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Summary record of the 1620th meeting

Topic:
State responsibility

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be employed before resorting to armed force, the use of which was justified only if it constituted an *ultima ratio*. Moreover, if self-defence was confined to resistance to armed attack, it was unlikely that the State in fact had any means other than recourse to armed force available to it.

25. As far as proportionality was concerned, he emphasized that there was some danger of confusion between reprisals and self-defence. In the case of reprisals, it was obviously necessary to ensure some proportionality between the injury suffered and the injury resulting from any sanctions. In the case of self-defence, it was essential to avoid the error of thinking that there should be some proportionality between the action of the aggressor and the action of the State defending itself. Proportionality could be judged only in terms of the objective of the action, which was to repel an attack and prevent it from succeeding. No limitations that might prejudice the success of a response to attack could be placed on the State suffering the attack. The concept of reasonable action must of course enter into the matter, since self-defence could not justify a genuine act of aggression committed in response to an armed attack of limited proportions.

26. As to the question of immediacy, the reaction could not fail to be immediate if its aim was to halt aggression. That was an inherent aspect of self-defence, and not one of the requirements for the existence of that concept.

27. The concept of self-defence was therefore clear and straightforward: its purpose was necessarily and exclusively that of repelling an attack and preventing it from succeeding. The Commission must, however, determine its attitude with regard to Article 51 of the Charter before resolving the wording of draft article 34. It must decide whether to refer to that provision, paraphrase it, or set out a definition of the principle of self-defence, as in the case of all the other circumstances, without taking the Charter definition into account but ensuring that it was not contradicted. For the sake of prudence, and bearing in mind that the Commission was a United Nations body, he personally had opted in favour of an express reference to Article 51.

28. He emphasized that he had used the French expression "*agression armée*", which was not completely identical with the English equivalent "armed attack" or with the Spanish "*ataque armado*", and the situation was complicated by the fact that a recent instrument contained a definition of aggression, yet the two concepts of aggression and armed attack were not exactly the same. The Commission and its Drafting Committee should choose what they considered to be the most appropriate solution in the light of all the circumstances.

The meeting rose at 12.55 p.m.

1620th MEETING

Thursday, 26 June 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

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

DRAFT ARTICLE 34 (Self-defence)[1] (*continued*)

1. Mr. RIPHAGEN said that there were three options open to the Commission in dealing with the phenomenon of self-defence. It could decide to deal with the matter more or less along the lines proposed in draft article 34; it could choose not to deal with the matter at all, on the grounds that it could not, or should not, add to or detract from the relevant provisions of the Charter of the United Nations; or it could make an explicit reference to international law, as it had done in respect of draft article 30.[2]

2. There were a number of variables influencing the choice. First, if the Commission intended to introduce, at some stage, in Chapter V of part 1 of the draft, an article along the lines of article 42 of the Vienna Convention,[3] it would have to deal with self-defence in some way, even if only by a "saving clause" such as that contained in article 75 of that Convention. If the Commission did not intend to include such an article, the option of not dealing with self-defence at all would be open to it.

3. Personally, he would not be in favour of making Chapter V an exhaustive enumeration of circumstances precluding wrongfulness, because of the danger of inadvertent omission and because the rigidity of such a clause would be particularly unrealistic in the field of international relations. Furthermore, draft articles 33[4] and 34 did not deal with the situation where a state of necessity, in the sense of draft article 33, was caused wholly by the State against which it was invoked. He doubted whether in such a case the rule of proportionality, as expressed in the second sentence of draft article 33, paragraph 1, was fully valid.

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[1] For text, see 1619th meeting, para. 1.

[2] See 1613rd meeting, foot-note 2.

[3] See 1615th meeting, foot-note 3.

[4] For text, see 1612th meeting, para. 35.

