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Summary record of the 1477th meeting

Topic:
State responsibility

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prevent an event was not breached unless and until the preventive measures which the State was obliged to take had actually failed to prevent the event from occurring. Mr. Calle y Calle had rightly drawn a distinction between a wrongful act committed by a State organ and a wrongful act committed by a private individual following a lack of prevention on the part of the State. Politically, that was an important distinction because, when a State organ committed a wrongful act, the State was even more directly responsible than if the wrongful act had been committed by a private individual. Legally, the distinction was also important since, if a State organ was instrumental in breaching an obligation, the basis of responsibility was not the absence of preventive measures. Mr. Reuter had made a similar point when he had said that, if the risk was not apparent before the damage was done, then the obligation to prevent the risk was not apparent either and could hardly be invoked.

38. The questions raised by Mr. Calle y Calle and Mr. Reuter might be the direct result of the shortcomings of the wording of article 23, which made the breach of an obligation of a State to prevent an event dependent on the occurrence of the event following a lack of prevention on its part. The wording of the article also failed to take account of an essential element referred to in the penultimate sentence of paragraph 14 of the Special Rapporteur's seventh report, namely, "the necessary link between the actual conduct of the State and the event". The observations made by Mr. Njenga were particularly relevant. What article 23 should reflect was that the event in question must have been caused by a lack of prevention on the part of the State. He hoped that the Special Rapporteur would find some way of bringing out that point more clearly. Otherwise, the idea expressed by Mr. Quentin-Baxter concerning the relationship between article 3 and article 21, paragraph 1, would have to be studied in greater detail.

39. Mr. YANKOV wished to ask the Special Rapporteur whether he had considered the possibility of wording article 23 positively.

39. He also hoped the Special Rapporteur would define more clearly the relationship between article 23 and article 21.

The meeting rose at 12.50 p.m.

1477th MEETING

Thursday, 11 May 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

State responsibility (*continued*)
(A/CN.4/307 and Add.1)
[Item 2 of the agenda]

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

ARTICLE 23 (Breach of an international obligation to prevent a given event)[1] (*continued*)

1. Mr. DÍAZ GONZÁLEZ said that the wording of article 23 as it now stood had left him in doubt as to whether there were any limitations on the obligation of the State to prevent a given event from occurring. In order to be able to prevent an event from occurring, the State had to assess the risks involved, but even when it had done so it might not always be able to prevent a private individual from committing a wrongful act. Under article 23, the State could not be held responsible for the commission of a wrongful act by a private individual, but it could incur responsibility for failing to fulfil its obligation to prevent that act from being committed. As Mr. Reuter had stated at the previous meeting, the preventive measures which the State was required to take depended on whether or not the risks involved were apparent. The State's responsibility was consequently limited by the nature of the risks involved in the occurrence of a particular event.

2. To take as an example the case of pollution of the sea, it was quite obvious that the responsibility of a State to prevent ships flying its flag from polluting the sea existed even before pollution occurred. The State's obligation was to take the necessary precautions to ensure that its flagships observed the international rules designed to prevent such pollution. Another example that came to mind was that of a State that took all the necessary measures to protect a visiting head of State, but was unable to prevent the visitor from being attacked by a private individual. In such a case, the State's obligation was to apprehend and prosecute the person who had committed the wrongful act, but it could not be held responsible for the act itself.

3. Since a State could be held responsible for lack of prevention, but not necessarily for the unforeseeable, certain limitations on the obligation of the State to prevent a given event from occurring should be provided for in article 23. He agreed with Mr. Calle y Calle (1476th meeting) that the article should also contain a reference to the idea of "reasonable prevention", which had been described by the Special Rapporteur in the last sentence of paragraph 2 of his seventh report (A/CN.4/307 and Add.1).

