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Summary record of the 1571st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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Francis Vallat had indicated, there were cases in which it was genuinely impossible to perform an international obligation. Although the expression "absolute impossibility" might not appear to be very satisfactory, it demonstrated clearly that there were occasions when it was materially impossible to comply with an international obligation. It was especially to situations of that kind to that the continental law systems applied the term "*force majeure*". Anglo-Saxon lawyers were undboutedly faced with a difficulty, since they preferred to use the French term "*force majeure*" rather than *vis major*. For them, the concept of *force majeure* evoked primarily "acts of God", which covered only natural events, whereas the concept of *force majeure* also covered situations resulting from human action.

66. In short, Sir Francis Vallat was right to suggest that the Commission should confine its attention to the following three questions. Where it was "materially impossible" to adopt the conduct required by an international obligation, did that preclude the wrongfulness of conduct not in conformity with that obligation? Where a State organ that should have adopted a particular course of conduct failed to do so because it was in distress and could at most choose between the conduct required of it and the conduct it adopted, but where it could not reasonably be expected to have adopted the conduct required of it because that would amount to self-destruction, did that preclude the wrongfulness of the organ's conduct? Where an external and unforeseen event made it impossible for an organ to realize that its conduct was in breach of an international obligation, did that preclude the wrongfulness of the conduct?

67. Referring to his oral presentation of articles 31 and 32 at the previous meeting, he wished to thank the Secretariat for its valuable assistance in providing him with materials on *force majeure* and fortuitous event. The Secretariat study entitled "State responsibility—'*force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctorine"[16] had not only helped him greatly in preparing his report but would also be appreciated as an authoritative work of great academic value.

The meeting rose at 1 p.m.

[16] *Yearbook... 1978*, vol. II (Part One), document A/CN.4/315.

1571st MEETING

Wednesday, 18 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1–4)

[Item 2 of the agenda]

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

ARTICLE 31 (*Force majeure*) *and*

ARTICLE 32 (Fortuitous event)[1] (*continued*)

1. Mr. RIPHAGEN said that articles 31 and 32 submitted by Mr. Ago formed an excellent basis for discussion. The Commission could not ignore the special circumstances provided for in those articles if it wished to take account of the concept of justice, which was not only universal and permanent, but also concrete, as indicated by the maxim *jus in causa positum*. Nevertheless, there were inherent difficulties in treating the subject-matter of *force majeure* and fortuitous event within the framework of the draft, which was at a very high level of abstraction, for two reasons: first, because the draft dealt with the legal relationship between States, which were themselves abstractions; secondly, because it dealt with the responsibility of States irrespective of the content of the obligation whose non-performance entailed that responsibility, as could be seen from articles 1 and 16,[2] and irrespective of the content, forms and degree of responsibility—matters that would be treated later, in part II of the draft.

2. With regard to the first level of abstraction, articles 31 and 32 were concerned with the situation in which the author of the conduct attributable to the State was placed, in other words, the situation of the individual through whom the State was considered to act; account also had to be taken of the situation of the individuals through whom the State suffered, as was shown by the last phrase of article 31, paragraph 2. As to the second level of abstraction, an effort had to be made to resolve the problem without drawing any distinction between the two sides of the legal relationship between States, namely, the content of the obligation of one State and the content of the right of the other. It was in that context that the Commission faced the difficult task of dealing with the impact of the unforeseeable.

3. The problem involved an abstract obligation of one State with a corresponding abstract right of another State, and vice versa—which touched on the content of the so-called primary rule. On the other hand, the Commission also had to deal with responsibility,

[1] For texts, see 1569th meeting, para. 1.

[2] See 1532nd meeting, foot-note 2.

in other words with the legal consequences of non-performance of the abstract obligation that took the form of rights of the other State—which involved the so-called secondary rules. Both matters formed part and parcel of the legal relationship between the two States.

4. The task facing the Commission was to adapt the abstract obligations and rights of the legal relationship to the special circumstances of what, for the time being, could be called *force majeure* and fortuitous event. It was important to remember, however, that they could be adapted in various ways and not simply in order to preclude the wrongfulness of the act in respect of *all* the legal consequences the act would normally—in other words, in the abstract—entail under the so-called secondary rules. For instance, the obligation and the right might have to be adapted under the primary rule, or again, they might have to be adapted under the secondary rules. The crucial problem was which of the two States involved in the legal relationship, in both its primary and secondary aspects, should bear the risk of the unforeseeable. In addition, it might prove necessary to discuss whether the risk could be divided between the States in question and whether the obligation and the right could be adapted by conversion of the legal relationship as a whole, in other words, by means of a substitute performance of the obligation of one State or a substitute right of the other State.