4. He agreed fully with Mr. Ago that, in the case of self-defence against an armed attack, the question of proportionality did not arise. State practice showed that, in many cases, the suffering of the aggressor State often exceeded that which it had intended to inflict on the victim State. He disagreed, however, with the statement contained in paragraph 121 of the report (A/CN.4/318/Add.5–7) to the effect that, even in national law, excessive forms of self-defence were punishable. In his own country, a certain amount of excess had been accepted in a number of judicial decisions, and even the International Court of Justice seemed to have accepted something along the same lines in the *Corfu Channel* case.[5]

5. Draft article 33 contained a number of elements which were missing from draft article 34. For example, paragraph 3 (*a*) of article 33 referred to *jus cogens* as limiting the possibility of invoking a state of necessity. Article 34, on the other hand, conveyed the impression of translating the old maxim *adversus hostem aeterna auctoritas*. Surely, however, the rules of *jus cogens* relating to the protection of human rights in armed conflicts remained valid even in the relationship with an aggressor State.

6. Another element contained in article 33 but missing from article 34 was the reference to the impact of conventional instruments in the field of self-defence. Draft article 34 related to what the Charter called "collective self-defence". In that respect, he did not entirely agreed with Mr. Ago's analysis. The right to collective self-defence was a real extension of the right of self-defence and was inspired by a sound scepticism as to the capacity of the Charter system to protect the territorial integrity and political independence of all States. On the other hand, a conventional instrument might be regarded as enlarging the *casus belli* beyond the armed attack, in the sense of an armed invasion of the territory of another State. In that connexion, he referred, in particular, to the Rhine Pact, cited in paragraph 97 of Mr. Ago's report.

7. One point had been overlooked in both draft articles 33 and 34. As they stood, those texts seemed to leave themselves open to the interpretation that an act of necessity or of self-defence precluded the wrongfulness of the act *erga omnes*, which could certainly not have been the intention of the drafter. Even in the case of self-defence against an aggressor State, the neutrality of a third State must in principle be respected.

8. Although it might be possible to deal with the points he had referred to by expanding on draft article 34, there were obvious dangers in such an approach, just as there were obvious drawbacks in the simple reference to Article 51 of the Charter in the existing text of draft article 34. It might be preferable, therefore, to adopt the option of making a general reference to international law. Although that might appear to be avoiding the issue, it should be remembered that even the Definition of aggression[6] contained a rather vague saving clause. Until such time as the United Nations was in a position to protect effectively the territorial integrity and political independence of all States, the Commission was practically forced to accept the inherent right of self-defence as it stood, without going into any details.

9. Mr. USHAKOV said that, although not endorsing entirely the approach chosen by Mr. Ago, he nevertheless considered that a provision concerning self-defence was undoubtedly needed in the draft.

10. He doubted that the Commission would be able to produce conclusive evidence in its commentary of the actual existence of a generally recognized principle of international law concerning self-defence. He did not consider that the existence of such a principle should be proved by reference to history, since the rule that would appear in the draft was the rule contained in Article 51 of the Charter of the United Nations, a rule which undoubtedly existed and which was so self-evident that it was unnecessary to prove its basis. The problem was different when the Commission tried to codify a rule derived from practice, case law or the writings of learned authors, for in such cases the Commission first had to prove the existence of the rule before codifying it. In the case of self-defence, the rule definitely and manifestly existed in fact. Accordingly, he considered that the Commission's commentary on draft article 34 should be short and refer expressly to the existing rule, which was that of Article 51 of the Charter.

11. In his report, Mr. Ago tried once again to prove that the rule in the Charter was identical to that of general international law. *Nolens, volens*, therefore, one was constrained to inquire what connexion there existed between the Charter and general international law.

12. He realized that some writers who were strong partisans of customary international law tried to prove that, side by side with that law, there was a written and separate international treaty law. In his opinion, the Commission could not take a position of that kind and regard the Charter as being distinct from general international law, for if the Charter was not part of modern general international law, the latter would be no more than customary international law, whereas in reality there were two sources of general international law.

13. No Soviet writer on law had ever contended that the Charter and the United Nations system did not form part of existing international law. It could even be said that the Commission shared that view, as was shown, for example, by article 6 of the Vienna Convention on Succession of States in Respect of

[5] *I.C.J. Reports 1949*, p. 4.

