Document:-
A/CN.4/SR.1573

Summary record of the 1573rd meeting

Topic:
State responsibility

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

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.

ation that doctrine applied the expression "relative impossibility". As for material, real or absolute impossibility, the first situation dealt with in the draft articles, it was characterized by the fact that the State or a person acting on the State's behalf could in no way perform a given international obligation and had no choice available to him. In the second situation, that of distress, there was at most a choice between conduct not in conformity with the international obligation and conduct that was theoretically possible but, that could not normally be expected of a human being in the situation in question. A choice therefore existed, but not a free choice. In the third situation, finally, it would be absurd to speak of a choice where, as a result of an unforeseen external factor, the person acting on behalf of the State was placed in a position where it was impossible for him to know that his conduct was not in conformity with an international obligation.

3. Each of the cases envisaged was marked by the intervention of an external and unforeseeable factor. Of course, as several members of the Commission had pointed out, hardly any events were not in some way foreseeable. However, for the purposes of the articles under consideration, what must be established was whether, in the circumstances, the intervention of the deciding factor could have been foreseen as a matter of reasonable diligence. The same factor could intervene in each of the three cases, but its consequences varied according to the case concerned. In the first, it produced a situation of material impossibility of performance; in the second, a virtually inexistent choice; in the third, a situation such that the State's agent was unable to realize that his behaviour was not in conformity with the international obligation. It was at that point that views in the Commission began to diverge. All the members agreed that the external and unforeseeable factor could be due to a natural event or to human action, but they differed on points of terminology. However, whatever expressions and categories they used, they arrived at the same result. Thus Mr. Ushakov (1571st meeting), who distinguished between *force majeure* and fortuitous event according to whether the factor concerned was due to nature or to man, had pointed out that their consequences were nevertheless the same. An aircraft whose wing had been damaged by lightning or by a bomb thrown by a terrorist might in either case be obliged to make a forced landing. As Sir Francis Vallat had pointed out, what counted in every case, in the final analysis, was the material impossibility of performing the international obligation, whether that impossibility was due to an act of nature, an act of the State or the action of individuals. A State that had made a commitment to another State to deliver certain quantities of products from its soil or subsoil might find it impossible to perform its international obligation, for example as a result of drought, an invasion of locusts, a strike or the fact that the territory in which the products were situated had been subjected to foreign invasion.

4. The external factor, which Mr. Reuter (*ibid.*) would like to see defined more precisely, must nevertheless not be due to an intentional act or to the negligence of the State invoking it to justify conduct not in conformity with an international obligation.

5. Several members of the Commission had considered that the articles should refer to the act of the State and not the act of the organ acting on behalf of the State. In his view, that comment hardly applied to the first rule. The words "if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise", in paragraph 1 of article 31, might be replaced by the words "if, when the act is committed, it is materially impossible to act otherwise", yet the difference between obligations to do and obligations not to do must be made clear. For obligations in the first category, it was evident that the articles could refer only to the State. However, in the case of obligations in the second category, for example the obligation not to cross a border, it was not really the State, but the pilot of a particular aircraft or the captain of a particular ship of the State, who found it impossible to act otherwise. However, he would not suggest that the expression "the author of the conduct attributable to the State", proposed in articles 31 and 32, was irreplaceable.

6. Since the Commission approved the first rule, a title should be found for it, and opinions were divided on that point. Mr. Ushakov objected to the term "*force majeure*", while Mr. Yankov and Mr. Verosta (1572nd meeting) were in favour of it. In fact, the term "*force majeure*" was merely the translation of the Latin expression *vis major,* which described a force too great to resist. There appeared to be no reason for that force to be natural and not due to human action. Of course, as pointed out by Mr. Ushakov, in some legal systems the idea of *force majeure* was confined to acts of nature, but the Commission could overcome that difficulty by stating in the article it entitled "*Force majeure*" that it had in mind an external factor, whether natural or human. However, if the Commission rejected that solution he could accept another expression, such as "irresistible force". The expression "irresistible coercion" proposed by Mr. Reuter (1571st meeting) (*ibid.*) should be avoided, since the term "coercion" was used in a different sense in another article of the draft. But such terminological problems were really of only secondary importance, and should be dealt with by the Drafting Committee.

