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Summary record of the 1544th meeting

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23. In the *Savarkar* case referred to by Mr. Francis, the arbitral tribunal had not said that there had been no irregularity. It had only said that the British authorities had been under no obligation to return Savarkar, since a French police officer had consented to his arrest. Whether the police officer had been right or wrong in giving his consent was another matter.

24. He quite understood what was worrying Mr. Njenga, but he thought it would be more dangerous to remain silent than to try to prevent abuses by a well-drafted article. The second part of Mr. Njenga's proposal had convinced him that it was possible to qualify consent rigorously in order to prevent improper interpretations. On the other hand, it seemed difficult to say that the consequences of a wrongful act were not actionable, since it was not the consequences of the wrongful act that were precluded by consent, but the wrongfulness itself.

25. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 29 to the Drafting Committee.

It was so decided. [5]

Drafting Committee

26. Mr. RIPHAGEN (Chairman of the Drafting Committee) proposed that the Drafting Committee should consist of the following members: Mr. Barbosa, Mr. Francis, Mr. Njenga, Mr. Ushakov, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Verosta and Mr. Yankov, it being understood that Mr. Dadzie, as Rapporteur of the Commission, was an *ex officio* member of the Committee.

27. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to accept Mr. Riphagen's proposal.

It was so decided.

The meeting rose at 12.40 p.m.

[5] For consideration of the text proposed by the Drafting Committee, see 1567th meeting, paras. 1, 6, 7 and 40–49.

1544th MEETING

Friday, 1 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Also present: Mr. Ago.

Fifteenth session of the Seminar on International Law

1. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

2. Mr. RATON (Secretariat) said that the International Law Seminar would hold its fifteenth session from 5 to 22 June 1979. The Selection Committee, which had met at the end of April, had chosen 22 candidates, and two further participants were being sent by UNITAR.

3. In 15 years, 330 participants from 102 different countries had attended the Seminar, and 137 of them had been awarded fellowships by various Governments. For 1979, the Governments of Austria, Denmark, the Federal Republic of Germany, Finland, Kuwait, the Netherlands, Norway and Sweden had awarded fellowships in amounts ranging from $815 to $10,260. Partly as a result of the generosity of the Norwegian Government, which had more than trebled its usual contribution, the sum of $32,000 was available to the Seminar that year for distribution among about 10 candidates.

4. As every year, the Seminar would be organizing a series of lectures, which would be delivered by Sir Francis Vallat (The Vienna Convention on Succession of States in respect of Treaties); Mr. Ushakov (The most-favoured-nation clause); Mr. van Boven, Director of the Division of Human Rights (United Nations efforts to promote and protect human rights); Mr. Reuter (Narcotics and international law); Mr. Pinto (The development of customary international law through United Nations conferences); Mr. Sucharitkul (The crystallization of norms relating to the jurisdictional immunities of States and their property); Mr. Ferrari Bravo, Chairman of the Sixth Committee of the General Assembly (The work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization); Mr. Bedjaoui (Legal aspects of the New International Economic Order); Mr. Francis (The Commodity Producers' Association within the framework of the New Economic Order); and Mr. Njenga (The United Nations Conference on the Law of the Sea).

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.291, A/CN.4/L.292, A/CN.4/L.293)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State) [1] (*concluded*)

5. Mr. USHAKOV proposed that draft article 29 should be replaced by the following text (A/CN.4/L.293):

[1] For text, see 1537th meeting, para. 25.

"Lawfulness by consent

"The consent of a State, valid in accordance with international law, to a particular act of another State not in conformity with the obligation of the latter State towards the former State precludes the wrongfulness of the act in question if it is in conformity with the said consent."

6. The expression "valid in accordance with international law" made it possible to exclude all cases in which consent was not valid (consent given under duress, consent to the violation of an obligation deriving from a *jus cogens* rule or from a restricted multilateral treaty, etc.) without enumerating them, for the Commission was not at present required to define the conditions for validity of consent.

