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Summary record of the 1468th meeting

Topic:
State responsibility

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principles and issues that emerged from it but rather to make certain that what it did codify did not conflict with principles that properly belonged to a more detailed and specialized study of the rule.

45. Like most of his colleagues, he had no doubt that the rule was a substantive rule of law, which bulked quite large in the practice of States in their conception of their relationship to other States. In the final analysis, however, obligations were always measured in terms not of substance and procedure but rather of primary and secondary rules. For many, there was a substantive primary element in the rule of exhaustion of local remedies, and any reference to exhaustion of local remedies as the genesis of responsibility implied that the obligation was breached by a complex act which was not complete until the rule had been applied and had failed to produce the correct result. That was a perfectly valid point of view because, in certain cases, the whole conception of the rule of exhaustion of local remedies was, in a sense, a counterpart to the conception of State sovereignty and the responsibility of the State arising through the actions of each of its government organs; in other words, respect for the sovereignty of the State in matters linked to the internal order of that State permitted it to be judged not by what was done initially or by any one organ but only by the test of whether every means at the disposal of the State under its internal order had been applied.

46. There was another important corollary in comprehending the place of the rule in the draft. If he had understood the Special Rapporteur rightly, the rule was not intended to limit the obligations of States which arose in some other way. For example, the breach of a treaty obligation might immediately give rise to international responsibility vis-à-vis the other State concerned, regardless of whether nationals of that other State had suffered from the breach and whether, if they had pursued any local remedies available, the first State was liable on that count too. That seemed to be quite clear as a matter of doctrine and from the presentation of the report, but in the actual drafting of the rule care should be taken not to suggest that it evacuated some responsibility towards another State which existed independently of the rule.

47. He had no real difficulty regarding the relationship of the rule to article 20. Once it had been agreed, under a different kind of obligation, which might well be one of conduct, to carry out the specific terms of a treaty requirement, that obligation could exist quite independently of the question of responsibility to achieve a given result in regard to the private persons affected.

48. He was, however, a little concerned about the relationship of the rule to article 21. He noted in that connexion that the Special Rapporteur had referred to the rule as being in a sense a sub-aspect of article 21, as indeed it was. At the same time, he was pleased to see the the rule appear as a separate provision for he did not think it could appropriately form part of article 21. The Commission was bound to leave open the question of the moment at which international responsibility arose and, in that respect, there must be a significant difference in the drafting of the two articles.

49. With regard to the State itself, the Special Rapporteur had referred in paragraph 103 of his commentary to the modern tendency for States to participate more directly in commercial concerns. The Commission's discussions on succession to State property and debts suggested that it should go even further than was suggested there, since all members had apparently been willing to contemplate the circumstance that an international person —a sovereign State or international organization—could, if it chose, accept obligations at the domestic level under the internal law of another State and that, if it did so, the procedures applicable to its legal remedies were the same as for private persons. He saw no reason in principle why the rule of exhaustion of local remedies should not apply to a Government which, for example, chose to buy bonds issued by another Government on terms regulated by the latter's internal law. That seemed a perfectly reasonable extension of the application of the rule.

50. At the present stage, the rule had little to do with nationals, although the Special Rapporteur had rightly drawn attention to the treaty provisions relating to the rule.

51. He was somewhat concerned also about the statement in the commentary that obligations in regard to nationals were for practical purposes of a conventional nature only. It was necessary to bear in mind the shadowy borderline between what belonged to the treaty itself and what belonged to the common heritage of received law arising under the United Nations Charter. It was also necessary to recognize that the Commission was at present drafting secondary rules and was not advancing by one iota any obligations whatsoever of the State towards its own nationals but simply providing a matrix against which positive obligations could be measured.

52. Lastly, the distinction between aliens and nationals should not receive undue emphasis in the draft since that would simply lead the Commission back to some of the difficulties which had beset Mr. García Amador's draft long before. It would be wiser to rest on the general proposition that the Commission's work on the present draft had nothing to do with the making of primary rules and was solely concerned with drawing up a system of secondary rules which would not in any way constrain or prejudge developments in the primary field.

The meeting rose at 6.15 p.m.

1468th MEETING

Friday, 22 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

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

[Item 2 of the agenda]

Draft articles submitted by the Special Rapporteur (*concluded*)

Article 22 (Exhaustion of local remedies) [1] (*concluded*)

1. Mr. TSURUOKA said there was no doubt that the rule of exhaustion of local remedies was a well-established rule of customary international law, which was recognized not only in international jurisprudence and doctrine but also in State practice. However, while he could fully accept the Special Rapporteur's explanations on that point, he found it less easy to share his opinion concerning the reason for the rule and the scope of its application.

