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Summary record of the 1579th meeting

Topic:
State responsibility

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point that all aspects of the subject would have to be considered at some stage, including uses, abuses and effects, competing priorities among uses, general principles, co-operative institutions and measures for the peaceful settlement of disputes.

19. The question had been raised whether the draft articles should deal not only with the uses of international watercourses but also with the uses of the water of international watercourses—a distinction which he had not thought to be profound. Reference had likewise been made to related problems such as flood control, erosion, sedimentation, salt-water intrusion and estuaries. In view of the approach adopted by the Commission so far, and of the response of States to the questionnaire, there was every expectation that the Commission would deal with such related problems, the importance of which must not be minimized. As far as any distinction between the uses of international watercourses and the uses of the water of international watercourses was concerned, the latter expression had been used in his report solely for purposes of clarification. It had been taken for granted, however, that the Commission was meant to deal, and was dealing, with the uses of the water of international watercourses. Of the uses referred to in question D of the questionnaire, some, such as swimming, fishing and timber floating, were clearly direct uses of the watercourse, but most were not. For example, water used for irrigation was water diverted from watercourses, and the use of water for the production of nuclear energy, or for building or manufacturing, was a use of the water of a watercourse, not a direct use of the watercourse itself.

20. In view of the terms of the questionnaire and the answers to it, he believed that the contention that the Commission should confine itself to uses of the watercourse as such could not be upheld. Moreover, the possibility of excluding the uses of the water of international watercourses from the scope of the Commission's work had not been entertained earlier, and he saw no reason for now allowing such an exclusion.

21. Another point stressed during the discussion had been the problem of pollution, and it had been noted that pollution could not be dealt with effectively if measures were confined to riparian States. The need to analyse the provisions of the relevant treaties had rightly been emphasized. It had also been observed that the draft articles should provide for the responsibility of States which caused injury, and for technical assistance to developing countries.

22. The need to take account of the physical characteristics of water, and to obtain the necessary technical and scientific advice, had been generally recognized, and the Commission appeared to be largely in favour of dealing with the navigational uses of international watercourses when they affected, or were affected by, other uses. The majority also apparently took the view that the subject was ripe for codification.

23. He trusted that at its next session the Commission would be able to crystallize the measure of agreement achieved, so that it would be possible to deal constructively with the various elements of the law of

the non-navigational uses of international watercourses. He agreed that it would be desirable for the questionnaire to be circulated again to those member States that had not yet responded to it.

24. Lastly, he trusted that the Commission's report to the General Assembly would contain a detailed account of the discussion, especially as no articles had been adopted for the Assembly's consideration.

25. The CHAIRMAN thanked the Special Rapporteur and congratulated him on his work on a complex subject which touched simultaneously on legal, political, technical and economic questions.

26. He explained that the Commission's report to the General Assembly would give an account of the discussions and would mention the need to draw the attention of certain States to the questionnaire adopted by the Commission at its twenty-sixth session.⁵

27. He noted that the Commission had thus completed its consideration of item 5 of its agenda.

The meeting rose at 10.55 a.m.

⁵ See foot-note 2 above.

1579th MEETING

Monday, 30 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

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

Also present: Mr. Ago.

State responsibility (concluded)*
(A/CN.4/318 and Add.1-4, A/CN.4/L.297/Add.1)
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)**

ARTICLES 31 AND 32

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 31 and 32 as adopted by the Drafting Committee (A/CN.4/L.297, Add.1), which read:

* Resumed from the 1573rd meeting.

** Resumed from the 1567th meeting.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that articles 31 and 32 corresponded to the articles proposed by Mr. Ago in his eighth report (A/CN.4/318 and Add.1-4, para. 153).¹ Those articles had dealt respectively with "*force majeure*" and "fortuitous event", but the Drafting Committee had decided, in the light of the Commission's discussions, to rearrange their contents and to introduce some drafting changes, without in any way altering their meaning as originally intended. Article 31 now dealt with both *force majeure* and fortuitous event, while article 32 dealt with the case of distress.

3. Paragraph 1 of the Committee's article 31 covered the provisions contained in paragraph 1 of articles 31 and 32 presented by Mr. Ago. The Committee had thought it appropriate to deal in a single provision with both *force majeure* and fortuitous event, in view of the characteristics common to those excluding circumstances, particularly the element of impossibility. That element, which in the original text had been qualified, with regard to *force majeure*, by the word "absolutely", was now qualified by the word "materially", which was intended to convey the idea of an objective rather than a subjective criterion for determining the situation of impossibility. In order further to stress the element of impossibility, the Committee had considered it necessary to add that the event that gave rise to the potentially wrongful act of the State must have been "beyond its control". It had emphasized the causal relationship between the *force majeure* or unforeseen event and the State's conduct by using the words "was due". The Committee had also decided to refer, in the last part of the paragraph, to "the State", rather than to "the author of the conduct attributable to the State", since, according to the provisions of chapter II of the draft, and in particular

article 5,² the conduct of any State organ having that status under the internal law of the State was to be considered as an act of the State under international law. The Committee had also considered that it would be more appropriate to say that a fortuitous event would make it impossible for a State "to know", rather than "to realize", that its conduct was not in conformity with an international obligation. Finally, while the Committee had decided to retain, provisionally, the word "external", which Mr. Ago had employed in his article 32, it wished to draw the Commission's attention to the general opinion of its members that the term might be superfluous, particularly in view of the text proposed for paragraph 2 of article 31.