7. Sir Francis VALLAT trusted that Mr. Ushakov's proposal, which might do much to dispel his own concern in regard to draft article 29, would receive the Drafting Committee's careful consideration.

ARTICLE 30 (Legitimate application of a sanction)

8. The CHAIRMAN invited Mr. Ago to introduce Article 30 (A/CN.4/318 and Add.1-3, para. 99), which read:

Article 30. Legitimate application of a sanction

The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State.

9. Mr. AGO said that the second circumstance to be considered among possible grounds for precluding the wrongfulness of an act of the State was the legitimate exercise or application of a sanction. In other words, an act of the State which was not in conformity with what would be required of it by a binding international obligation towards another State was not internationally wrongful if it constituted the application to that other State of a measure admissible in international law as a sanction in response to an international offence committed by the latter.

10. The term "sanction" should not be understood in too narrow or too broad a sense. The idea of a sanction should not be reduced to the use of armed force in the context of a legal system regarded as repressive; but neither should it cover every possible legal consequence of an internationally wrongful act, including the right to obtain reparation for damage sustained.

11. The application of the sanction must also be "legitimate". Admittedly, that adjective might seem superfluous, since it was obvious that a sanction whose application was not legitimate could not be described as a sanction in accordance with international law. But to avoid abuses, he thought it necessary to specify in the body of the article that, to preclude wrongfulness, the application of the sanction must be legitimate in the specific case considered. It was in the same spirit that he had proposed, in article 29, that it should be stressed that consent must be "valid" (1543rd meeting). A whole series of internationally wrongful acts in fact existed which, under international law, did not justify recourse to sanctions, but only created the right to claim reparation for the damage sustained. In such cases, the injured State could legitimately resort to measures of sanction only if it had not succeeded in obtaining reparation.

12. Moreover, some kinds of measures, such as armed reprisals, which had been admissible under "classical" international law, were no longer tolerated by contemporary international law, or only within strict limits. The present tendency was to leave decisions on the application of measures involving the use of armed force to subjects other than the "injured" State—generally to an international organization that could entrust the application of the sanction to a member State, which then acted by virtue of a responsibility entrusted to it by the organization and not in its individual capacity. The use of armed force by the injured State would then remain wrongful, even if it was a response to an internationally wrongful act.

13. Moreover, armed reprisals, even if legitimate, would cease to be a legitimate form of sanction if they were not proportionate to the injury caused by the offence and if the rules of the humanitarian conventions were not observed. However, it was only in part II of the draft, when it sought to determine the forms, modalities and consequences of an internationally wrongful act, that the Commission would consider in which cases a sanction was to be regarded as legitimate or illegitimate.

14. In international case law between the two world wars, reprisals had been deemed legitimate provided they constituted a reaction to an internationally wrongful act and remained within certain limits. For example, in the award relating to the responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa (Naulillaa incident), rendered on 31 July 1928, the Portugal-Germany arbitration tribunal had held that an act of reprisal was "an act of taking the law into its own hands by the injured State,... in response—after an unfulfilled demand—to an act contrary to the law of nations by the offending State", the effect of which was "to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations", and that the reprisal "was limited by the experience of mankind and the rules of good faith applicable in the relations between States" and "would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive". The tribunal had concluded that "the first requirement—the *sine qua non*—of the right to take reprisals is a motive furnished by an earlier act contrary to the law of nations".[2]

15. In its award relating to the responsibility of Germany for acts committed subsequent to 31 July 1914

[2] See A/CN.4/318 and Add.1-3, para. 86.

and before Portugal entered into the war (Cysne case), rendered on 30 June 1930, the tribunal had also held that "an act contrary to international law may be justified, by way of reprisals, if motivated by a like act."[3]

16. That position corresponded to the one revealed by State practice. The replies of States to the question: "What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?" formulated by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930), were particularly revealing in that regard. In the "Bases of discussion" it had drafted in the light of those replies, the Preparatory Committee had stated:

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs.[4]

17. It was the Institut de droit international which, as far back as 1934, had first declared, in its resolution concerning the régime of reprisals in peace time, that "armed reprisals are prohibited in the same way as recourse to war",[5] thus initiating the development of international law in the matter. That development had culminated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[6] of 24 October 1970 by the General Assembly, according to which "States have a duty to refrain from acts of reprisal involving the use of force" (first principle).

