

24. He therefore suggested that, in paragraph 1, the words "at the outset" should be deleted. Thus, the general rule embodied in article 21 would be stated in paragraph 1 and the exception to the general rule in paragraph 2.

25. He also objected to the use of the word "conduct" in paragraph 1 because he thought that, since article 20 concentrated on the particular course of conduct to be adopted by the State in achieving a certain result, article 21 should emphasize the fact that the State often had a choice of means of achieving a required result. As the Special Rapporteur had pointed out, the State's intention was of little importance when an international result was to be achieved. Thus, although the State's conduct might be consistent with the highest international standards, it might still be inadequate for the achievement of the required result, precisely because of a fundamental defect in the means chosen by the State for that purpose. On the other hand, the State's choice of means might be excellent, but its conduct might be such as to prevent the achievement of the required result. He would therefore prefer article 21 to place greater emphasis on two possible cases: that in which the exercise of the choice of means of achieving the required result was hampered by the State's conduct, and that in which the State's conduct was frustrated by a basically faulty choice of means.

26. He also had some problems with paragraph 2, which dealt with cases in which the international obligation was less strict than the one referred to in paragraph 1, and in which a State whose initial conduct had led to a situation incompatible with the required result was given a subsequent opportunity to rectify that situation. In his opinion, the wording of that paragraph was likely to give rise to misunderstandings. It should be made clear that a breach of the type of international obligation in question was deemed to exist only if the State had failed to take the opportunity of remedying the situation created by its initial conduct which was incompatible with the required result.

27. Mr. USHAKOV said that a State which received a foreign Head of State must take all possible measures to ensure his safety and that its responsibility was engaged if it failed, despite those measures, to prevent an assault. Whatever the circumstances, whether attenuating or aggravating, its responsibility stood.

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

28. He accepted the principle of the rule stated in article 21, which derived from that set out in article 20. He pointed out, however, that in his commentaries to both those articles the Special Rapporteur had cited as examples mainly measures, whether legislative, administrative or judicial, which the State should take within the sphere of its domestic jurisdiction, whereas obligations of result were generally obligations of international law. They required a State to take measures not only within the sphere of its domestic jurisdiction but also in that of international relations. The Commission should mention that point in its commentary for the benefit of foreign ministries, and not confine itself to quoting examples drawn from the sphere of internal affairs.

29. He approved of the substance of the article proposed by the Special Rapporteur but found the text too descriptive. In paragraph 1, the words "*in concreto*" seemed pointless, for a result was always concrete. The word "particular" also seemed to him to be superfluous. In his opinion, it would be preferable to refer simply to the "result required by the obligation". Nor did he see the need for the phrase "but leaving if free to choose at the outset the means of achieving that result", for it was obvious that, if the obligation required the State to achieve a result, the State was free to choose the means of achieving it. The words "by the conduct adopted in exercising its freedom of choice" seemed equally unnecessary, since a result was always achieved by some form of conduct. In his view, those were explanatory phrases which no doubt had their place in the commentary but were superfluous in an article, which should be confined to stating a rule that could be interpreted in only one way. It would accordingly suffice to say, in paragraph 1, that:

> "A breach of an international obligation exists if the State has not achieved the required result."

Perhaps the phrase "Subject to the provisions of paragraph 2" should be added at the beginning of paragraph 1, since paragraph 2 provided for an exception to the rule set out in paragraph 1.

30. In his opinion, paragraph 2 was really concerned with the "act of the State", for it was that which was incompatible with what was required of the State by the obligation. Thus, the case contemplated in paragraph 2 was an application of article 16. If an initial act of a State was incompatible with the required result, the State could achieve that or an equivalent result by another act.

31. He was in favour of referring article 21 to the Drafting Committee, which would no doubt be able to find suitable wording with the help of the Special Rapporteur.

32. Mr. SETTE CÂMARA said that article 21 dealt with obligations of result, by which the State was committed to achieve a particular result by whatever means it chose. In international life, obligations of result were encountered much more frequently than obligations of conduct, which had been dealt with in article 20.

33. In paragraph 19 of his sixth report (A/CN.4/302 and Add.1-3), the Special Rapporteur had noted, in referring to obligations of result imposed by treaties, that, even if a State had initially adopted conduct not in conformity with an obligation, it might be given another opportunity to correct that conduct in order to achieve the desired result. The Special Rapporteur had, however, pointed out that that situation was different from the one in which a State fulfilled an obligation by whatever means it chose, for recourse to a subsequent course of conduct led to an *ex post facto* correction of a situation which had frustrated the achievement of the internationally required result. It thus partook "of the pathology rather than the physiology of the fulfilment of international obligations". The Special Rapporteur had also referred to another, more radical case, in which the State's initial conduct, which had not been in conformity with the obligation, was completely obliterated by the subsequent adoption of a different course of conduct and in which the required result was achieved by alternative means. An example of such a case was that of reparation for injury.

34. In paragraph 27 of his report, the Special Rapporteur had reached the logical conclusion that the State's choice of the means to be employed could in no case constitute a breach of the obligation in question, and that the breach could consist only in the fact that the State had not in practice succeeded in achieving the result internationally required, by one or other of the means available to it. The four elements of that conclusion, which had been described in paragraph 27, gave a complete picture of the different situations in which a State might find itself in attempting to fulfil an obligation of result. In paragraph 28, the Special Rapporteur had then shown that the conclusion he had reached in paragraph 27 was the obvious consequence of the fact that "in the cases considered, it is only the result actually achieved which counts, and a comparison of that result with the result which the State should have achieved is the only criterion for establishing whether the obligation has been breached or not". The Special Rapporteur's review of the opinions of writers had, moreover, shown that permissiveness had as important a place in article 21 as specificity had in article 20.

35. Although he had no major difficulties with the rules embodied in article 21, he thought that the wording could be improved. For example, the Latin words "*in concreto*" in paragraph 1 could be deleted because they added nothing to the idea of the achievement of "a particular result"; moreover, the Commission usually avoided the use of Latin words in draft articles. With regard to the concept of an incomplete breach introduced in paragraph 2, he believed that a breach of an international obligation, which might be corrected by subsequent conduct, either existed or it did not. There could not be an incomplete breach which was subsequently completed. He therefore suggested that, in paragraph 2, the words "the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct" should be replaced by the words "the State has failed to take the subsequent opportunity to correct the breach begun by its initial conduct". The Drafting Committee might take those drafting comments into account when it considered article 21.

The meeting rose at 6.05 p.m.