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Summary record of the 1572nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1979, vol. I

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.

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. Sir Francis VALLAT said that it might facilitate the Commission's consideration of the questions of *force majeure* and fortuitous event if the three substantive provisions of articles 31 and 32 were treated as separate articles, at any rate for the purposes of initial drafting. That applied in particular to paragraph 2 of article 31, which should incorporate the relevant provision from paragraph 3, since it would be helpful if the Drafting Committee could examine the question of distress in isolation.

2. Inasmuch as distress, as a defence or excuse, was pleaded most frequently in connexion with ships and aircraft, it had a special character, and in a sense the problem could be handled more easily within that specific context. The generalization of the excuse of distress gave rise to difficulties, not the least of which was the meaning of distress itself; what amounted to distress, and to whom and in what circumstances it applied, were questions that called for careful examination. From paragraph 2 of article 31 he assumed it was intended to apply to an individual, as opposed to a corporation or a State. If that assumption was correct, it should be made clear. Also, he wondered what was the precise nature of the distress contemplated in the paragraph. Obviously, if a person was in peril of his life, that was a case of distress. But did a man have to be in peril of his life to be allowed to adopt conduct that would otherwise involve a breach of an obligation by the State under international law? That was a point he had difficulty in deciding. Again, he was not certain that the test of conduct laid down in the same paragraph, namely, conduct that did not "place others in a situation of comparable or greater peril", was the right one. In his view, the doctrine of proportionality should operate to establish a link between the measures of avoidance actually taken and what was necessary, or reasonably necessary, to avoid the peril.

3. A somewhat more important point was that paragraph 2, as drafted, suggested that the choice of means was left entirely to the individual involved in a situation of distress; that seemed to sever the link between the individual, who would normally be the organ of the State, and the State itself. For instance, the pilot of an aircraft in flight might find himself in a situation in which, to save life, he was obliged to cross a border and land in the territory of a foreign country. That situation might have arisen because the airport control tower of the State had failed to provide the pilot with the necessary information or because there had been negligence in the maintenance of the aircraft. It was his view that in such cases—where what happened was due to some failure on the part of the State—the State should bear the responsibility even though the individual had been in peril and had been obliged to take action to avoid that peril. Paragraph 3 went some way to meeting his point but did not deal with the question as to how the situation had arisen, which called for more positive treatment.

4. In article 32, the stress was likewise placed on the position of the individual, the "author of the conduct", and there again he wondered whether there should not be a more direct link with the State. Also, he had doubts about the shift from the negative formulation of paragraphs 1 and 2 of article 31 to the formulation adopted in article 32, and even greater doubts whether, as a matter of law, the test of what was unforeseeable could be applied. His main difficulty with article 32, however, arose from the words "realize that its conduct is not in conformity with the international obligation"; he would be grateful if they could be explained. A situation might arise where the State had means of knowledge, but not the individual, and he doubted whether the State should be relieved of responsibility in such circumstances. In internal law, for instance, it often happened that a person committed a breach in all innocence, but that did not necessarily relieve him of responsibility.

5. Mr. SUCHARITKUL considered the three general principles set out respectively in paragraphs 1 and 2 of article 31 and in article 32 to be acceptable; he feared, however, that the transposition to international law of expressions peculiar to internal law would inevitably lead to difficulties of understanding and interpretation. Not only were the situations envisaged in the articles in question described by expressions that varied from one country to another, but the same expression was sometimes used in two juridical systems to describe different situations. Moreover, the scope of those expressions could vary in internal law, depending for example on whether they were used in penal or civil matters.

6. The expression "*force majeure*" had often been a source of confusion, whether used in internal law, in international contracts such as contracts for the international sale of goods, or in international conventions. Even where that expression was defined in internal law, it could happen, in view of the rule that the will of the parties to a contract prevailed, that those parties gave it a different meaning. Like Mr. Ago, he believed that the concept of *force majeure* should not be limited to the occurrence of acts of nature but should extend to acts caused by human action. Moreover, the principle stated in article 31, paragraph 1, should be applied not only to conventional and customary obligations but also to obligations that might flow from decisions of the Security Council, from arbitral awards or from judgements of the International Court of Justice. In 1960, in the *Case concerning Right of Passage over Indian Territory*, involving Portugal v. India, the International Court of Justice had ruled that in 1954 Por-