7. If the two rules set out in paragraphs 1 and 2 of article 31 respectively were dealt with in separate articles, the provision in paragraph 3 would obviously have to apply to both, since wrongfulness persisted whenever the State was at the origin of the situation of impossibility. As Mr. Sucharitkul (1572nd meeting) and Mr. Riphagen (1571st meeting) had pointed out, a very important subjective element came into play in all situations covered by article 31.

8. In the wording of the rule relating to a situation of distress, set out in paragraph 2 of article 31, it was impossible not to mention the State agent, since it was not the State itself but its agent that was in such a situation. The fact that a human being was at the

centre of the situation could not be disregarded. It could happen, however, that, faced with the situation of distress of one of its agents, a State would not intervene to extricate him, even though it could do so. In that case, the conduct of the State would be wrongful and article 31, paragraph 3, would apply. That would be the case of a State which, although in a position to save one of its ships in distress on the high seas, failed to intervene.

9. Account should also be taken of the human aspect of the situation referred to in article 31, paragraph 2, to distinguish it from state of emergency. Mr. Ushakov (*ibid.*) had used the expression "extreme necessity" to describe the latter case too, which would be dealt with in article 33. It was for the sake of completeness that the report mentioned cases that in fact did not fall under the concept of *force majeure* or of fortuitous event, but rather under that of state of emergency. In a dispute with Belgium, for instance, Greece had claimed that repayment of its debt would have placed it in a situation of bankruptcy, and that it could not incur such a danger to the State.[2] Mr. Ushakov had mentioned the case in which a State that had authorized another State, by treaty, to fish a certain species in its territorial waters, found that part of its population was thus in danger of being deprived of an important food resource. Situations to be characterized as "state of emergency" were those that held a grave danger to the existence of the State or to an essential interest of the State. Such situations, however, must be distinguished from those where it was the State organ that was in danger and was obliged to act to escape the distress in which it was placed. As Mr. Riphagen had pointed out, account had to be taken, in that second instance, of the case of a human being acting on behalf of the State, but in terms of a situation in which he was placed *qua* human being.

10. Another question raised with respect to article 31, paragraph 2, was that of the proportionality between the interest of one party that was safeguarded and the interest of another that was sacrificed by the non-observance of the international obligation. As had been indicated, it was possible that no real interest would be sacrificed or, at all events, that no material damage would be caused. On that point Mr. Riphagen had envisaged two cases. In the first, he had considered the example of an island that a State was obliged to cede to another State but that disappeared, whereas of course the sea surrounding it and the continental shelf bordering it remained. It might then be asked what should happen to the sea and the continental shelf. Personally, he was inclined to favour the view that the obligation simply ceased to exist, but that question in fact lay outside the sphere the Commission had been instructed to examine. The second case was one where an act whose wrongfulness was precluded produced injurious consequences for third States. There again the situation was beyond the scope of the articles under consideration. He was nevertheless prepared to agree that, if the Commission deemed it necessary, there should be a paragraph expressly indicating that, where wrongfulness was precluded, it was without prejudice to other consequences that might for other reasons flow from the act of the State concerned. In addition, it must be borne in mind that the absence of a reasonable proportion between interests safeguarded and interests sacrificed reintroduced the possibility of the wrongfulness of the act.

11. As to the third rule, dealt with in article 32, it was again the situation of the State agent who had committed the act that came into play, because the State as such might even know, for its part, that one of its aircraft had gone beyond the boundaries of its territory, whereas the pilot had not known. It was therefore important to say expressly in the draft article that it was the agent, as a human being, who was in a situation where it was impossible for him to realize that he was acting contrary to an international obligation. As to the title of the article, the expression "fortuitous event" had proved to be a source of difficulty because of the particular meaning given to it in certain juridical systems. The Drafting Committee would have to examine that point.

12. He sympathized with Mr. Reuter's view (1571st meeting) that, generally speaking, it would be preferable not to go into the question whether the general principles stated applied to international economic relations, and hoped that the Commission would avoid any specific reference to economic obligations, even in its commentary, although the International Court of Justice had decided to allow *force majeure* as an exception in such obligations.

13. Some members had pointed out the need to guard against permitting abuses that would be dangerous for weak States. In his opinion, the risk of such abuses seemed unlikely, since the rules prepared by the Commission were aimed precisely at protecting the weakest States. Even in the case envisaged by Mr. Thiam of a newly independent State grappling with an uprising in part of its territory that prevented it from discharging an international obligation relating to that territory, the draft articles would afford sufficient protection, since such a situation would come under the first rule, based on absolute impossibility of performance, and the non-performance would have nothing wrongful about it.