2. The Special Rapporteur saw in the rule no more than a rule of substance making it possible to establish the existence of the breach of an international obligation; he did not think it was in any way procedural. In his own view, however, that opinion was too rigid. At first sight, the question might seem too abstract for study by the Commission, but it was of some practical importance, especially for the determination of the point at which the wrongful act occurred. For the Special Rapporteur, it was in particular to the collaboration of the injured persons that one must look to determine whether there had been a breach by the State of an international obligation requiring it to grant certain treatment to aliens. If the person concerned had obtained the required or equivalent treatment after exhaustion of the local remedies, there was no breach of the obligation. The Special Rapporteur further claimed that there was no such breach if the injured person made no use of the local remedies.

3. It was on those points that he did not altogether agree with the Special Rapporteur. As the Special Rapporteur indicated in paragraph 40 of his report (A/CN.4/302 and Add.1-3), in certain cases the State failed irremediably in its duty and there was no possibility of using any subsequent means to restore the situation *ab initio* in conformity with the internationally required result. That was the case when a State clearly breached the customary international obligation requiring it to take minimum preventive measures to protect foreigners against attacks due, for example, to an outbreak of xenophobia. It was so in the case considered in article 21, paragraph 1, namely, when the breach of the international obligation was definitive. It did not matter whether the victim had been given financial compensation or an equivalent result had been produced. Subsequent action of that kind could not erase the breach of the international obligation. Indeed, when private persons had recourse to internal remedies, it was not in order to erase the breach of an obligation but to obtain compensation or reparation. It seemed that, even in cases of that kind, the rule of exhaustion of local remedies prevented the State whose nationals had been injured from making a claim on the State charged with responsibility so long as the injured persons had not exhausted all the internal remedies.

4. If that was so, he was inclined to think that, in such cases, the rule of exhaustion of local remedies was not a substantive rule, which determined the existence of the breach, but a procedural one. In support of that view, he quoted the opinion of Schwarzenberger:

> "The rule does not mean that, until it has been complied with, no international tort has been committed. Clearly, at this stage, an international obligation has been broken. Yet until ... the foreign national has done everything in his power to obtain redress 'through the ordinary channels', his home State lacks the requisite legal interest in taking up the claim on the international level. ... the function ... of the local remedies rule is to establish whether the point has been reached at which the home State may actively intervene and raise the issue on the international level."[2]

5. Consequently, he did not think the Special Rapporteur could deny that there was any procedural aspect to the rule of exhaustion of local remedies. Admittedly, the rule sometimes made it possible to determine the existence of a breach of an international obligation, particularly when a dispute was brought before the courts. However, the breach was not truly established until the last court rendered its verdict. If it was right to speak of the rule of exhaustion of local remedies as a substantive rule in relation to the article under study, it would none the less have to be considered as a procedural rule in the part of the draft dealing with the implementation (*mise en oeuvre*) of the international responsibility of States.

6. The existence of a link between the injured person and the injuring State seemed essential for the application of the rule of exhaustion of local remedies. It would, for example, be wrong to require a person injured by a soldier of an occupying Power to exhaust the local remedies of that Power. Similarly, a fishing vessel stopped and searched on the high seas by a vessel of a State other than its own should not be obliged to exhaust the remedies available in that State. An equitable balance must be maintained in the protection of the interests of the two parties involved. The foundation of the rule was certainly respect for the sovereign jurisdiction of the State, which should have an opportunity to remedy the situation by its own means, within the framework of its own internal law, as the International Court of Justice had recognized in the *Interhandel* case.[3] Consequently, he felt that the scope of the rule of exhaustion of local remedies should be limited to cases in which the individual in question had voluntarily placed himself under the jurisdiction of the injuring State. The applicability of the rule should not depend solely on the existence or absence of internal remedies.

7. He considered the greatest caution was necessary in asserting that the rule in question was applicable to the nationals of the injuring State. Application of the rule to a State's own nationals was a very recent phenomenon, which almost always originated in conventional rules and was found essentially in the sphere of human rights.

[1] For text, see 1463rd meeting, para. 1.

[2] G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 603-604.

[3] *I.C.J. Reports* 1959, p. 27.

8. From the drafting angle, he suggested that, since article 22 concerned essentially the breach of the obligation and not the generation of responsibility, its second sentence should be deleted.