5. To do justice, consideration must clearly be given to the special circumstances of a concrete case of non-performance of an international obligation, but that could be done in several ways. With regard to adaptation of the obligation, it would be noted that paragraph 103 of Mr. Ago's eighth report (A/CN.4/318 and Add.1–4) spoke of the "unquestionable" case of destruction, through uncontrollable natural causes, of property that a State was required to hand over to another State. But was that always so? Could there be no substitute performance of the obligation? The textbooks often cited the hypothetical case of an obligation under which one State was required to transfer an island to another State, and asserted that the obligation would no longer exist if the island in question disappeared, for example as a result of volcanic eruption. Nevertheless, that part of the continental shelf would remain, and it could well be of value or interest to the State to which the island would have been transferred. As to adaptation of the right, it would be seen that paragraphs 113 and 132 of the same document mentioned *force majeure* and distress in connexion with the right of innocent passage through the territorial sea. In that context, however, *force majeure* and distress did not constitute justification for an otherwise unlawful act; they were simply the necessary elements of the right of innocent passage itself. It was interesting to note that the circumstances of *force majeure* and fortuitous event were not specifically mentioned in article 38 of the Informal Composite Negotiating Text/Revision 1,[3] used in the current negotiations on the law of the sea, in connexion with the right of transit through straits, transit passage being considered to be part of freedom of navigation and overflight, for the purposes of continuous and expeditious transit.

6. An example of the possibility of adapting the legal consequences of non-performance of an obligation was given in paragraph 115 of the report, which cited the case of Bulgarians who had been unable to return to their properties in Greece. Greece had not fulfilled its obligation to permit the Bulgarians to return to their properties, but it had fulfilled a substitute obligation by paying them compensation. Again, paragraph 118 discussed the *Case concerning the payment of various Serbian loans issued in France,* in which the Permanent Court of International Justice had considered that the obligation had not been to repay the loans *in specie.* However, had the Court taken the view that Serbia had an obligation to pay *in specie,* would it then have ruled that, in the circumstances of the case, the obligation had ceased to exist? He could not imagine that any court would arrive at such an unwarranted conclusion. Another case of adaptation of a State's obligation seemed to be contemplated in foot-note 290 of the report, in which it was difficult to distinguish between fortuitous event as a circumstance precluding wrongfulness and determination of "the degree of diligence required", which was a matter of the content of the obligation.

7. The answer to the question which party was to bear the risk lay to some extent in the nature of the breach, particularly when the breach did not entail any material damage, as it might not in a case of violation of a frontier, for example. That general problem was reflected in the train of thought developed in paragraphs 133 to 136 of the report relating to *force majeure,* and in paragraph 145, relating to fortuitous event. With regard to paragraphs 133 to 136, it was at first sight difficult to draw a distinction between non-performance of the obligation not to violate the frontier of another State—a violation that often did not entail any real damage—and non-performance of other obligations involving an interest that was "sacrificed" (paragraph 133).

8. The rule of proportionality between the interest protected by adopting conduct not in conformity with an international obligation and the interest protected by the obligation seemed easy to apply in the case of Breaches that did not result in real damage. Nevertheless, the interest served by the *prima facie* wrongful act was the interest of a person or entity other than that whose interest was injured, which meant that what was at issue was not so much a hierarchy of interests as a hierarchy of norms, namely, the conflict between the right of self-preservation and the duty not to injure others. Again, that conflict could to some extent be resolved by adaptation of the consequences of non-performance of the obligation.

9 Paragraph 145 brought out the same link between the character and content of the obligation and the

[3] See A/CN.4/318 and Add.1–4, para. 113.

consequences of the existence of a fortuitous event. In that respect, the distinction made earlier by the Commission between obligations to refrain from certain conduct, obligations to do something and obligations to prevent something from happening, was clearly relevant to the concepts of *force majeure* and fortuitous event. There again, there seemed to be room not only for adaptation of the obligation, but also for adaptation of the consequences of objective non-fulfilment of the obligation, in other words, for substitute performance.