4. Paragraph 2 reproduced, in simplified form and with the drafting changes necessitated by the use of somewhat different terminology in paragraph 1, the provision originally restricted to *force majeure* in paragraph 3 of Mr. Ago's article 31. The Committee, bearing in mind the elements common to both *force majeure* and fortuitous event that were present in paragraph 1 of article 31, had considered it appropriate to extend to fortuitous event the provision that made that paragraph inapplicable when the State in question had contributed to the situation of material impossibility.

5. Paragraph 1 of article 32 covered the case of distress, which Mr. Ago had treated in paragraph 2 of his article 31. The Committee had tried to make the rule more precise and clear by referring to a situation of "extreme" distress, rather than merely to a situation of distress, and to "persons entrusted to his care", rather than to "those accompanying him". Paragraph 2 of article 32 combined elements of Mr. Ago's article 31, paragraphs 2 and 3, and fulfilled a function similar to that of paragraph 2 of the new article 31.

6. The Drafting Committee had been seized of a proposal to add to the draft a new article, reading:

"The preclusion of the wrongfulness of an act committed in the conditions provided for in articles 31 and 32 is without prejudice to the possible substitute obligations of the State and the possible legal consequences of the act under other rules of international law."

It had considered that such an article might be applicable not only to the proposed articles 31 and 32, but also to other articles concerning circumstances precluding wrongfulness, such as the article to be drafted on "state of emergency". It had therefore decided to refrain from examining the proposed text at the current session, on the understanding that the Commission would consider the inclusion in the draft of such a general article at a later stage of its work on State responsibility.

7. The CHAIRMAN invited the Commission to examine the articles proposed by the Drafting Committee one by one.

¹ Texts reproduced in the summary record of the 1569th meeting, para. 1.

² See 1532nd meeting, foot-note 2.

ARTICLE 31³ (*Force majeure* and fortuitous event)⁴

8. Mr. TSURUOKA, referring to article 31, paragraph 1, observed that the term “conduct” had so far generally been applied to an organ of the State rather than to the State itself. Perhaps it might be better to replace it by the word “act”. The Commission might even go a step farther and insert, after the words “in conformity with that obligation or”, the words “for the author of the conduct constituting that act”.

9. Mr. USHAKOV expressed concern about the use, in the last phrase of paragraph 1 of the French text, of the expressions “rendre matériellement impossible” and “se rendre compte”.

10. Mr. RIPHAGEN (Chairman of the Drafting Committee), replying to Mr. Tsuruoka, explained that it was because of the comments made by certain members of the Commission and by the majority of the members of the Drafting Committee that the expression “the author of the conduct” had not been used. It had been possible to avoid that expression mainly because of the existence of paragraph 2, which referred to the case in which organs other than the author of the conduct had contributed to the situation of material impossibility. As to replacing the word “conduct” by the word “act”, that might be considered when the Commission proceeded to standardize the expressions used, during its second reading of the draft articles.

11. With regard to the repetition of the verb “rendre”, pointed out by Mr. Ushakov, it was true that it was awkward, but it would be difficult to avoid using either of the expressions in which that verb appeared.

12. Mr. TSURUOKA said he would not press his proposals, especially as last minute changes were often dangerous, but he still believed that the wording of article 31 ought to be improved later.

13. Mr. AGO said he was convinced that it would be dangerous to change the wording of the article. The insertion in paragraph 1 of the words proposed by Mr. Tsuruoka might indeed prove useful, but neither the Drafting Committee nor the Commission would be prepared to accept it at the moment. Moreover, if the word “conduct” were to be replaced by the word “act” in the last phrase of the English version of paragraph 1, that word would be used twice in the same phrase, and in two different senses. Lastly, the expression “se rendre compte”, to which Mr. Ushakov had drawn attention, seemed to him perfectly correct in French. In short, it would be better not to change the wording of article 31.

14. Sir Francis VALLAT, supported by Mr. VEROSTA, stressed that the terminology used in article 31 was quite in conformity with the content of article 3,

according to which there was an internationally wrongful act of the State when certain “conduct consisting of an action or omission” was attributable to the State under international law.

15. The CHAIRMAN, noting that no member of the Commission had formally proposed an amendment, proposed that if there were no objections the Commission should adopt article 31 proposed by the Drafting Committee.

It was so decided.

ARTICLE 32⁵ (Distress)⁶

16. Mr. BARBOZA proposed that the Spanish title of article 32 should be amended to read “Peligro extremo”, which was the expression normally used to render the legal term “distress”.