4. Mr. AGO (Special Rapporteur), in reply to the questions to which article 23 had given rise, said first that the international obligations referred to in that article were not normally absolute obligations, and that the rule he had proposed for adoption was by no means aimed at tranforming them into absolute ob-

[1] For text, see 1476th meeting, para. 2.

ligations, as some members of the Commission feared. If they were absolute obligations, they would require that the State prevent the occurrence of a given event in any case whatsoever; consequently. the mere occurrence of the event would constitute a breach of the obligation. However, under his proposed article 23, there was a breach of the obligation to prevent an event only if the event occurred "following a lack of prevention on the part of the State". Accordingly, two conditions had to be fulfilled: the event to be prevented must have occurred and it must have been made possible by lack of vigilance on the part of the State. Therefore the case in which the event occurred despite the State's having taken all the adequate preventive measures had to be excluded.

5. As he had explained before, the obligations of prevention referred to in article 23 normally had to be construed within the limits of what was reasonable and possible. Perhaps that point should be recalled in the commentary, but the Commission should beware of introducing the idea of reasonableness in article 23 or of describing the lack of prevention in one way or another in the article. As in the case of other articles, the Commission should not yield to the temptation of defining the subject-matter of the primary rule whose breach was being considered; if it did so, it would run into insuperable difficulties. The international obligations to prevent an event might, after all, have their origin in custom or in treaties, and their subject-matter as well as the degree of prevention required might vary considerably. It was not to be excluded that some of them might be absolute. On the other hand, it was clear that a lesser degree of prevention was required for the protection of foreign private persons than for those enjoying special protection. The Commission might include those points in the commentary, but it should not include them in the article under consideration. If it introduced any limitation in the article, moreover, the other provisions of the draft where the notions of "reasonable" and "possible" were assumed might be interpreted *a contrario* as not implying any such limitation.

6. Replying to a comment made by Mr. Reuter (1476th meeting), he pointed out that the word "damage" had a number of meanings. In taking the view that the internationally wrongful act consisted of only two constituent elements, and that "damage" was not a distinct constituent element that must accompany the breach of an international obligation for an internationally wrongful act to exist, the Commission had noted that the idea of "dammage" as a distinct constituent element had been developed precisely by taking into account obligations of prevention of events. As such events generally injured somebody, certain writers and judges had come to speak of "damage" in referring to an event that did not necessarily cause injury. Mr. Reuter had cited the case of an ambassador who, by his own exertions, escaped an attack and so suffered no injury. Clearly, in such a case there would nevertheless be responsibility on the part of the State that had failed to take the necessary preventive measures, for its obligation had been to prevent the attack and not merely to prevent an injury. That was why the event must be distinguished from the damage. The same applied to the case of demonstrations against an embassy mentioned by Mr. Njenga (1476th meeting); such demonstrations obviously engaged the responsibility of the State that had failed to take the necessary preventive measures, even if no damage were caused. The State's obligation derived from article 22 of the Vienna Convention on Diplomatic Relations,[2] and was one of the classes of obligations dealt with in the article under consideration.

7. Some members of the Commission had emphasized the need to take account of the subject-matter of the obligation to distinguish between obligations of prevention of events and certain obligations of conduct. It was a fact that some international obligations, developed for a particular purpose, required the adoption of specific measures by the State, whereas others required the prevention of an external event. Depending on the objective, an obligation could be modelled on one type or the other. In the case of pollution, the two types of obligations coincided. States might in some cases have the obligation to take measures—for example normative measures—and in other cases they might have to ensure the prevention of specific occurrences, such as certain discharges. It was the latter type of obligation that was referred to in article 23.

8. As far as the drafting was concerned, Mr. Reuter had suggested that the rule in article 23 should be applicable only in the absence of a different rule. While agreeing that such a proviso would be true of most of the rules, he would be hesitant to introduce it in article 23 before carefully considering its implications.

9. Echoing views expressed by Mr. Ushakov (1476th meeting), several members of the Commission had inquired whether the international obligation contemplated in article 23 was an obligation "of means" or an obligation "of result", or whether it might even be an obligation of a third kind. There was no question, however, but that when the obligation was formulated in such a way as to require that the State prevent the occurrence of a certain event, by the means of its choice, the obligation incumbent upon it was one of result. Various differents ways of achieving the required result might not be available to the State, but the fact remained that it was not bound to adopt a specific course of conduct. It would be different if, with the indirect objective of avoiding certain events, the obligation required that the State adopt certain specified measures: for example, a measure prohibiting certain practices likely to lead to the pollution of the air of bodies of water. That specific obligation would be an obligation of conduct and not of result, but it would not fall into the category referred to in article 23.