14. Mr. Verosta (1572nd meeting) had indicated that there might be situations in which wrongfulness would not be precluded but in which account should be taken of the circumstances involved as attenuating circumstances in regard to fixing the amount and form of reparation for damage. Such cases would come under part II of the draft, which would have to determine not the existence but the consequences of the internationally wrongful act.

15. Mr. REUTER unreservedly approved Mr. Ago's explanation and agreed with him that the Commission must reason in terms of situations, namely, situations of impossibility. That meant that account would not

[2] See A/CN.4/318 and Add.1–4, para. 120.

be taken of the cause of the situation, regardless whether it was an act of nature or a human act. In that connexion, Mr. Ago had said that it would be preferable, in describing situations of material impossibility attributable to natural and especially human causes, to avoid the term "coercion", which had been used in other provisions in a specific sense. For his own part, he had taken that remark to refer to article 28,[3] and the subject-matter considered by the Commission in fact called to mind the content of that article.

16. In practical terms, it was possible to think of a number of treaty situations in which the treaty as a source of international obligations included many elements of what, between private individuals, would be called a contract. That was particularly the case with treaties between States relating to the delivery of products or equipment. In such a case, the act of a third party might produce some effect. For example, a treaty might provide for the delivery by one State to another of aircraft that the first State was unable to manufacture without having first concluded another agreement with a third State for the supply of necessary equipment. If the third State did not supply the equipment, that would amount to an act by a third State that prevented the performance of the first treaty, and it must be determined whether, as a result, the non-performance by the State that had undertaken to supply the aircraft of its obligation pursuant to the treaty lost its character of wrongfulness. In that connexion, Mr. Ago had mentioned the idea of an act of State, taken from private law, where it described the act of a State that prevented the performance of private contracts. Such a situation could in fact arise in international relations, especially where treaty implementation was prevented by an international decision.

17. The Commission could not avoid studying complex problems of that kind if it decided to approach the matter in terms of causes; like Mr. Ago, he thought it would be best to deal exclusively with situations.

18. Mr. USHAKOV said he had always considered it necessary to make a distinction between natural occurrences, which relieved the State of its responsibility, and acts of human origin, which were a different matter. Moreover, he thought the Commission should rid its commentary of all examples of specific cases that were not clear and indisputable, as great caution was called for.

19. Mr. VEROSTA said he still regretted that articles 31 and 32 were not followed and supplemented by an article 33 defining necessity. It would in fact be desirable to establish a closer link between cases in which the State was in mortal danger and cases of distress on the part of organs of the State, since the author of the conduct attributable to the State was generally an organ of the State.

20. Mr. SUCHARITKUL pointed out that he had mentioned the danger of adopting private law terminology in international law only as a general reminder. In the present case, he was not opposed to the use of the words "*force majeure*", especially after the explanations given by Mr. Ago.

21. Mr. AGO agreed with Mr. Reuter that a number of difficulties could be avoided by not referring to causes. However, the Commission had been asked to draft general rules of international law and it was obvious that, where an international treaty contained a different rule, the latter would apply, since the texts drafted by the Commission had only the value of subsidiary rules.

22. In the specific case described by Mr. Reuter of the impossibility of performing an international sales agreement owing to the act of third State, paragraph 3 of article 31 would become operative, for it might be considered that the State had been careless and negligent by concluding a treaty to supply equipment for whose production it was not dependent on itself alone. In the different case of international sanctions, article 30 (Countermeasures),[4] could be applied.

23. Like Mr. Ushakov, he thought the Commission should exercise great caution in drafting its commentary.

24. As to the question of distinguishing between state of emergency and situation of distress, raised by Mr. Verosta, he pointed out that state of emergency was quite different from distress, and would be studied subsequently.

25. In conclusion, he shared Mr. Sucharitkul's concern about the need to use clear and precise terminology that left nothing in doubt.

26. The CHAIRMAN proposed that if there were no objections the Commission should refer draft articles 31 and 32 to the Drafting Committee, which would consider them in the light of the discussion and of the proposal submitted by Mr. Ushakov (1571st meeting, para. 20).

It was so decided. [5]

The meeting rose at 11.40 a.m.

[3] 1567th meeting, para. 1.

[4] *Ibid.*

[5] For consideration of the texts proposed by the Drafting Committee, see 1579th meeting.

1574th MEETING

Monday, 23 July 1979, at 3.15 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter,