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Summary record of the 1461st meeting

Topic:
State responsibility

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treaty also provided for the exhaustion of local remedies, the nature of the obligation might change again, because the judiciary of the State would have to ensure that there were adequate remedies for the aliens in question if they were, for instance, unlawfully detained. All those factors would have to be taken into account in determining the time when the breach had actually occurred.

44. Referring to the commentary to article 21 (A/CN.4/302 and Add.1-3, chap. III, sect. 6), he said that, although it provided a wealth of information, it did not contain very many examples of State practice. The draft articles would, however, be of valuable assistance to many persons and, in particular, to ministry of foreign affairs officials. He therefore suggested that it should be indicated in the report that, although the commentary did not contain very many examples of State practice, the members of the Commission had based their conclusions on their experience of the development of that practice. He also suggested that, when Governments were requested to comment on the draft articles, they should also be requested to provide further examples of State practice in order to assist the Special Rapporteur and reinforce the experience of the members of the Commission.

45. Mr. USHAKOV stressed the importance of the distinction between obligations of means or conduct and obligations of result. With regard to obligations of result, he was more and more convinced that the emphasis should be placed not on a particular course of conduct but on a particular act. In the *Tolls on the Panama Canal* case, referred to by the Special Rapporteur in paragraph 34 of his sixth report, there had been a particular course of conduct on the part of the United States Government—the enactment of a law—but no act leading to a result that was not in conformity with the result required by the international obligation in question, since that law had not been applied. When the law was amended, the international obligation had not been breached. He therefore considered that a breach of the international obligation existed, not in the case of conduct by the State which did not in fact achieve the internationally required result, but in the case of an act by the State which was not in conformity with the result required of it by that obligation. In the case in point, there would have been a breach of the international obligation if the United States Government had levied tolls in application of the said law.

46. Referring to Mr. Reuter's remarks to the effect that the breach of an international obligation could arise out of a series of actions or omissions, in the case of a complex act, he pointed out that a single act would suffice in such a case. Where an official of the customs authorities of a State party to GATT charged duty on foreign products in breach of article III of the Agreement, there was an act conflicting with the achievement of the internationally required result, giving rise to a breach of the provisions in question. If that act was not rectified, the breach would exist from the time of the first act. If it was rectified, for example, by rescinding the mistaken decision, the second act would cancel out the first.

47. Finally, he referred to the case of a receiving State which did not accede to the request of a State for its embassy to be placed under the protection of the local police. As long as no unauthorized person entered the embassy premises, there was no act that conflicted with the internationally required result but merely a course of conduct by the receiving State. That conduct did not of itself give rise to a breach of an international obligation.

The meeting rose at 1.05 p.m.

1461st MEETING

Friday, 15 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. Tabibi, Mr. Thiam, 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 21 (Breach of an international obligation requiring the State to achieve a particular result) [1] (*concluded*)

1. Mr. AGO (Special Rapporteur) said he would sum up the debate on article 21, first reviewing the principal comments made by the members of the Commission and then taking up some general matters.

2. At the outset (1457th meeting), Mr. Tabibi had stressed a fundamental point: breaches of international obligations varied according to the form of the obligations. Mr. Verosta had made excursions into the past and the future (1457th meeting) and had brought out the close link between article 21 and article 16 [2] (1460th meeting), while Mr. Francis (1457th meeting) had dwelt on a very important point, namely, that a distinction must be made between the means a State chose to achieve the required result and its actions or omissions after making that choice. Sometimes the choice was excellent but the ensuing actions or omissions prevented achievement of the required result.

3. Mr. Ushakov had shown (1457th meeting) the importance of article 21 from the point of view of both the time and the circumstances of the breach. He had spoken about the commentary to the article and also about its text, and several of his drafting comments had touched on matters of substance. Finally, he had rightly pointed out (1460th meeting) that the act of the State referred to in

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

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

article 16 and the action or omission of the State to which article 18 referred were notions which did not necessarily coincide. Mr. Sette Câmara had made some valuable drafting comments (1457th meeting), particularly with regard to the expression "*in concreto*". In a pertinent comment, which merited the Commission's attention, Mr. Thiam had questioned (1460th meeting) whether it was really appropriate to introduce the idea of means in a provision relating to obligations of result. He had also asked what was meant by the reference in article 21, paragraph 2, to the beginning of a breach. It must be admitted that the wording in question required, at the least, some clarification.