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

tugal had had a right of passage to two enclaves.[2] In the mean time, however, those enclaves had ceased to be under Portuguese sovereignty. The effect of that supervening factor had therefore been to render the performance of India's obligation absolutely impossible materially. Admittedly, in that case, it might be asked whether the situation thus created had not been due to "the State to which the conduct not in conformity with the obligation is attributable", in the terms of article 31, paragraph 3. As to the case of the *Appeal Relating to the Jurisdiction of the ICAO Council*,[3] referred to the International Court of Justice shortly before the disappearance of east Pakistan as such, it had involved the overflight of Indian territory by Pakistan civil aircraft. In that case too India's obligation had become void of subject-matter and its performance impossible, but there again it might be asked whether that impossibility had not been attributable to India.

7. With regard to the situation of distress, he was inclined to think, like Sir Francis Vallat, that it concerned individuals rather than States. In Mr. Ago's opinion that situation, which he described as a relative impossibility, was characterized by the choice between the performance of the international obligation and some other conduct that would make it possible to avoid a serious danger.

8. Like Sir Francis Vallat, he doubted whether the idea of an unforeseeable factor constituted a sound criterion. Although many events, such as cyclones, were foreseeable, it was generally impossible to determine in advance the precise moment of their occurrence. Ultimately, in all the cases covered by articles 31 and 32, account had to be taken of a subjective element that found expression in the degree of diligence displayed by the author of the conduct attributable to the State. From that point of view it would be possible to distinguish, as in Roman law, between *culpa lata, culpa levis* and *culpa levissima*. A pilot who had to make a forced landing was often at the mercy of natural or mechanical factors that made it very difficult to pilot the aircraft. For that reason, he hoped that the Commission would place the emphasis on some such idea as constraint or "insurmountability" rather than on that of "control".

9. Mr. NJENGA said that the rationale for the rule in article 31 was that an external event over which the State had no control might make it impossible for that State to fulfil its obligation, as a result of which its act could not be wrongful. He was therefore unable to take the view that, for the purposes of the draft articles, the doctrine of *force majeure* should be construed in a restricted sense as applying solely to natural disasters. In that connexion, he noted the statement made in paragraph 107 of Mr. Ago's report (A/CN.4/318 and Add.1–4): "But this external factor may also be attributable to human action, loss of sovereignty or quite simply loss of control over a portion of State territory, for example." It therefore seemed that Mr. Ago himself had not ruled out the possibility that a cause other than a natural disaster might amount to *force majeure*.

10. He wished to know whether, if wrongfulness were precluded on grounds of *force majeure*, the intention was that compensation for the other equally innocent party was likewise precluded. His concern on that point arose because Mr. Ago, in paragraph 124 of his report, had referred, apparently with approval, to article 10, paragraph 6, of the codification draft of Graefrath and Steiniger, which read: "The obligation to indemnify does not apply in cases of *force majeure* or of a state of emergency." He feared that, if the Commission took that approach, its hands would be tied when it came to deal with responsibility for acts not prohibited under international law. For instance, if an oil tanker travelling from State A to State B collided with another vessel because of dense fog, with the result that oil was discharged on the shores of State C, that in his view would be a clear case of *force majeure*, and he saw no reason why State C should have to suffer the consequences merely because no party was liable in law. It might be that parties engaged in exceptionally hazardous pursuits should be required to insure in advance against the risks involved, and that some mechanism should be set up for dealing with such situations. There was a common law rule (*Rylands* v. *Fletcher*),[4] which imposed what amounted to absolute liability for damage resulting from such pursuits.

11. It was also necessary to take account of what might be termed "economic *force majeure*", which had been considered in the *Case concerning the payment of various Serbian loans issued in France* and in the *Case concerning the payment in gold of the Brazilian Federal loans issued in France*, which were referred to in paragraphs 118 and 119 of Mr. Ago's report. The fact that a country had suffered some disaster as a result of which it was completely unable to meet its debts could not, in his view, be excluded as a circumstance of *force majeure*. For instance, the unprecedented rise in the price of petroleum and manufactured goods, combined with the fall in the price of raw materials, had brought many developing countries to the verge of bankruptcy. If that were not *force majeure*, he did not know what was. It was in recognition of that state of affairs that certain creditor countries, including the Netherlands and the Scandinavian countries, had indicated their willingness to write off their loans to developing countries.