[2] See 1476th meeting, foot-note 6.

10. That being so, it might be suggested that the content of article 23 should be included in article 21. However, the obligations dealt with in article 23, although they were obligations of result, represented a special kind of such obligations, with a characteristic distinguishing feature. The obligation referred to in article 23 was distinguished by the fact that the required result consisted in preventing the occurrence of a certain event. Whereas, in other cases, the problem of establishing whether the required result had not been achieved (and therefore whether there was a breach of the obligation) could pose pratical difficulties, it went without saying that in the particular case of the breach of an obligation to prevent an event, it was when the event occurred that it was established that the result had not been achieved and that there was, therefore, a breach of the obligation. Consequently article 23 was justified as a separate provision.

11. He would nevertheless be prepared to establish a link between articles 21 and 23 by drafting the opening passage of article 23 to read: "Where the result required by an international obligation of a State consists of preventing the occurrence of a given event, there is no breach of that obligation unless...".

12. In circumstances like those of the *Corfu Channel* case, to which Mr. Quentin-Baxter had alluded (1476th meeting), everything depended, obviously, on the subject-matter of the international obligation. If there was a duty to warn other States of a potential danger, what was required was specific action, and failure to give such warning therefore entailed a breach of the obligation. If the duty was to prevent the accident, what had to be prevented was an event, and the obligation was breached only if, through lack of prevention, the event occurred.

13. In reply to Mr. Ushakov's suggestion that it might be preferable to speak of an "act in law" rather than of an "event", he pointed out that the event became an act in law by virtue of rules other than those relating to the prevention of the said event. To return to the example of the birth of a child, for the comparison to hold it would have to be assumed that a rule existed obliging certain parties to prevent the occurrence of a particular event—in the case in point, birth. The consequence of such a rule would be that couples who contravened it would be guilty of a wrongful act. From the point of view of that rule, the birth was an event and not an act in law. By contrast, it was an act in law from the point of view of other rules: those that would apply to new-born babies and would treat them as subjects of rights and obligations. The material point for the purposes of article 23 was the prevention of an act as an event, and not as an act in law. Thus it would be preferable not to speak of "act of law" in that context.

14. Mr. Ushakov had further suggested that the rule in article 23 should apply not only to events occurring within the jurisdiction of a State, but also to events belonging directly to international relations. In his own opinion, all the cases considered so far, including that of the attack on an embassy, involved international relations. Although the most obvious cases often concerned events that had occurred within the territory under the jurisdiction of the State complained against, there were also cases, like the one he had cited, of the destruction of protected cultural property in foreign territory. The internationl international arrangements relating to pollution likewise offered examples of events whose occurrence abroad had to be prevented. Thus there was no reason for thinking that the rule in article 23 would be limited to cases where the State acted in its own territory or within the confines of its jurisdiction.

15. On the other hand, and unlike Mr. Ushakov, he doubted that the scope of the article should be extended to international obligations whose object was to bring about the occurrence of an event. In the example cited by Mr. Ushakov, what was required of a State was not to bring about an event but to adopt certain measures. In any case, in matters of State responsibility, the traditional approach was to aim at the prevention of an undesirable event rather than the realization of a desirable event.

16. With reference to Mr. Yankov's suggestion (1476th meeting) that article 23 should be reformulated in positive language, it would not be easy to act on that suggestion since the Commission had already expressed a preference for the negative formulation, as being more incisive, in the case of the earlier articles.

17. Mr. PINTO was not convinced that the Special Rapporteur had been entirely successful in his purpose if he had intended article 23 to be a further step in a logical progression that thad begun with articles 20 and 21 and was designed as a systematic exposition of the essential elements of an international obligation. Indeed, he could not agree with the Special Rapporteur that there was a close connexion between those three articles.