10. The difficulties in applying the two concepts under discussion did not, of course, rule out the possibility of drafting articles on them. The articles proposed by Mr. Ago were extremely useful, as long as they were not regarded as providing a complete answer to the problems involved. Paragraph 1 of article 31 was perfectly clear and logical, and paragraph 3 was its obvious counterpart. The question arose, however, whether the last part of paragraph 2, referring to "a situation of comparable or greater peril", adequately covered the full effect of the rule of proportionality. In regard to article 32, there was some doubt whether a "supervening external and unforeseeable factor" was not in principle something for which the State committing the act had to bear the risk. That State should at least express regret and make good any real damage caused by the act, which meant that an act that was not considered wrongful still had some consequences. If a number of situations were construed as precluding the wrongfulness of a particular act of the State, there might still be room for certain legal consequences of that act. However, the legal consequences of an act that was not wrongful formed a quite separate topic.

11. Mr TABIBI said that he had been greatly impressed by Mr. Ago's analysis of the concepts of *force majeure* and fortuitous event, which encompassed doctrine, State practice and, more particularly, the views expressed at international conferences held under the auspices of the League of Nations and the United Nations. He could not fail to agree with the conclusion reached in paragraph 125 of the report that, in international law, it was a well-established and unanimously recognized principle that conduct not in conformity with what was required by an obligation did not constitute a wrongful act if it was absolutely impossible for the subject to act otherwise. The terms of article 31, paragraph 1, fully reflected that conclusion. In general, he supported the principles underlying both article 31 and article 32.

12. Nevertheless, there were many pitfalls surrounding the question of fortuitous event, and great care must be taken to draft the articles in such a way as to prevent any abuse and ensure that international obligations were not breached on a variety of pretexts. Good faith should be the point of departure in establishing the intentions of the author when a breach of an obligation was due to a fortuitous event. Again, the burden of proof should not rest on the victim, but on the author of the conduct attributable to the State. The third element that required very careful consideration was proportionality between the act and the obligation. For example, a State responsible for damage to a highway in a neighbouring State might claim that it was financially unable to repair the damage, yet the damage might be such as to put a stop to free transit along the highway. The terms of paragraphs 2 and 3 of article 31 should be clarified, so as to bring them into line with the purposes of paragraph 1. In article 32, the basic criterion should be a "supervening unforeseeable factor", and the word "external" should be deleted. Lastly, the Drafting Committee might consider the possibility of formulating a single article, containing one section relating to *force majeure* and another relating to fortuitous event.

13. Mr THIAM did not intend to go into the distinction to be made between *force majeure* and fortuitous event, since the meaning given to those expressions varied according to the system of law considered. It seemed to be generally accepted that *force majeure* and fortuitous event were in principle exonerative of responsibility. Hence it was only possible to inquire from a practical standpoint, in each specific case, whether special circumstances constituted a case of *force majeure* or a fortuitous event.

14. He wondered what value the rules laid down in articles 31 and 32 would have for newly independent States. In his first reports Mr. Ago had raised the question of responsibility in the case of newly independent States, and the Commission had decided to examine that question later, when it took up the grounds for exoneration from responsibility. The question had then arisen whether special provisions should be drafted for newly independent States or whether the elements of a solution could be provided by stating a general rule. He would like Mr. Ago to reply to that question.

15. Mr USHAKOV recognized that there were circumstances that prevented a State from fulfilling its international obligations and, by their nature, precluded the wrongfulness of an act of the State and consequently its responsibility. But he thought that a very clear distinction should be made between the three types of circumstance that might preclude wrongfulness; those types, in his opinion, were *force majeure,* fortuitous event and "extreme necessity".

16. *Force majeure* and fortuitous event had the same consequences: they made it materially impossible for the State to fulfil its obligation. But they had different causes: *force majeure* (in English, "act of God") was a circumstance brought about by a natural event, independently of the will of man, whereas a fortuitous event was a circumstance produced by human action, individual or collective. Thus a forced landing due to a storm was a case of *force majeure,* since it was brought about by a natural event, whereas a forced landing due to the explosion of a bomb placed on board the aircraft by a terrorist was a fortuitous event, because it was the result of human action.

17. He supported the view expressed by the representative of Haiti at the 1907 International Peace Conference, which had revised the system of arbitration established by the 1899 Convention for the Pacific

Settlement of International Disputes, namely, that the circumstances of *force majeure* could be defined as "facts independent of the will of man".[4] However, he did not agree with Mr. Ago's statement, in paragraph 107 of his report, that *force majeure* was an external factor that "may also be attributable to human action". In that connexion, he believed that the expression "force majeure" was wrongly used in article 42, paragraph 5, of the Convention on Special Missions,[5] where it would have been better to speak of "exceptional circumstances", as in the Russian text. In his view, *force majeure* was always a natural event. Such an event was foreseeable in some cases —for example, in so far as it was possible to foresee a flood or a volcanic eruption—but its consequences were unavoidable.

18. Thus there was *force majeure* when a State could not fulfil its obligations because of a natural event, and there was fortuitous event when a State could not fulfil its obligations because of human action. For example, if a State had undertaken to export the output of a mine to another State and the mine was destroyed by an earthquake, that was a case of *force majeure*. On the other hand, if the mine was occupied by an enemy Power, that would be a fortuitous event. In both cases the result was the same: it was really impossible for the State to fulfil its obligation.

19. What distinguished *force majeure* and fortuitous event from "extreme necessity" was that, in the latter case, it was not materially impossible for the State to fulfil its obligation. It could do so, but such conduct would be so far contrary to its own interests—and even, in some cases, to the interests of the international community as a whole—that it was in a situation in which it found it impossible to meet its obligation. For example, if a State could repay a debt, but by so doing ran the risk of placing itself in a disastrous financial situation that would threaten its very existence, the postponement of payment of its debt could be considered necessary. Similarly, if a State had undertaken, by an agreement, to authorize another State to engage in whaling in its territorial sea, and whales were threatened with extinction as a result of overexploitation, the first State could continue to authorize whaling, but it would find itself under the "extreme necessity" of prohibiting it to protect an endangered species.

20. Consequently, he proposed that draft articles 31 and 32 should be replaced by the following provisions:

"Force majeure

"The wrongfulness of an act of a State not in conformity with its international obligation is precluded if the act is due to *force majeure*."

"*Fortuitous event*

"The wrongfulness of an act of a State not in conformity with its international obligation is precluded if the act is due to a fortuitous event involving real impossibility for the State to act in conformity with that obligation."

21. Mr. VEROSTA wished to know, for the future orientation of the Commission's work, what Mr. Ago proposed with regard to state of emergency, which was to be the subject of article 33.

22. Mr. AGO, replying to Mr. Verosta's question, stressed the distinction he had made, particularly in paragraph 102 of his report, between *force majeure* and state of emergency. Some of the examples of extreme necessity given by Mr. Ushakov were covered neither by article 31 nor by article 32, but would be covered by the article that was to follow those two provisions and that was to deal with state of emergency. Paragraph 120 of his report describes the case of the *Société commerciale de Belgique,* in which a dispute between Greece and Belgium had been referred to the Permanent Court of International Justice. In arguing that it could not fulfil its international obligation without jeopardizing the normal functioning of its public services, the Greek Government had in fact invoked a state of emergency, in other words, extreme necessity, which constrained it, if not to refuse payment definitively, at least to defer it to avoid State bankruptcy. When there was a state of emergency, it was the very existence of the State or one of its fundamental interests that was normally at stake; however, as Mr. Ushakov had pointed out, it could also be one of the fundamental interests of a number of States or of the international community. Cases of state of emergency relating to a situation of extreme necessity for a State had nothing to do with cases of distress of an agent of the State faced with a choice that was not really a choice at all: a pilot could not be required to commit suicide rather than violate an international obligation.

23. It was a fact that the terminology on the subject was varied. If one expression had been used in a text rather than another, it was merely because it corresponded more closely to the thought of its author, but he wished to point out once again that none of them had an indisputable natural meaning. It would be preferable, in those circumstances, to disregard the expressions provisionally used to designate the real situations dealt with in the articles under consideration, and to concentrate on the drafting of generally acceptable provisions. It was quite possible to maintain, as Mr. Ushakov maintained, that the concept of *force majeure* referred only to natural events, but it would be better, for the time being, not to insist on the use of one expression rather than of another.

24. Mr. VEROSTA said that the Commission would one day have to opt for certain expressions and that it should already give the matter serious consideration. The terminology established by State practice was very varied, but the Commission should be careful not to use expressions that would be unfamiliar to certain States. He himself could not accept the idea of relative

[4] *Ibid.*, para. 116.