[6] General Assembly resolution 3314 (XXIX), annex.

Treaties[7] or article 3 of the draft articles on succession of States in respect of matters other than treaties,[8] which spoke of the effects of a succession of States "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". Both of those provisions, which had been drafted by the Commission, clearly indicated that it held that the principles embodied in the Charter formed part of modern international law. Indeed, it would be dangerous to argue otherwise.

14. Actually, Mr. Ago recognized the fact. In his report he had merely concentrated on analysing the writings of learned authors. It had never been disputed by any State that the principles of the Charter formed part of modern international law, and in so far as learned authors did not share that opinion it was not the Commission's business to argue with the authors on that point.

15. Nor did he (Mr. Ushakov) think that the Commission was competent to interpret the principle of self-defence laid down in the Charter by trying to prove that it formed part of general international law. For that matter, it was unthinkable that the Commission should claim to interpret Article 51 of the Charter one way or another. He appreciated Mr. Ago's zeal in dealing with all the aspects of the question in his report, but considered that it would be dangerous for the Commission to aspire to substitute itself for States and for the competent bodies of the United Nations that were alone competent to interpret the Charter. Hence, the commentary on draft article 34 should be as short as possible and should refer to Article 51 of the Charter as a rule that was generally admitted, with all its possible interpretations, by the States or the competent bodies.

16. Referring to the nature of the principle of self-defence, he considered that self-defence was not a circumstance precluding the wrongfulness of an act; in his opinion, the principle of self-defence was of greater scope, and to say that self-defence precluded wrongfulness was tantamount to regarding it as the sole limitation on the prohibition of the use of armed force, as Mr. Ago affirmed in the second sentence of paragraph 108 of his report. He (Mr. Ushakov) did not share that view, and he pointed out that Chapter VII of the Charter authorized the United Nations to employ force in a number of circumstances other than aggression. To think of self-defence as the sole limitation on the prohibition of the use of armed force was like regarding suicide as lawful murder. It would be strange, to say the least, to describe self-defence as something like lawful aggression.

17. Accordingly, he considered that it was not the correct approach to regard self-defence as a circumstance precluding the wrongfulness of an act; the notion should be understood as such, and not by reference to the use of force, and might be defined as the inalienable right of a State that suffered armed attack—in other words, self-defence was lawful *per se*. In his opinion, self-defence was a perfectly legitimate action and did not operate as a circumstance precluding the wrongfulness of an act. The issue was not to establish that an act constituted a breach of an international obligation and then to hold that the act was not wrongful by reason of certain circumstances; on the contrary, the point to be affirmed was that self defence typified an action which at no point was tainted by wrongfulness and which took the form *ab initio* of the exercise of a right. That was why he considered that article 34 was out of place in chapter V of the draft, which dealt with circumstances precluding wrongfulness, and that it should form part of a separate chapter and a separate article dealing with self-defence.

18. So far as the language of the draft provision was concerned, he said that the Commission was not expected to explain the notion of self-defence; it should simply refer to Article 51 of the Charter and draft a provision using the terminology of the Charter provision on the following lines:

> "Nothing in the present articles shall impair the inherent right of self-defence provided for in Article 51 of the Charter of the United Nations".

It would be most dangerous to try to draft a clause paralleling the Charter provision and to define the rule itself. It should be possible to find documents, treaties or other instruments that offered a usable precedent.

19. He stressed again that the Commission's commentary on the draft article should be extremely short and should refer to the Charter of the United Nations without trying to interpret Article 51 or to prove the existence of an established rule of greater scope.

20. Mr. REUTER said that, to his mind, the notion of self-defence was the reverse of another legal notion: aggression. If the Commission accepted that proposition, it would realize that it was tackling a problem of vast dimensions concerning which it would not be able to take any definitive position. If one looked at article 51 of the Charter, as Mr. Ushakov thought one should, one would realize that that Article dealt only with armed attack, which implied that there might perhaps be other forms of aggression. Yet, even within the United Nations system, opinions had not crystallized on that most intractable issue, for it was no secret to anyone that the crime—the prohibited aggression—went beyond armed attack. Accordingly, he agreed with Mr. Ago that there were some cowardly solutions. The situation in the modern world might indeed cause a great deal of anguish, and draft article 34, like the cloak which was used discreetly to cover Noah, coyly

[7] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.

[8] See *Yearbook ... 1979*, vol. II (Part Two), pp. 15 *et seq.*, document A/34/10, chap. II, sect. B.

covered the great problem on which the peace of the world hung.

21. He was convinced that the reference to armed attack alone was not enough. To illustrate his view, he cited the example of a State which sent its fishing vessels into a zone regarded by another State as an exclusive fisheries zone, thus provoking incidents with warships of that other State. He was personally prepared to concede that that was a case of self-defence as between the two States involved, even though it would be going too far in such a case to speak of aggression or crime, for the situation did provoke some acts of violence or coercion. Similarly, if a State launched a satellite which broadcast to the territory of another State radio or television programmes that gave rise to internal disturbances, that other State might try to destroy the satellite and claim that it was acting in self-defence against a cultural or political aggression; he was not sure that in such a case it would be possible to speak of armed attack. Again, if a State blockaded a strait in order to cause prejudice to another State, the action might conceivably be regarded as armed attack, and it would be understandable that the State suffering the blockade should argue that the situation was one in which it could act in self-defence.

22. Self-defence presupposed the existence of an immediate and direct link between the action taken and the action against which it was taken. Self-defence was a self-contained notion distinct from state of necessity and from *force majeure*. He considered that the Commission should do no more than formulate a relatively vague provision concerning self-defence, for the international community had not yet reached a sufficient degree of unity to be able to go beyond a certain stage. Accordingly, the Commission could do no more than refer to the existing general rule.

23. The question had been asked whether reference should be made to the Charter or to some other more general principles. He considered that it would be most desirable to refer to the principles of international law that had been embodied in, among others, the Charter. The use of the words "among others" ("*notamment*") would imply that not all principles concerning self-defence were stated in the Charter. It would be recalled that at the United Nations Conference on the Law of Treaties the question of the retroactive application of the principles of the Charter to situations antedating the Charter had been raised, and that Sir Humphrey Waldock, Special Consultant, had answered that it was not the Commission's function to settle problems of that kind. Likewise, the Commission should admit that the notions of self-defence and aggression antedated its draft articles.

24. He considered that an article on self-defence was needed in the draft. At the same time, he considered that the article should not be one of substance, but should be in the form of a clause laying down a general proviso or saving clause and mentioning self-defence in the vaguest possible terms. Although not opposed to a reference to the Charter, he would prefer in that case that reference should be made not solely to Article 51 but to the whole of the Charter, by means of a passage drafted on the following lines: "... the general principles of self-defence as embodied, among others, in Article 51 of the Charter of the United Nations".

25. He expected that it would be difficult to write the commentary to the draft article, and thought that the Commission should once again trust Mr. Ago to find appropriate language.

The meeting rose at 11.40 a.m.

1621st MEETING

Friday, 27 June 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Also present: Mr. Ago

State responsibility (*continued*) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

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

ARTICLE 34 (Self-defence)[1] (*continued*)

1. Mr. SCHWEBEL said he endorsed the main thrust of the report (A/CN.4/318/Add.5–7, sect. 6) and agreed in particular with the parts relating to proportionality and collective self-defence. He also agreed that there were questions which the Commission should not attempt to answer within the context of draft article 34 and the commentary thereto, such as the lawfulness of preventive self-defence.

2. On a number of points, however, his views were not entirely in accord with those of Mr. Ago. In the first place, while it was true that the Charter of the United Nations codified the law governing the use of force in international relations, including the use of force in self-defence, Article 51 of the Charter, taken alone, could not be said to do so. The Charter included other provisions of paramount importance, such as Article 2, paragraph 4, which, in its reference to the "threat" as well as to the "use" of force in inter-

[1] For text, see 1619th meeting, para. 1.