4. After stressing the importance of distinguishing between international obligations according to their nature when dealing with the question of a breach, Mr. Šahović (1460th meeting) had suggested a change in the order of the draft articles. He had also expressed the view that article 16 was rather too general. Mr. Calle y Calle (1460th meeting) had commented mainly on points of drafting and translation.

5. As Mr. Reuter (1460th meeting) had elegantly put it, his intention in drafting article 21 had been to shape the question of responsibility (for the breach) by reference to the characteristics of the obligation. Mr. Reuter had also said that, in his opinion, there was a gap between article 16 and articles 20 and 21, and he had suggested that it should be filled in article 21. He (the Special Rapporteur) considered, however, that account must also be taken of article 18 and, to that end, he would later draft a provision on the duration of the wrongful act. Mr. El-Erian (1460th meeting) had expanded on the question of alternative results, observing that the alternative result which a State might be authorized to produce when the original result was no longer attainable very often took the form of compensation or reparation. It must be emphasized that such cases involved the fulfilment of a primary obligation, which had nothing to do with reparation for an internationally wrongful act.

6. Mr. Schwebel (1460th meeting) had taken the view that the wording of article 21 should be somewhat simplified. He agreed, but wanted to ensure that none of the essential elements of the provision were eliminated. Mr. Dadzie (1460th meeting) had concentrated on the drafting and had advocated the use of the word "method" as corresponding more or less to the word *moyen*. He had spoken of a "new method" designed to remedy a situation not in conformity with the internationally required result. Mr. Quentin-Baxter (1460th meeting) had shown, on the basis of judicial decisions, that the difference between the two types of international obligation envisaged was more subtle than it appeared. He had maintained that the decisive factor was the meaning to be given to the expression "complex act", and it would, in his opinion, be necessary to define the relationship between the initial and the subsequent conduct of the State in each particular case.

7. Sir Francis Vallat had referred (1460th meeting) to article 18 and pointed out that one and the same treaty provision could impose on a State both obligations of conduct and obligations of result. He had stressed the importance of the notion of a complex act for the purposes of articles 21 and 22 and had suggested that Governments be requested to provide the Commission, for its second reading of the draft, with additional information on international judicial decisions and State practice, since the examples given in the report under study, although numerous, were mainly limited to certain countries and certain types of case.

8. Turning to more general matters, he observed that all the members of the Commission had shown that they were fully aware of the importance of articles 20 and 21 and of the distinction made, for the purpose of establishing the existence of a breach, between the two types of international obligation to which they applied.

9. As to the order of the articles, it seemed out of the question to place article 21 before article 20, since it was logical to proceed from the more simple to the more complex. Although it would be possible to place articles 20, 21 and 22 (and, perhaps, future articles 23 and 24) immediately after article 18, so that the present article 19 would become the final provision of chapter III, articles 20 and 21 could not be placed immediately after article 16, since articles 16, 17 and 18 formed a logical sequence and articles 17 and 18 were the indispensable premise for the subsequent articles.

10. In that connexion, he pointed out that the chapter under study dealt with the objective aspect of an internationally wrongful act, in other words, the breach of an international obligation, whereas chapter II dealt with the subjective aspect. Article 16, the first article of chapter III, contained an entirely general rule, the wording of which could perhaps be improved. In that provision, the Commission had referred to the "act of the State", and not to its conduct, whether action or omission. It could be seen from article 18 that there were acts of a State which did not involve an instantaneous action or omission and which could extend over a period of time (continuing acts), or consisted of a set of similar actions or omissions relating to separate cases (composite acts) or of a plurality of different actions or omissions by State organs relating to the same case (complex acts). Article 18 dealt first with the simplest case: that of an act constituted by an instantaneous action or omission. The article stated that there was a breach of the obligation in that case if the instantaneous act was performed at a time when the obligation was in force. The article went on to deal with acts having a continuing character. In order for the obligation to be breached, it was enough for it to have been in force at any time in the period during which the act had continued. The article then dealt with the case of a composite act. If an international obligation prohibited a discriminatory practice, the State could not be held to have breached that obligation merely because it had committed an isolated act of discrimination against one person. No internationally wrongful act and, thus, no breach of the international obligation existed until cases of discrimination had become sufficiently numerous to constitute a discriminatory practice. The internationally wrongful act then comprised all the instances of such conduct of the State, from the first to the last. Nevertheless, if the international obligation arose during that process, only the cases of discrimination subsequent to the creation of the obligation would come into consideration.