18. Consequently, a State which was the victim of a breach of an international obligation towards it could no longer react legitimately by using armed force against the State which had committed the breach, since international law now prohibited States from taking armed reprisals individually against other States, and reserved that right to international organizations.

19. The prohibition of "armed reprisals" did not however extend to "unarmed" reprisals, recourse to which remained lawful in principle. But even in the case of reprisals not involving the use of armed force, the right to apply measures of sanction was no longer the monopoly of the State directly injured, and the progressive intervention of international organizations in that area was to be anticipated. According to Article 41 of the Charter of the United Nations, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures", which "may include complete or partial interruption of economic relations and of rail, sea, air... and other means of communication, and the severance of diplomatic relations".

20. In cases where an international body such as the United Nations decided on economic sanctions, if a State bound to another State by a trade treaty broke off its economic relations with that other State in pursuance of a United Nations decision, the rupture, although in breach of a treaty concluded between the two States, was not an internationally wrongful act, because it had been decided on as a sanction for an internationally wrongful act committed by the other State. In such a case, there was no violation of an international obligation under a treaty, since the obligation had been made inoperative with regard to the specific case.

21. Similarly, if the United Nations imposed an embargo on arms deliveries to a State with which other States had concluded treaties providing for the sale of arms, those other States did not commit an internationally wrongful act by applying the embargo since, in such a case, the interruption of arms deliveries was a legitimate measure of sanction for an internationally wrongful act committed by the State against which the embargo was directed.

22. Moreover, where it was adopted pursuant to Article 41 of the United Nations Charter, conduct not in conformity with an earlier obligation was not only lawful but compulsory; a State that did not adopt such conduct was in breach of an international obligation imposed by the Charter and thus committed an internationally wrongful act against the United Nations and its Members.

23. An international organization could itself apply a sanction not in conformity with an international obligation which it had itself assumed. For example, if ILO suspended its technical assistance to one of its member States as a sanction for an internationally wrongful act of that State, it would not commit an internationally wrongful act by deciding not to fulfil the commitments it had entered into vis-à-vis that State in regard to technical assistance.

24. Doctrine confirmed the principle that action taken as a legitimate sanction against a State which had committed an earlier internationally wrongful act was not wrongful. However, the question arose whether the legitimate exercise of a sanction against a State which had committed an internationally wrongful act might not injure the interests of third States. His own view, based on practice and doctrine, was that any infringement of a substantive right of a third State remained wrongful and required reparation.

25. Mr. SCHWEBEL said that, in the current state of international law and international life, it was regrettable, but none the less inevitable, that States must retain a right to take reprisals in response to acts committed in violation of their legal rights, with the vital exception of armed reprisals. A recent arbitral award, in which two members of the Commission had played a prominent part, analysed in a most interesting fashion the state of the law in regard to reprisals

[3] *Ibid.*, para. 87.

[4] *Ibid.*, para. 88.

[5] See *Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, p. 709.

[6] General Assembly resolution 2625 (XXV), annex.

and the essential justification for them. He was not sure whether the award in question had been published, but he hoped that it would be brought to the attention of members of the Commission. The fact that armed reprisals were quite properly exluded from modern international law did not detract from the right of a State to take legitimate measures in the exercise of its right of self-defence, a matter which was taken into account in Mr. Ago's report, in which examples were cited to illustrate the distinction between acts of reprisal and acts of self-defence.