[5] General Assembly resolution 2530 (XXIV), annex.

impossibility and would prefer, like Mr. Ushakov, to restrict the concept of *force majeure* to natural events. Furthermore, he thought the Commission could not entirely avoid studying the consequences to which Mr. Riphagen had drawn attention.

25. Mr. REUTER thought that for the time being the Commission should avoid using the expressions "*force majeure*", "fortuitous event" and "state of emergency" in the draft articles, or even in the commentaries, unless they were placed in brackets. The meaning of those expressions varied so widely from country to country that their use by the Commission should be barred, because it would be dangerous. It might perhaps be possible to use, for example, the expression "irresistible coercion".

26. To make progress in its consideration of the articles under study, the Commission should confine itself to the three questions raised at the previous meeting by Mr. Ago (1570th meeting, para. 66). It would reach a deadlock if it took up the questions raised by Mr. Riphagen and tried to determine what became of the international obligation once it was established that the conduct adopted was wrongful. The United Nations conference on the Law of Treaties had been careful not to settle questions of responsibility, which had only been touched on in article 60 of the Vienna Convention.[6]

27. The principles that Mr. Ago had laid down in the articles under consideration were general principles, valid in all cases. To avoid becoming deadlocked on that issue as well, the Commission should not try to determine whether those principles applied to economic relations. The cases cited by Mr. Ago concerning loans were already old, as Mr. Ushakov had pointed out. At the present time, economic questions of that kind were nearly always dealt with in special agreements in which the expression "*force majeure*" was used in a sense quite different from its general meaning. The Commission did not, of course, have to lay down rules for cases covered by agreements, but it could try to show that, in the absence of any agreement, monetary or economic coercion could justify temporary non-fulfilment of an international obligation, or even reduction of a debt. On that issue, there were not only old arbitration cases, but also recent judicial decisions. In its commentary, the Commission could therefore explain that it was laying down general rules and had deliberately refrained from drafting more detailed provisions on particular kinds of obligation.

28. As to the substance, he could give affirmative answers to the three questions raised by Mr. Ago. With regard to article 31, paragraph 1, he was glad that Mr. Ushakov, in his proposal (para. 20 above), had not referred to the author of the conduct attributable to the State. Between paragraph 1 of article 31 on the one hand, and paragraph 2 of the same article and article 32, on the other hand, there were great differences. As Mr. Ago had pointed out, there could be coercion either of a State or of its agents. It was for that reason that, in the Vienna Convention, two separate articles had been devoted to coercion of a State and coercion of a representative of a State. The case contemplated in article 31, paragraph 2, seemed to relate to natural persons. As he had already observed with regard to another article, the question arose in different terms for States because, in certain circumstances, they must agree to perish. As Mr. Ago wished to deal separately with the problem of necessity for the State and that of necessity for the individual, it might perhaps be advisable to make paragraph 2 of article 31 a separate article. Mr. Ago's idea of the concept of "cas fortuit" (fortuitous event) was contrary to French usage and probably not in conformity with a number of systems of law. Moreover, it was open to question whether article 32 was not mainly concerned with natural persons, as appeared from the examples given by Mr. Ago. Could a State be exonerated because it had been impossible for it to realize that its conduct was not in conformity with an international obligation? It might therefore perhaps be better to combine paragraph 2 of article 31 and article 32 in a single provision.

29. In article 31, paragraph 1, Mr. Ago mentioned only the absolute impossibility of acting otherwise. Mr. Ushakov did not wish to go so far. For his own part, he would like to go further and mention the cause. It would not be wise, however, to mention the possible causes in the text of the article itself. In the commentary, the Commission might indicate, first of all, natural causes, such as cataclysms. Would it be appropriate then to mention unknown causes? If a dam built in one State gave way and the waters it retained flowed into the territory of a neighbouring State, the cause of the disaster could be an earthquake, a defect in construction or a defect in construction revealed by the earthquake. Could two concomitant causes be accepted? On whom would the burden of proof rest? In some systems of law, the expression "cas fortuit" (fortuitous event) referred precisely to situations brought about by unknown causes. That was why the Commission should not go into the causes in detail, but should perhaps introduce in article 31, paragraph 1, two elements appearing in article 32, namely, the external nature of the determining factor and its unforeseeable character. It could be retorted, of course, that that factor could only be external, since paragraph 3 of article 31 provided that the situation of impossibility or distress must not be due to the State to which the conduct not in conformity with the obligation was attributable. To illustrate the need for the factor to be unforeseeable character. It could be retorted, of course, though international meteorological services had announced a storm and warned airports not to allow any further take-offs, a State authorized an aircraft to take off, but the aircraft had to land shortly afterwards on the territory of another State, causing serious damage. As the factor determining the adoption of conduct not in conformity with the international obligation had been foreseeable, such conduct could not be regarded as lawful.