17. During the Drafting Committee’s discussion of the article, he had argued that the situation it covered was not so much one of *force majeure* or fortuitous event, as a particular case of “state of emergency” affecting an organ of a State. A person faced with a situation of the kind contemplated in the article would find himself with no choice but to violate an obligation of the State he represented, if he was to save his own life or that of the persons entrusted to his care. In other words, he would be faced with a situation that corresponded to the traditional definition of a “state of emergency”; he would have to choose to sacrifice something that was protected by law in order to save something else that was protected by law, but that was considered to be in a higher category. However, that situation could be treated in an article of the kind proposed, partly because there was an impressive body of doctrine which held that it fell within the ambit of *force majeure*, and partly because, however the situation was described, its practical consequences would be the same.

18. Mr. AGO observed that the situation covered by article 32 was not one of *force majeure*. The fact that it followed an article dealing with *force majeure* and fortuitous event, and preceded an article dealing with state of emergency, clearly showed that article 32 dealt with a different case.

19. Mr. USHAKOV found article 32 acceptable subject to three reservations. First, the Commission should perhaps reconsider the article when it had a draft article on state of emergency before it, since the situation of distress was really only a case of state of emergency. It might then perhaps be possible to drop the expression “the author of the conduct which constitutes the act”. Lastly, it was probably going too far to provide that the author of that conduct must have “no other means” of saving his life or that of persons entrusted to his care. It would be enough if no other means occurred to him.

³ For consideration of the texts initially presented by Mr. Ago, see 1569th meeting, paras. 1–23, 1570th meeting, paras. 64 *et seq.*, and 1571st to 1573rd meetings.

⁴ For text, see para. 1 above.

⁵ For consideration of the text initially submitted by Mr. Ago, see 1569th meeting, paras. 1–23, 1570th meeting, paras. 64 *et seq.*, and 1571st to 1573rd meetings.

⁶ For text, see para. 1 above.

20. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 32 proposed by the Drafting Committee, the Spanish title having been amended as proposed by Mr. Barboza.

It was so decided.

21. The CHAIRMAN pointed out that the Drafting Committee had considered it inadvisable, for the time being, to consider the new article it had been proposed to add. That proposal concerned not only articles 31 and 32 but all the articles in chapter V, so that it would have to be studied later.

The meeting rose at 4 p.m.

1580th MEETING

Tuesday, 31 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

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

Review of the multilateral treaty-making process (General Assembly resolution 32/48 para. 2) (concluded)* (A/CN.4/325)

[Item 6 of the agenda]

REPORT OF THE WORKING GROUP

1. The CHAIRMAN said that, at a closed meeting, the Commission had approved the report of the Working Group on review of the multilateral treaty-making process (A/CN.4/325), established in response to the request of the General Assembly. The report would be sent that day to the Secretary-General for publication as a separate document, the closing date for submission of comments by the Commission having been fixed at 31 July. The report would also be published in the Commission's *Yearbook* as one of the documents of the thirty-first session.

2. If there were no objections, he would take it that the Commission approved those steps.

It was so decided.

3. Sir Francis VALLAT said that all the members of the Working Group on review of the multilateral treaty-making process would no doubt wish to join him in expressing their appreciation to Mr. Quentin-Baxter,

Chairman of the Working Group, as well as to the Secretariat, and in particular Mr. Romanov, Secretary to the Commission, for their excellent work.

Draft report of the Commission on the work of its thirty-first session

4. The CHAIRMAN invited the Commission to consider its draft report on its thirty-first session, beginning with chapter I.

CHAPTER I. *Organization of the session* (A/CN.4/L.301 and Corr.1)

5. Mr. DADZIE (Rapporteur), introducing chapter I of the draft report, said that it followed broadly the form of previous reports. Paragraphs 1 and 2 indicated the content of the report, and sections A, B, C, D and E dealt, respectively, with the composition of the Commission, its officers, the Drafting Committee, the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the Working Group on review of the multilateral treaty-making process. Section F, on the juridical status of the members of the Commission at the place of its permanent seat, was a new section which had been included to record the developments that had taken place in that matter since the Commission's report on its thirtieth session. The two remaining sections, G and H, followed the normal form of the Commission's reports on the work of its sessions.

Paragraphs 1-4

Paragraphs 1-4 were adopted.

Paragraph 5

6. Sir Francis VALLAT said that the statement in paragraph 5 did not give a correct picture of the actual position regarding attendance by members. He felt bound to raise the question since, unless there was an improvement, the work of the Commission would suffer seriously.

7. One possible solution would be to add a foot-note referring to the paragraphs dealing with the report of the Planning Group. Such a foot-note might read: "On the question of attendance, see paragraphs ... below."

8. Mr. TSURUOKA supported that proposal.

9. Mr. YANKOV agreed that paragraph 5 was not altogether satisfactory. He proposed that, in addition to the foot-note suggested by Sir Francis Vallat, a sentence should be added to the paragraph reading: "Some members were not able to attend all the meetings of the Commission."

It was so decided.

Paragraph 5, as amended, was adopted.

Paragraphs 6-12

Paragraphs 6-12 were adopted.

* Resumed from the 1546th meeting.