9. Mr. DADZIE said that the wide variety of sources on which the Special Rapporteur had based his views concerning the rule of exhaustion of local remedies, and which he had taken from conventional and customary law, jurisprudence and State practice, provided ample evidence both of the complexity of the topic and of the fact that it might not be ripe for codification. However, the Commission had a duty at least to begin its study of the topic and to deal as thoroughly as possible with all the material provided by the Special Rapporteur.

10. He fully agreed with the Special Rapporteur that the rule of exhaustion of local remedies was a rule of general international law. He nevertheless considered that the importance of that rule had until now been apparent mainly in cases involving the protection of the economic interests of weaker States. It was thus a rule with strong political overtones.

11. In general, he approved the Special Rapporteur's treatment of the topic under consideration, but he did not think the Special Rapporteur had taken sufficient account of the fact that the rule of exhaustion of local remedies could be a prerequisite for the existence of international responsibility. Accordingly, an international tribunal seeking to do justice had to determine whether all the remedies locally available to an injured person had in fact been exhausted before it could say that international responsibility was engaged.

12. He could not support the Special Rapporteur's view that the rule of exhaustion of local remedies should apply to international obligations of the State concerning the treatment to be accorded to its own nationals. Indeed, if the scope of application of the rule was extended beyond the scope of application of the provisions of existing international human rights conventions, relating to the obligation of States to guarantee the human rights of their nationals, there might, in his view, be interference in the internal affairs of States.

13. He was also concerned by the fact that article 22 did not provide either for cases in which local remedies were ineffective or unavailable or for the case in which the State was so obviously at fault that it was prepared to take immediate action to compensate the individual whose rights or interests had been infringed. He therefore hoped that the Drafting Committee would take account of such cases when it considered article 22.

14. Mr. USHAKOV pointed out that there were two categories of indemnification: indemnification in consequence of international responsibility and indemnification in consequence of a primary rule. In the example quoted by Mr. Tsuruoka, indemnification was one of the forms taken by international responsibility.

15. If a State had breached an international obligation with respect to the treatment of aliens and an international tribunal had held it responsible in that connexion, the State would have to indemnify the victims of the breach because its responsibility had been engaged, and the amount of compensation would be fixed by the tribunal. In such a case, the indemnification formed part of the process of implementation of the State's responsibility. On the other hand, if an agreement provided that aliens resident in a State were to be compensated in the event of nationalization of their property, the indemnification represented merely the application of a primary rule. The distinction was very important for, in the first case, the indemnification was procedural while in the second it was not.

16. Mr. AGO (Special Rapporteur) noted that the Commission was unanimous in recognizing that the principle which required the exhaustion of local remedies by private beneficiaries of certain international obligations did not have a purely conventional origin but was of long standing and had arisen in general international law at the same time as certain rules concerning the treatment of aliens. Mr. Francis had rightly pointed out the link which existed in that respect between the rule stated in article 22 and those in articles 20 and 21.

17. Contrary to what Mr. Tsuruoka had gathered, he had never denied that the rule of exhaustion of local remedies had also procedural aspects. Indeed, he had said in paragraph 51 of his report that no one could dispute "that the principle has an obvious impact on the possibility of utilizing the procedure for implementing responsibility" and that the "undeniable impact of the principle of these different procedures is a corollary, and a logical one, of the principle in question". He had added, however, that "this does not warrant the conclusion that the principle itself is merely a 'practical rule' or a 'rule of procedure', as some contend".

18. The principle of the exhaustion of local remedies did not arise from treaties, even if some treaties did reflect the principle, whereas international procedure was always based on treaties. How then could a rule which had arisen in international custom at the same time as the primary rules concerning the treatment of aliens in the national territory of a State be merely a rule of procedure? It was perfectly clear that the principle was linked in the first place to the performance and possible breach of obligations concerning the treatment of aliens, even though it necessarily had implications for the procedures in respect of implementation (*mise en oeuvre*) of responsibility. That was why the definition of the principle in question was to be found in article 22. Articles 20, 21 and 22, which formed an organic whole, sought to show how the performance and breach of the various international obligations differed according to their nature. As had been seen, there were, undoubtedly, international obligations which required the State to adopt a specific conduct, which might be an action, an omission or a series of actions or omissions. In that case, if the required action or omission did not occur, there was an immediate breach of the obligation, whatever the sphere of international law concerned by the obligation.

19. However, along with those obligations concerning means, there existed obligations which required the State merely to produce a certain result. That result might have to do exclusively with relations between States, as in the case dealt with in article 21, or with relations between a

State and private persons, as in the case covered in article 22. If, in the latter instance, an international obligation required for example that aliens be permitted to engage in a certain commercial activity on the same footing as nationals of the State, the mere fact that the first local authority from which an alien sought the necessary authorization refused it would not justify the conclusion that the result required by the obligation would not be achieved if, in the internal legal order of the State in question, any person considering himself injured by a decision of a local authority could appeal to a higher body. In such a case, the co-operation of the individual was inherent in the discharge of the obligation.

20. Even in the specific area of treatment of aliens, the principle of exhaustion of local remedies did not always apply. There were cases in which the breach of the obligation was immediate, and those were of two types. The first, obviously, was where obligations were not of result but of conduct or means. For example, if one State had undertaken in a bilateral agreement to enact a law extending a certain treatment to the nationals of another State, its failure to enact that law entailed an immediate breach of the obligation, and the question of exhaustion of local remedies did not arise. Thus, the rule in article 20 could in certain cases apply to the treatment of aliens, as Mr. Riphagen had pointed out at the 1466th meeting.

21. The breach of the obligation could also be immediate if it was obvious from the time of the State's initial action or omission that the required result had not been achieved and never would be. For example, the characteristics of the internal law of a State or political circumstances might be such that it would be absurd to speak of exhausting local remedies because such remedies were inexistent or inaccessible. The breach would then be immediate because the State's first action or omission would reveal the total and definitive impossibility of achieving the required result.

22. Similarly, it was clear that, in States where domestic law took precedence over international law and where the legislation in force conflicted with the result required by an international obligation, it would be pointless for an individual to appeal to other national bodies after the first administrative or judicial authority he had approached had denied a right which should be his according to international law, for those bodies would always apply the domestic law, which itself would be contrary to the requirements of the international obligation. Nor was there any question of applying the condition of exhaustion of local remedies in a case where action against a private person was part of a deliberate policy of hostility towards all the nationals of a certain country. In all such cases, the breach was immediate because internal remedies were inexistent or ineffective.

23. Rather than saying, like Mr. Tsuruoka and Mr. Dadzie, that the rule of exhaustion of local remedies was sometimes substantive and sometimes procedural, he would prefer to say that it was both at the same time. It was a rule of substance because its principal premise was linked to the performance and the possible breach of an international obligation; it was a rule of procedure in that it undoubtedly entailed consequences for the procedure of claims. But it would be absurd to say, as certain writers had, that exhaustion of local remedies must be considered a procedural rule when the first action of the State was that of an administrative organ, and a substantive rule when the first action was that of a judicial organ. If it was accepted that, when a lower court dismissed an alien's claim, no breach existed so long as the supreme court of the State concerned had not given a ruling, there was no reason to consider the breach immediate where the first action was that of an administrative organ which refused an alien permission to engage in a particular activity. The rule of exhaustion of local remedies unquestionably had procedural aspects, but they were always linked to the substance of the rule, which set out a condition for the breach to be considered complete and definitive.

24. He was grateful to Mr. Ushakov for having drawn attention to what was a frequent source of confusion in speaking of indemnification, compensation or reparation. When the obligation had an economic content, it was indeed easy to confuse its performance with the consequences of responsibility for its non-performance.

25. Where an international obligation bound a State to expropriate aliens for reasons of national interest only and to pay them adequate compensation if it did so, it was clear that, if the State did expropriate an alien for such a reason—for example, to build a road across his land—and paid him adequate compensation, that payment itself represented the discharge of the initial obligation and not compensation for an international wrongful act. Provided that it paid him satisfactory compensation, there was no breach of an obligation by the State in expropriating an alien for reasons of national interest.

26. If, however, the expropriating State did not give the alien the required compensation, there would be a breach of the international obligation. In that case, the State of which the alien was a national would intervene at the level of diplomatic protection to seek reparation from the expropriating State, but it would then be reparation for an internationally wrongful act. The compensation might be identical from the practical aspect, but the reasons why it was given would be entirely different. That distinction was very important for the exhaustion of local remedies did not concern reparation for a breach but performances of an obligation. It concerned a phase prior to the wrongful act.

27. As Mr. Schwebel had pointed out (1466th and 1467th meetings), it was not always necessary, procedurally, to wait until responsibility had been generated before intervening at the diplomatic, and even, in some instances, at the judicial levels. That was so because interventions of that kind—for example, when the claimant State addressed itself to an arbitral tribunal in order to obtain a purely declaratory judgment—were not always aimed at denouncing a wrongful act, but were sometimes purely preventive, being designed to draw a State's attention to the economic or other damage which might result from its conduct. Consequently, it should not be thought that there was always a direct link between the existence of a breach—and therefore of responsibility—and the possibility of intervening on the diplomatic or judicial planes.