18. A comparison of the structure and of the way in which those three articles had been presented showed that articles 20 and 21 were consistent and logical, whereas the position of article 23 was somewhat ambiguous. Thus, in article 20, it was clear that a State breached an international obligation requiring it to adopt a particular course of conduct if its conduct was not in conformity with that required of it by the obligation. Similarly, in article 21, a State breached an international obligation requiring it to achieve a specified result if, by the conduct adopted, it did not achieve that result. Under article 23, however, a State breached an international obligation requiring it to prevent "a given event", following a lack of prevention on the part of the State, "the event in question" occurred. It seemed to him that the "given event" referred to in the first part of the sentence might not necessarily be the same as the "event in question" referred to in the second part of the sentence. The given event was the event sought to be prevented, whereas the event in question was the event which demonstrated that there had been a

breach of the obligation. The "event in question" might be part of the "given event", but was not necessarily the same as that event.

19. His difficulties with article 23 had been further increased by the fact that, although the Special Rapporteur's seventh report gave examples of the international obligation of the State to prevent a given event, it did not really specify the nature of the event that had to occur for the obligation to be breached. He was therefore not sure whether the rule enunciated in article 23 would, for example, be applicable in cases involving international obligations arising from treaty commitments. For instance, if a State wishing to encourage investments undertook bilaterally not to nationalize businesses belonging to the nationals of another State, but adopted legislation permitting nationalization in a general sense, contrary to its bilateral undertaking, the businesses of the nationals of the foreign State would be placed in some jeopardy. The responsibility of the host State might thus be entailed, even though the event it had undertaken to prevent, namely, nationalization, had not occurred. He also wondered whether the rule enunciated in article 23 would apply in a case where a State that was a party to the IBRD Convention on the Settlement of Investment Disputes between States and Nationals of Other States[3] had agreed to ensure that it its nationals would submit disputes with nationals of other States to arbitration and where a national of that State delayed arbitration proceedings indefinitely.

20. Mr. ŠAHOVIĆ was glad to have the Special Rapporteur's explanations, which he was certain would enable members of the Commission to reach agreement on the principle laid down in article 23. He himself had studied that article from the points of view of State practice and of its place in the draft.

21. From the point of view of State practice, the need to provide against the possibility of a breach of an international obligation to prevent a particular event was indisputable. It was clear from doctrine, international jurisprudence and State practice that there could be no doubt whatsoever concerning the value of the rule stated in the article. However, its application might cause some problems, and it must therefore be stated in terms that left no room for differences of interpretation.

22. On the subject of the article's place in the draft, he agreed with the Special Rapporteur. Like some other members of the Commission, he had thought that a third category of obligation should be covered. But rather than rely merely on explanations in the commentary, perhaps the Commission should establish a link between article 23 and article 21. The wording proposed for that purpose by the Special Rapporteur[4] seemed satisfactory.

23. The commentary should explain in detail what was meant by failure to prevent an event and give more examples which would be of help to States.

24. Mr. SUCHARITKUL subscribed unreservedly to the proposals and explanations put forward by the Special Rapporteur, whom he congratulated on his excellent introduction of article 23. In his opinion, the obligation to which the article referred was of a special kind and merited special treatment, for it was neither exclusively an obligation of conduct, nor exclusively an obligation of result. Two conditions must be met before it could be said to have been breached: on the one hand, the conduct of the State must have been less than that required of it by the obligation, and on the other, a given event must have occurred.

25. However, like the Special Rapporteur, he believed that the obligation referred to in article 23 was one of result rather than of conduct. In his view, the article raised three vital questions, namely, the relativity of the obligation of conduct, the continuity of the obligation of result after the occurrence of the event, and the legal basis of the obligation to prevent a particular event.