12. In conclusion, with regard to the formulation of articles 31 and 32, he suggested that the Drafting Committee should be asked to consider whether the articles could be merged or recast with a view to clarifying their intent and establishing the nexus

[2] *I.C.J. Reports 1960*, p. 6.

[3] *I.C.J. Reports 1972*, p. 46.

[4] United Kingdom, *The Law Reports, English and Irish Appeal Cases before the House of Lords* (London, Council of Law Reporting, 1868), vol. III, p. 330.

between them. He agreed entirely with Mr. Tabibi about the the need to narrow their provisions so that the articles could not be used as an excuse to infringe the rights of weaker countries.

13. Mr. YANKOV disagreed with what seemed to be the rejection of the use of the term "*force majeure*". The Commission would be failing in its duty if it decided that it was safer to disregard *force majeure* because the concept had so many different connotations. "*Force majeure*" was a term of art not only in many systems of internal law, where it was left to jurists and the courts to determine the interpretation, but also in international law and even in the terminology of the Commission itself. If some countries did not use the term, the Commission should elucidate it in the commentary. Fortunately, Mr. Ago had fully complied with the request made to him to identify and clarify the factors justifying the non-performance of an international obligation. Article 31 clearly stated the very important element of the impossibility of performing an obligation and also the situation of distress that precluded the international wrongfulness of an act of the State. Article 32 provided for "a supervening external and unforeseeable factor", although it was true that the draft dealt with the responsibility of States and it might therefore be best to avoid referring to "the author of the conduct". The Drafting Committee could doubtless improve the wording of the articles in the light of the suggestions that had been made, but Mr. Ago was to be congratulated on a comprehensive and profound analysis of the subject-matter and of the substance of the articles he had proposed.

14. Mr. USHAKOV stressed the need to consider only those situations that involved the State. In the articles in question, it was absolutely necessary to avoid any reference to State organs, private individuals and other authors of conduct attributable to the State; reference could be made to chapter II of the draft to determine what conduct was attributable to the State.

15. The expression generally used in Russian to translate the expression "*force majeure*"—and which appeared *inter alia* in article 14, paragraph 3, of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[5]— referred to natural occurrences, to the exclusion of human action. That expression could be translated into French by the words "force insurmontable" or "force irrésistible". It would therefore be best to avoid using the expression "*force majeure*" in the draft. The reason why he favoured two separate articles, dealing respectively with fortuitous events due to human action and with insurmountable events due to natural forces, was because he believed that the State could be held responsible for an event due to human activity, whereas *force majeure* could not be considered as resulting from an activity of the State. Referring to the example given by Mr. Reuter (1571st meeting), he wondered whether a State that authorized an aircraft to take off from its territory despite pessimistic weather forecasts was really violating an international obligation. In conclusion, he suggested that both acts of nature and acts of man should be taken into consideration in so far as they originated with the State.

16. Mr. QUENTIN-BAXTER said that it was important to resist the lure of discussing the various aspects of the topic that might have some bearing on liability for injurious consequences of acts that were not in themselves unlawful. He realized that it was impossible to deal in articles 31 and 32 with the question of substitute obligations, and he shared the general sentiment that those articles must speak expressly of the State rather than of the author of a particular course of conduct. In emphasizing the latter point, however, it had to be recognized that the perspective of the three main provisions set out in articles 31 and 32 changed somewhat.

17. At the human level, it was easy to take the view that what had been termed "*force majeure*" was the major consideration and that, in the context of article 31, paragraph 2, the impossibility of complying with an obligation was to be judged by a rather different standard when the lives and fate of human beings were at stake. At the level of the State, however, a different relationship could be seen between the three main provisions. Admittedly, the situation of distress provided for in paragraph 2 of that article could not be divorced from its human dimension, yet it was difficult to determine the dividing line between the idea of distress and that of necessity, which the Commission had not yet considered. The release of dam waters that were backing up and flooding towns in a country upstream might lead to loss of life and property in a neighbouring country downstream; such a case would normally be regarded as one of necessity rather than of distress. Nevertheless, the similarity between the two ideas was too great to be ignored or to allow the Commission to make up its mind about the one until it had formed an opinion on the other. If doubts existed about the connexion between that paragraph and the concept of necessity, they must also exist about the connexion between *force majeure* and fortuitous event.