26. He very much agreed with Mr. Ago's cogent analysis and with the proposed article, but he would welcome enlightenment on a particular question. What was the difference, if any, in terms of legal effects, between cases in which, under Article 41 of the Charter, the Security Council required States Members of the United Nations to apply sanctions against a given State, and cases in which the Security Council, or alternatively the General Assembly, simply recommended the application of sanctions against the State in question? In the case of a recommendation, Member States would not be bound, under Article 25 or under Chapter VII of the Charter, to apply the sanctions. If they had certain obligations towards the State concerned, which would be breached as a result of the application of the sanctions, would the authorization of a mere recommendation of the Security Council or the General Assembly—as opposed to a decision under Article 41—constitute sufficient legal defence? The answer might simply be that if a State, by virtue of a unilateral right of reprisal or a right to apply sanctions, could do what was recommended in a United Nations resolution, then surely States acting together could implement the recommendation of the Security Council or the General Assembly.

27. On the other hand, he wondered whether there were circumstances in which an individual State that was not entitled to apply sanctions would nevertheless become so entitled as a result of a recommendation of a United Nations organ, or whether in fact no such circumstances existed, and a State would become entitled to take action that would otherwise be illegal solely as a result of a binding resolution adopted by the Security Council. When the question of sanctions against Rhodesia had first arisen in the Security Council, the latter had adopted a resolution which had been viewed by the United States as recommendatory, and therefore as one that did not entitle the President of the United States of America to issue an executive order imposing sanctions against Rhodesia. Such an order had not been issued until later, upon the adoption by the Security Council of a resolution that had been clearly binding.

28. Mr. USHAKOV supported article 30, but had some reservations about the expression "legitimate application of a sanction". It was probably premature to describe as "sanctions" the measures whose application against a State which had committed a wrongful act would be deemed legitimate under part II of the draft articles. Moreover, it would be better to speak of an act by a State against another State, rather than of measures. With those considerations in mind, he suggested that article 30 should be worded to read:

> "The commission by a State, against another State which has committed a wrongful act, of an act as a measure provided for as legitimate in part II of the present draft articles, precludes the wrongfulness of the latter act in cases where it is not in conformity with the obligation of the former State towards the State which has committed the said wrongful act".

That wording would obviate the need to describe acts committed by a State against a State which had committed a wrongful act as sanctions, reprisals, retaliatory measures or coercive measures. In paragraph 83 of his eighth report (A/CN.4/318 and Add.1–3), Mr. Ago had made it clear that for the time being the Commission should not enter into the question of measures that could be taken in response to an internationally wrongful act. In his own view, the Commission would certainly be entering into that matter if it retained the concept of a sanction in article 30.

29. Mr. YANKOV agreed in general with the conclusions reached in the report—a lucid and learned document which was yet another example of Mr. Ago's monumental contribution to the work of the Commission. More particularly, he shared Mr. Ago's view on the two very important parameters of responsive action by States, namely, the requirement for the action to be legitimate and the definition of the action itself. Like Mr. Ushakov, however, he was somewhat apprehensive about the use of the term "sanction", for the sole reason that the trend in the development of modern international law was to regard sanctions as measures adopted by an international organization that were legally binding on the members of the organization. That trend would almost certainly have crystallized by the time the set of draft articles was completed and came to be adopted in the form of convention. Indeed, Mr. Ago himself had on several occasions pointed to the differences in the concept of sanctions in "classical" international law and in modern international law.

30. Obviously, Mr. Ago had not intended to comment on the recent practice of the Security Council, which had taken a clear-cut position in some instances of reprisals carried out by a State against the population of another State on the pretext of self-defence, or even of "preventive" action of a punitive nature involving the use of sophisticated modern weapons. Plainly, the action must be provoked, in other words, it must be taken in response to an internationally wrongful act committed earlier by another State; but it might be more appropriate, in the context of article 30, to use wording such as "responsive measures taken by a State in accordance with international law" and "sanctions applied by virtue of a valid decision of an international organization". A formulation of that kind would cover the different types of case that might arise.