26. The extent of an obligation of conduct varied according to the circumstances of each case, such as the imminence or magnitude of the foreseeable danger. It was clear that, in the case of nuclear tests, for example, the State must take greater precautions than in other cases. The relative importance of the foreign dignitaries the State received determined the extent of the protective measures it had to take. For example, a Head of State was entitled to a greater degree of protection than an ambassador or a consul. Similarly, the embassies of certain countries required greater protection than others, since they were more at risk. In the Netherlands, for example, the Indonesian Embassy merited special protection. The extent of an obligation of conduct also varied according to the means at the State's disposal. It was obvious that developing countries could not be expected to take the same security measures as the great Powers. The source of the obligation of conduct was also of importance. For example, if a State invited a foreign Head of State to visit its territory, it was obliged to ensure his safety. The accreditation of an embassy implied that the receiving State would take the measures necessary to protect the staff of that embassy within its territory. But in the case of political refugees, receiving countries of which Thailand was one could not be required to monitor the subversive activities of all the refugees within their territory. Finally, the extent of an obligation of conduct depended on the conduct of the persons injured: if it was they who had brought about the event or contributed to its occurrence, the degree of diligence required of the State would be less.

27. In his opinion, the obligation of result continued in force after the occurrence of the event, the State then being obliged to mitigate its damaging effects.

28. An obligation to prevent an event had also to be assumed by its beneficiaries, and in some cases the responsibility had to be shared.

29. Mr. USHAKOV was satisfied with most of the

[3] United Nations, *Treaty Series*, vol. 575, p. 159.

[4] Para. 11 above.

explanations given by the Special Rapporteur. Nevertheless, he continued to have doubts on certain points, particularly on the crucial question whether a third category of obligations really existed that bound the State to prevent a particular event. He doubted whether that was the case, since the existence of such a category of obligations depended, in his view, on the interpretation placed on the obligation of means and on that of result.

30. As an example of the third category of obligations, the Special Rapporteur had cited the obligation to prevent an attack on an embassy. That was not, however, an obligation of a special kind, but a simple obligation of result. Article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations provided that

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

That article made it incumbent on the State to achieve a certain result by "all appropriate steps". But that was not an obligation to prevent a particular event. Moreover, it would be quite impossible to list all the events that the State ought to prevent. Consequently the examples concerning the protection of embassies were not conclusive, for they had to be considered as examples of an obligation of result.

31. That did not mean that the question of the event should be set aside or that the role the event played in the obligation could be denied. Every rule required conduct that consisted either in preventing or in bringing about certain events. Every event covered by a rule was an act in law, because it had consequences in law.

32. The wording of article 25, the title of which was modelled on the titles of articles 20 and 21, gave the impression that the obligation to prevent a given event was a third category of obligations in addition to those of conduct (article 20) and of result (article 21). It was questionable whether it was possible to single out from among obligations of result—and so establish the existence of a subcategory—of such obligations cases in which the result was achieved through the prevention of a given event. In the case of the protection of diplomatic missions, it was clearly impossible to foresee all the events that might occur. Again, when a hospital or a historical monument was bombed, was the obligation that was breached one of result or of conduct? Personally, he considered that it was more an obligation of conduct or of means, for the State should have refrained from bombing civilian targets.

33. Whatever its content, an obligation was always either an obligation of result or an obligation of conduct. He could not conceive of a single example of an obligation that would not fall into one of those two categories. The event that might consitute a breach of an obligation was always covered by the rule establishing the obligation, whether the obligation was one of means or of result, for the object of every obligation was either to prevent certain events or to bring them about.

Appointment of a Drafting Committee

34. The CHAIRMAN said that, following consultations in accordance with the usual practice, it was proposed that a Drafting Committee be appointed consisting of the following members: Mr. Schwebel as Chairman, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov and, *ex officio,* Mr. Pinto, the Commission's Rapporteur.

It was so agreed.

The meeting rose at 12.55 p.m.

1478th MEETING

Friday, 12 May 1978, at 10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/307 and Add.1)

[Item 2 of the agenda]

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

ARTICLE 23 (Breach of an international obligation to prevent a given event)[1] (*concluded*)

1. Mr. RIPHAGEN said that there were three logical steps in the work on the topic under consideration. First, it had been established that international obligations existed and, secondly, that breaches of those obligations might occur. However, the Commission's prime interest lay in the third step, namely, the consequences of the breach of an international obligation. In dealing with the first two steps, namely, the existence of an international obligation and the breach thereof, the Commission had necessarily encountered some difficulties because of its wish to avoid determining the content of the obligation itself, having decided to deal not with primary rules but only with secondary rules of responsibility.

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[1] For text, see 1476th meeting, para. 2.