[6] See 1533rd meeting, foot-note 2.

30. Sir Francis VALLAT said that, although there was broad agreement on the principles involved, it was the manner in which those principles were to be expressed that gave rise to difficulty.

31. It would be noted from section 4 of chapter V of Mr. Ago's eighth report that there were already cases in which certain elements affected the consequences of the act and the nature of the obligation, as well as cases in which the State was excused, or the wrongfulness of its act precluded, because of the circumstances. In addition, the Secretariat's study on *force majeure* and fortuitous event [7] had disclosed many more cases that illustrated the marginal character of the topic. In the particular case under consideration, however, the language proposed by Mr. Ago seemed appropriate to the circumstances, since the inclusion of the phrase "an act of the State not in conformity with what is required of it by an international obligation" in reference to each of the three situations covered by articles 31 and 32, meant that, if the obligation was varied so that some other obligation arose, the question should be dealt with elsewhere. He therefore considered that the Commission could safely agree to wording along the lines proposed, provided it was made plain in the commentary that articles 31 and 32 were concerned solely with the assumption that there was an obligation and that the conduct attributable to the State was not in accordance with that obligation and that they were therefore not concerned with the modification of an obligation.

32. With regard to the structure of the draft articles, it seemed to him that the difference between paragraphs 1 and 2 of article 31, on the one hand, and article 32, on the other, did not lie exclusively, or perhaps even mainly, in the nature of the event, since the difference was just as great according to the type of situation contemplated. For example, paragraph 1 of article 31 dealt with what the Vienna Convention termed impossibility of performance, paragraph 2 of article 31 dealt with a situation of distress, and article 32 dealt with the impossibility of recognizing that what had been done was in breach of the obligation. Those three situations, which were all quite different, were as much a part of the essence of the articles as the circumstances that had brought them about. Indeed, his own inclination would be to stress the circumstances that ensued from the situation rather than those that had given rise to it and, to that end, to incorporate the two elements of paragraph 3 of article 31, namely, the impossibility of complying with the obligation and the situation of distress, in paragraphs 1 and 2 of that article respectively.

33. As to the expression "the author of the conduct", in paragraph 1 of article 31, he believed it was the first time it had appeared in the draft, the usual expression being "the conduct of an organ of the State". He doubted whether it was advisable to introduce new terminology at that stage. The main point was not whether it was impossible for the author or the organ of the State to act otherwise, but whether it was impossible for the State itself to do so. In the case of the disappearance of an island, for example, the impossibility of transferring the island applied not merely to the organ of the State, but to the State as such. His concern was that any attempt to distinguish between impossibility for the author of the conduct and impossibility for the State would enable the State to claim that, as its agent had been unable to act otherwise, it was not responsible for the conduct. What mattered in the final analysis was whether or not it was impossible for the State to comply with the obligation; whether or not a particular person was in a position to do so was a secondary factor.

34. He was not proposing a specific amendment, but the essence of what he had in mind would be reflected if the phrase following the words "is precluded", in article 31, paragraph 1, were replaced by the words "if, due to circumstances beyond its control, it was impossible for the State to act in conformity with the obligation".

35. He had omitted any reference to the circumstances giving rise to the impossibility, although in his view the inclusion of such a reference merited the Commission's consideration, because he thought that any discussion of those circumstances would only lead to difficulties. It was clear, however, that the State must exonerate itself by establishing that what had occurred was beyond its control, and the essence of the matter might therefore be said to lie in the question whether or not the State could have avoided the situation.

36. Lastly, he considered that a test of foreseeability would be dangerous, since that quality was purely subjective and depended on the approach of the particular State or organ concerned. Indeed, he doubted whether anything was really unforeseeable, since the most common cases of *force majeure*—earthquake, disappearance of an island through volcanic action, extremes of weather, for example—could be and had been foreseen.

The meeting rose at 1 p.m.

1572nd MEETING

Thursday, 19 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

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[7] See *Yearbook... 1978*, vol. II (Part One), document A/CN.4/315.