31. He could not but agree with the view that, if the action were to be legitimate, a prior claim must have

been made for reparation. Moreover, the concept of a "prior claim" should be taken to signify that the application procedure had been exhausted, particularly in the case of coercive action. As early as the United Nations Conference on International Organization (San Francisco), the term "action" had been regarded as meaning enforcement or preventive measures. The glossary published at that time,[7] and now sometimes used for the purposes of interpretation of the Charter, differentiated between the acts of the General Assembly and the Security Council and clearly stated that, in conformity with the jurisprudence of the United Nations, the organ competent to take "action" was the Security Council. In that connexion, it might be justifiable to insert in the commentary the Commission's understanding that all other means must be exhausted before action of a punitive character could be undertaken.

32. Lastly, it was only common sense that there should be proportionality between the internationally wrongful act and the corresponding responsive action or sanction.

33. Mr. NJENGA said that nobody could question Mr. Ago's impeccable analysis of doctrine and State practice establishing features of what constituted a legitimate sanction under modern international law. However, he would have preferred a more detailed explanation of the grounds for suggesting that article 30 should omit any reference to the illegitimate use of sanctions. Since the end of the Second World War, States had once again been slipping into illegality in their international relations, and there were all too many instances of States using force for actions which purported to be legitimate sanctions. In Africa alone, there were numerous cases of clearly illegal acts in which States resorted to the use of force against peoples which were fighting for self-determination, and even against neighbouring countries. For example, the newspapers frequently reported incursions of Rhodesian troops into Zambia. The States in question employed the new concept of so-called "legitimate hot pursuit", or reprisals against other countries for harbouring guerillas or "terrorists". Cases of that kind, which were clearly illegal, were likely to increase in number until the struggle for liberation was finally won. Article 30 should therefore take account of contemporary situations, and it failed to deal with the possibility of a State alleging that its act had been lawful when it pursued guerillas beyond its frontiers.

34. Unfortunately, article 30 could be misinterpreted if it were not read in conjunction with the commentary. So in order to rule out any possible misinterpretation, the article might well include the principle set out in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States which had been cited by Mr. Ago in paragraph 89 of his report, namely: "States have a duty to refrain from acts of reprisal involving the use of force". The inclusion of that principle would make the terms of article 30 much more positive.

35. In addition, Mr. Yankov had suggested a very useful formulation. In certain circumstances, an individual State could legitimately apply a sanction; but it was undoubtedly true that the trend in modern international law was to regard a "sanction" as action taken in pursuance of a decision by an international organization. Unquestionably, the sanction must be commensurate with the internationally wrongful act, and the obvious *sine qua non* for the legitimacy of the sanction, as pointed out by Mr. Ago in his oral presentation, was that the sanction must be applied in consequence of an internationally wrongful act committed earlier by the other State. The Drafting Committee might wish to take that into consideration, since a reference to "an internationally wrongful act committed earlier" would clarify the situation covered by article 30.

36. In his opinion, the answer to Mr. Schwebel's question, namely, whether the fact that a sanction applied by an individual State was in conformity with a recommendation of the Security Council or the General Assembly would be an adequate legal defence for the breach by that State of an international obligation towards another State, must be in the affirmative. The Security Council or the General Assembly did not adopt a recommendation to impose sanctions against a particular State unless that State had committed a serious breach of international law. Very recently the General Assembly had adopted resolution 33/182B, strongly urging the imposition of sanctions against South Africa because of the latter's failure to comply with its obligations regarding the plan for the decolonization of Namibia. The resolution was recommendatory and any State acting in conformity with it would clearly be proceeding in a lawful manner. For his part, he would like to pose the question whether, in the case of the binding resolution 33/38B, concerning sanctions against Southern Rhodesia, a State would be acting lawfully if it unilaterally decided to lift the sanctions because, in view of the recent situation, it considered that the Rhodesian government was legitimate. In his opinion, once the United Nations Security Council had imposed mandatory sanctions, no State could legally lift such sanctions unilaterally.

The meeting rose at 12.55 p.m.

1545th MEETING

Tuesday, 5 June 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam,

[7] L. M. Goodrich and E. Hambro, *Charter of the United Nations —Commentary and documents*, 2nd rev. ed. (Boston, World Peace Foundation, 1949).