There was thus a breach of the obligation only if such subsequent cases alone were sufficient to constitute the "discriminatory practice" prohibited by the obligation.

11. The last paragraph of article 18 covered the case of a complex act. Such an act involved either successive action by several organs in the same case or repeated action by one organ with, in all cases, a plurality of actions or omissions. Such an act occurred, for example, when a foreigner who had applied to a court of first instance to settle a dispute under internal law had his case dismissed because he was a foreigner or because the court denied him the right to defend himself or gave a judgment that was obviously and purposely unfair. Such conduct on the part of a court was not, however, sufficient to constitute a denial of justice in the strict sense of the term. It was only when the judicial organs before which the case was subsequently brought had acted in the same way as the court of first instance that the denial of justice could be established. There was then a "complex act" comprising a plurality of actions or omissions. For it should be noted that an international obligation requiring the State not to deny justice to foreigners was usually not aimed at the conduct of a particular judicial organ but at the judicial system as a whole and its ability to ensure proper administration of justice in regard to foreigners.

12. The debate on article 21, paragraph 2, had to some extent run over on to article 22, which covered cases in which the international obligation was established for the benefit of individuals and in which the achievement of the internationally required result therefore called for the co-operation of the individuals concerned. Article 21 did not cover such special cases. But international obligations which the State could still discharge by rectifying, by subsequent conduct, a situation which had been created by its initial conduct and which was incompatible with the required result did not relate only to the treatment of individuals. Even in the case of obligations requiring a result which directly concerned only States themselves, a State might have to rectify, by the action of a higher authority, the unsatisfactory action of a lower authority. In such a case, there could be no question of the co-operation of individuals or of the exhaustion of local remedies by the individuals concerned.

13. At the 1460th meeting, Mr. Quentin-Baxter, taking up a comment by Mr. Thiam, had questioned whether it was appropriate to introduce the idea of means in a provision concerning obligations of result. In his own view, it was obvious that the requirements of article 20 and of article 21, in the final analysis, necessarily related to the conduct of the State. The difference between the two articles was that, in the case of article 20, the action or omission which the international obligation required or sought to prevent was specifically indicated whereas, in the case of article 21, in which the obligation required only a result, it was obviously by some form of conduct that the State would be able to achieve it, but the State was free to choose the form of conduct by which it would do so. If an international obligation required a State not to discriminate between men and women with regard to remuneration for work, the State could achieve the required result by enacting a law, by adopting a certain practice, by giving instructions to local labour authorities or by any other appropriate means. There would be a breach of its international obligation only if it could be established that women were in fact paid less than men for the same work and that such a situation resulted from an action or an omission by the State.

14. He therefore saw no objection to using the word "conduct" in the text of article 21, even though it was clear that the article related not to a breach of an obligation "of conduct" but to a breach through the conduct adopted of an obligation "of result". In any event, care must be taken to avoid fetishism in regard to the terminology of the preceding articles. For example, he was not averse to the use of the expression "obligation of conduct" as an equivalent of the expression "obligation requiring specific conduct", as suggested by Sir Francis Vallat.

15. As for the expression "*in concreto*", which had been criticized, he had used it to show clearly that the result must actually be achieved. A State could not justify failure to achieve the internationally required result by claiming to have taken measures designed to achieve the result. Thus, it was not enough to enact a law providing for equal pay for equal work by men and women: the law must be applied. If a contrary practice persisted, the result was not achieved "*in concreto*". He agreed, however, that the use of the Latin expression was not absolutely necessary. The words "at the outset" were merely intended to show that, in certain cases, the international obligation left the State initially free to choose between different means of achieving the required result. As in the first case considered, the State might, however, be given only such initial freedom of choice, whereas it had been seen that other international obligations also allowed the State to remedy by a subsequent means the situation created by the initial use of a particular means. Comments had also been made on the words "breach begun", which had already been used when the Commission had studied complex acts in connexion with article 18. In any event, it should not be forgotten that the texts of the articles he was proposing were only provisional and that their final wording would be the joint work of the Commission.