28. To conclude with regard to that aspect of the problem, he hoped that Mr. Tsuruoka would not insist on relegating the rule of the exhaustion of local remedies to part 3 of the draft since what was in effect important was to stress in part 1 that aspect of the rule which related to the performance or breach of an international obligation.

29. However, the real problem, and the one on which Mr. Jagota and Mr. Njenga (1467th meeting) and Mr. Dadzie had dwelt, was that of the limits of the principle of exhaustion of local remedies. In general, the Commission did not seem favourably disposed towards the automatic extension of the principle to nationals. Yet the principal conventions on human rights provided for its application to nationals, in order to protect the State by limiting international interventions with respect to violations of human rights. Most members of the Commission seemed, however, to feel that human rights were governed by purely conventional rules, and that it was better to leave it to treaties to develop in that respect the principle of exhaustion of local remedies. It should therefore be stated in the commentary that the Commission had studied the matter; that it considered that the application of the principle of exhaustion of local remedies to the treatment of nationals seemed to come more within the sphere of conventional rules; and that it had felt it inappropriate to consider that application as also provided for by general international law, and had decided to take into account only that aspect of the principle which concerned the treatment of aliens.

30. The most difficult problem, and one to which Mr. Tsuruoka had reverted, was the territorial aspect of the question: should the application of the condition of exhaustion of local remedies be limited to acts which had occurred in the territory of the State and to private persons residing in that territory? The consequences of such a limitation might be very serious since that would amount to considering any act committed by any organ outside the boundaries of the territory or to the prejudice of a non-resident as making the result required by the international obligation definitively inaccessible and, finally, transforming virtually all obligations of result into obligations of conduct in such cases. It might be preferable to state in the commentary that the Commission had decided to await the comments of Governments on those points before taking a final stand on the matter.

31. In his view, the Commission need devote no more time to the case in which there was simultaneous injury to a State and to private persons for, in such an instance, it was normal for the injury caused directly to the State to absorb the private injury and generate immediate responsibility. As Mr. Ushakov had pointed out, that was yet another area where there was often confusion between the exhaustion of local remedies as a condition for the generation of international responsibility and the fact of applying to national courts to obtain reparation.

32. He considered that the essential problem was to avoid creating a situation in which the guilty State could use recognition of the principle of exhaustion of local remedies as a pretext for its inaction. In his opinion, it would be best not to venture into an enumeration of exceptions to the rule but merely say that the remedies must be real, in other words, actually exist at the internal level; be effective, that is, be capable of producing the result required by the international obligation; and be accessible to private persons, for if remedies existed in internal law but private persons could not use them in concrete cases, that would be tantamount to their being non-existent.

33. Mr. FRANCIS, referring to the Special Rapporteur's comments concerning exceptions to the rule of exhaustion of local remedies, said he feared that, if the last sentence of article 22 was retained, it might provide an escape mechanism for States to claim that their international responsibility was not established until after local remedies had been exhausted without satisfaction. He therefore suggested that if, for technical reasons, the Drafting Committee could not enumerate in article 22 the basic exceptions to the rule, it should at least add a general proviso to the article in order to make it clear that the rule of exhaustion of local remedies was without prejudice to the responsibility of States where exceptions to that rule actually existed.

34. Mr. RIPHAGEN, referring to the question of exceptions to the rule of exhaustion of local remedies in cases where States acted outside the scope of their jurisdiction, said that, while he agreed with the Special Rapporteur that it was difficult to know what the exact limits of national jurisdiction were, his opinion was that such limits existed. He therefore expressed the hope that, in considering article 22, the Drafting Committee would take account of the fact that the rule of exhaustion of local remedies should not apply in cases where States acted outside the scope of their jurisdiction.

35. The CHAIRMAN said that the comments made by Mr. Francis and Mr. Riphagen would be taken into account by the Drafting Committee.

36. If there was no objection, he would take it that the Commission decided to refer article 22 to the Drafting Committee.

It was so agreed.[4]

The meeting rose at 11.50 a.m.

[4] For the consideration of the text proposed by the Drafting Committee, see 1469th meeting, paras. 11 *et seq.*

1469th MEETING

Tuesday, 26 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov Mr. Verosta, Mr. Yankov.