18. In Mr. Ago's view, the distinction between *force majeure* and fortuitous event lay in the fact that there was absolute powerlessness to affect the course of events in the one case and absolute ignorance that the course of events was potentially wrongful in the other. According to Mr. Ushakov, a broad and satisfactory distinction could be made between peril resulting from natural causes and peril resulting from acts of man. However, the affairs of man were so complicated that it would not normally be easy to assign a particular occurrence to one cause or another. For instance, a total crop failure might be due to drought, but it might also be due to the fact that the supply of insecticides had ceased. In article 31, paragraph 1, and article 32, alike, the essence of the matter was powerlessness to change the situation. Article 32 brought into operation

[5] United Nations, *Treaty Series*, vol. 516, p. 235.

factors similar to those catered for in article 31, paragraph 3. A "supervening external... factor" presumably meant a factor to which the State in question had not itself contributed, while an "unforeseeable factor" presumably involved considerations of duty of care or reasonableness; he had some difficulties with that, however. Obviously, the terms of article 32 were readily understood in the straightforward case of a pilot who, without any carelessness on his part, was unaware that he had violated foreign airspace. But the draft was concerned with the State and not with the pilot or his crew. What would the situation be if the necessary standard of care had not been met—for example, if the ground staff had fitted the aircraft with a faulty compass?

19. Mr. Sucharitkul had referred to the importance of the time factor. The distinctions that the Commission instinctively sought to draw between the situations covered by article 31, paragraph 1, and article 32, might well relate to the time element. The question whether or not a factor was foreseeable must frequently arise in connexion with *force majeure*, and it was no accident that the literature cited by Mr. Ago assigned a rather shadowy place to the concept of fortuitous event. Article 32 indeed related to an essential aspect of the over-all situation that the Commission was considering, but he was not sure about the dividing line between the two concepts, or whether they could even be separated. Fortunately, the Commission's brief discussion of the subject had paved the way for an interesting and constructive examination of articles 31 and 32 by the Drafting Committee.

20. Mr. TSURUOKA considered that, in view of the differences of opinion concerning the meaning to be given to such expressions as "*force majeure*", "fortuitous event", "necessity" and "distress", the Commission should formulate the rules applicable to those situations with extreme precision and define very clearly the terminology it used. As the question was one of rules under which an act not in conformity with an international obligation might not be wrongful, and which might consequently give rise to abuse in practice, their scope should be limited as much as possible to ensure the stability of the international legal order.

21. He favoured dividing article 31 into two articles. He would like all the articles concerning *force majeure*, fortuitous event and distress to include a proviso similar to that in article 31, paragraph 3.

22. Mr. VEROSTA said that paragraph 127 of the report referred to a situation which the State could not use to "justify and excuse the conduct". Care should be taken not to confuse justification and excuse, which were two entirely different concepts. Fortuitous events included cases where wrongfulness disappeared and others where it remained, although with extenuating circumstances.

The meeting rose at 12.30 p.m.

1573rd MEETING

Friday, 20 July 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

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

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 (*concluded*)

ARTICLE 31 (*Force majeure*) *and*

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

1. Mr. AGO, replying to the comments made in the debate, noted first of all the Commission's general acceptance of the three rules set out in articles 31 and 32. For the moment, therefore, the terminological questions giving rise to disagreement could best be disregarded. He wished to point out, however, contrary to the view expressed by Mr. Sucharitkul at the previous meeting, that it was not really a case of transferring concepts from internal law to international law. The terms he had used to designate the situations dealt with in the articles under consideration had already been used extensively in international law by Governments, writers, arbitrators and judges. The difficulty arose because even in internal law the terminology was uncertain.

2. The Commission should also leave aside the identification of the external factors giving rise to the situations to be taken into consideration and concentrate solely on the situations themselves. It seemed to be generally accepted that three situations, to which the three rules corresponded, must be considered. The first situation was that of material or absolute impossibility. Some members of the Commission were reluctant to use any adjective, because they took the view that, in the cases considered, it was simply a case of impossibility, or not, to perform the international obligation involved. Nevertheless, the expression "absolutely impossible" was used in doctrine, and there were in fact several kinds of impossibility. A person forced to choose between conduct not in conformity with an international obligation of the State on behalf of which he was acting, and conduct in conformity with that obligation but equivalent to suicide, was undoubtedly in a situation of impossibility, even if not of absolute impossibility. It was precisely to that category of situ-

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