16. Lastly, referring to a comment made by Mr. Ushakov (1457th meeting), he explained that, if the cases he had cited as examples in connexion with article 21 concerned certain matters rather than others, it was partly because the compilations did not give a complete survey of all disputes, but also because international obligations which were fulfilled in the sphere of inter-State relations rather than in the sphere of the internal order of the State were more often germane to article 20 than to article 21. In the direct relations between States, the State was often required to adopt a particular course of conduct (to hand over or sink its warships, not to fortify a region, not to fly over a certain territory or to refrain from entering extraterritorial premises etc.). International obligations of result, on the other hand, were much more common where the purpose of international law was to produce certain effects in the internal order of States. He would try to add to the examples he had already given, but the new examples would relate more to article 20 than to article 21, for the reason he had just stated.

17. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 21 to the Drafting Committee.

It was so agreed.[3]

The meeting rose at 11.15 a.m.

[3] For the consideration of the text proposed by the Drafting Committee, see 1469th meeting, paras. 1-10.

1462nd MEETING

Monday, 18 July 1977, at 3.10 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. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76) (*concluded*)* (A/CN.4/300, A/CN.4/305)

[Item 5 of the agenda]

REPORT OF THE WORKING GROUP (A/CN.4/305)

1. Mr. EL-ERIAN (Chairman of the Working Group), introducing the report, said that the Working Group set up by the Commission to consider item 5 of the agenda (A/CN.4/305) had held three meetings, at which it had discussed ways and means of carrying out the task entrusted to it and had reached agreement on the course of action to be recommended to the Commission.

2. Most of the members of the Working Group had been of the opinion that the Commission should undertake the study of the topic at its 1978 session, so that the Secretary-General could take the results into account in the report on the implementation of the 1961 Vienna Convention on Diplomatic Relations, which he had been requested to submit to the General Assembly at its thirty-third session, pursuant to paragraph 5 of General Assembly resolution 31/76. They had also maintained that the Commission would require further information and observations from Governments. Other members of the Group had taken the view that the study should concentrate mainly on finding solutions to the problems concerning abuses of the diplomatic immunities of diplomatic couriers and abuses of the diplomatic bag. The Working Group had nevertheless been able to reach a consensus on suitable ways and means of dealing with the topic. The conclusions it had agreed to recommend to the Commission were contained in paragraph 4 of its report, which it was submitting to the Commission for its consideration and approval.

3. The Group had recommended that the topic should be included in the Commission's programme of work for its 1978 session, and that it should be taken up during the first half of that session in order to facilitate the Secretary-General's task in submitting his analytical report to the General Assembly at its thirty-third session. The Working Group considered it advisable to follow a procedure similar to that adopted by the Commission when studying the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, and it was prepared to undertake the first stage of the study of the topic and to report on it to the Commission without appointing a special rapporteur.

4. The Working Group intended to study the topic on the basis of the proposals and observations submitted by States Members of the United Nations, pursuant to General Assembly resolutions 3501 (XXX) and 31/76. To facilitate the Group's task, members of the Commission would be invited to submit papers, preferably before the beginning of the 1978 session, and the Secretariat would be requested to remind Member States of the Commission's intention of studying the topic and of the desirability of sending it their proposals and observations. The Secretariat would also be requested to prepare a paper presenting the proposals submitted by Member States. The Working Group had agreed that the Secretariat paper would consist of an introductory part dealing with proposals relating to the topic in general, and a substantive part containing an analysis of those proposals.

5. Mr. TABIBI said he fully supported the report prepared by the Working Group and the recommendations it contained. He would, however, be grateful to the Chairman of the Working Group for a fuller explanation of why the Group had considered it appropriate to depart from the usual practice, which was that the Chairman raised questions and asked members of the Group and of the Commission to comment on them.

6. When the Working Group undertook its study, he thought it should bear in mind the complicated nature of the status of the diplomatic courier and the diplomatic bag, and the many developments in the practice of States that had taken place since the adoption of the 1961 Convention on Diplomatic Relations. For example, the diplomatic bag was, at present, often carried by special, rather than regularly scheduled, aircraft. The Group would therefore have to decide whether the protocol to be drafted should contain provisions relating to such special aircraft.

7. Since the topic of the diplomatic courier and the diplomatic bag was a matter of concern to all States Members of the United Nations, he thought that the States which had not yet done so should be urged to transmit their proposals and observations to the Commission in time for its 1978 session. Those proposals and observations would be of great assistance to the Commis-

* Resumed from the 1425th meeting.