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Summary record of the 1621st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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.

national relations, clearly had a bearing on the lawfulness of action taken in preventive self-defence, or again, the provisions of, *inter alia*, Chapters VII and VIII, which established that the use of force could be authorized or required by the Security Council and regional organizations. Hence, it might be necessary to include in the draft an article which, in substance, provided that, where a State used force in a manner that would breach an international obligation were it not for the fact that the State was responding to a requirement or authorization of the United Nations or a regional organization acting pursuant to the Charter of the United Nations, that State did not incur international responsibility.

3. Those considerations led him to conclude that draft article 34 should not specifically mention Article 51 of the Charter but should refer, in more general terms, to international law and to the Charter of the United Nations. He would suggest, for example, some wording along the following lines:

> "The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in the exercise of legitimate individual or collective self-defence in accordance with the provisions of the Charter of the United Nations."

4. Furthermore, it had rightly been said that self-defence was the other side of the coin of aggression, in which connexion he pointed out that, in its Definition of Aggression,[2] the General Assembly of the United Nations referred not to acts in contravention of Article 51 of the Charter but to acts in contravention of the Charter. Also, the acts of aggression specified in the Definition were not limited to armed attack.

5. Lastly, Mr. Ago had said that a State could act in self-defence only in response to the action of another State and not, for example, in response to attacks by private individuals or organizations. If that meant that State responsibility applied solely to State action or to acts or omissions by a State or imputed to it, he could agree. But if it meant that a State was not entitled to act in self-defence to attacks or threats of attack by other entities, he could not agree. Surely, a State was entitled to act in self-defence against, for instance, attacks by terrorist organizations or individuals? He would be grateful for Mr. Ago's views on that point.

6. Mr. FRANCIS said that draft article 34 had great practical significance for States in view of its relationship to Article 51 of the Charter of the United Nations.

7. In approaching the issue of self-defence in international law, he saw the concept as one which, first of all, set precise limits to the legitimate use of force by a State. He also saw its rationale as deriving from internal law, since self-defence in international law was no more than the sum of the rights to self-help that a State vested in its people. In other words, self-defence in international law was an extension of that collective right in the face of a common external aggressor. It would, however, be wrong to suggest that self-defence in international law had any more direct analogy with internal law. For instance, whereas some national laws on self-defence imposed a substantive requirement on the person in danger to retreat before exerting any measure of force, there was no such requirement in international law. There could be no retreat from national territory, save possibly as a tactical ploy. On the basis of that fundamental premise, it seemed to him that Article 51 of the Charter of the United Nations should not present any difficulty so far as draft article 34 was concerned.

8. The Commission's problem was rather one of drafting, and in that connexion care should be taken not to include any element that might amend the Charter, directly or indirectly. It should be remembered that self-defence, although a right like *force majeure*, necessity and distress, rested on an entirely different legal basis from the other circumstances that precluded wrongfulness. Indeed, it had been termed imperative, which was tantamount to saying that it had the force of *jus cogens*. How else could it remove the wrongfulness involved in a breach of a peremptory norm? The special nature of the right lay in the fact that it arose only when a wrongful act, within the meaning of Article 51 of the Charter, had been committed by a State. The question then was whether that right fell within the circumstances that precluded wrongfulness or was to be treated as being of an exceptional nature.

9. For the answer to that question, it was necessary to turn to the Charter itself. It seemed to him that Article 51 covered a situation that was different from the one contemplated in Article 2, paragraph 4. In that connexion, Mr. Ago had mentioned at the 1619th meeting the attitude of a country which had felt that the inclusion of a provision on self-defence in the Briand–Kellogg Pact of 1928 would have diminished the impact of the ban on recourse to war; it could perhaps be argued that the same consideration applied in respect of Article 51 of the Charter as it related to Article 2, paragraph 4. For his part, he saw Article 51 as an exception to Article 2, paragraph 4, and therefore considered that self-defence, although differing in its legal character from necessity, *force majeure* and distress, was one of the circumstances which precluded wrongfulness.

10. The next point to decide was whether Mr. Ago's report should be taken as the basis on which the Commission was to prepare its own report to the General Assembly. There were in fact three main aspects to the report, namely, interpretation of the Charter of the United Nations, the historical landmarks in the development of self-defence as a concept of international law, and the conflicting doctrine in that regard. As for the first two aspects, he

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

considered that, within the context of its work, the Commission was required to engage in some interpretation of the Charter, and he saw no harm in summarizing the history of the development of the concept of self-defence, since that would help in understanding the significance of the word "inherent" in Article 51 of the Charter. So far as the third aspect was concerned, he thought it entirely appropriate for the report to refer to doctrine, not only because the Commission was required to do so under its Statute but also because it would be remiss if it failed to take a position on the wealth of doctrine that had built up since the Second World War.

11. In that respect, Mr. Ago had been right to refer to the "*Caroline*" case, since there was clearly a difference between a situation in which a State acted in self-defence to protect its own interests and a situation—involving private individuals—to which the State was not a party and of which it might not even be aware. In the latter case, the issue was whether the State could act within the context of a state of necessity.

12. Subject to those comments, he could accept the report, and he agreed in particular that immediacy of response and proportionality were basic to the concept of self-defence. There was however one point on which he dissented. He noted that in his report Mr. Ago had left open the question of whether certain measures taken in self-defence would be in accordance with Article 51 of the Charter. Therefore, the words which appeared between brackets in the first sentence of paragraph 120 should be deleted wherever they occurred in the report.

13. Mr. ŠAHOVIĆ said that, in the main, he agreed with the conclusions reached by Mr. Ago on the question of self-defence. Those conclusions were consistent with modern general international law and could serve as a basis for the formulation of an article on self-defence as a circumstance that precluded wrongfulness.

14. The debate on draft article 34 had afforded an opportunity to discuss general questions which went beyond the framework of that provision. For example, a parallel had been drawn between the concept of self-protection or self-help embodied in general international law and the concept of self-defence as embodied in Article 51 and other provisions of the Charter of the United Nations. In his opinion, there was no doubt that the content of Article 51 of the Charter clearly reflected the progress made in the development of general international law with regard to the concept of self-defence. That article had been drafted in the light of the prohibition of recourse on the use of force, and it regarded self-defence, whether individual or collective, as an inherent right.

15. In the years following the signing of the Charter, some writers, including Kelsen, had held the view that there was a law of the United Nations but that such law, based on the multilateral treaty constituted by the Charter, had been applicable only as between the Member States of the Organization. Too much emphasis on the Charter as a foundation of international law was to be avoided. Much time had passed since then, however, and the Commission itself had helped to show, through its work, that the Charter now embodied general international law. That was why he, like Mr. Ago, considered that the question of a relationship between Article 51 of the Charter and customary international law did not arise.

16. With regard to the nature of the concept of self-defence, it could be asked whether it was a right, an excuse or an exception to the general rule banning recourse to the threat or use of force. It was quite apparent from the text of Article 51 of the Charter that self-defence was simply one of the exceptions to the premise that the threat or use of force was prohibited. The reference to armed attack in Article 51 also derived from that premise.

17. Self-defence was to be viewed as an exception and an inherent right because it was bound up with the existence of States as subjects of international law and because it was one of the attributes of their sovereignty. Therefore, one might well ask whether it was essential to formulate an article on self-defence, since self-defence was an inherent part of State sovereignty. But that was not the problem. A definition of aggression based on the prohibition of the use of force already existed and, as an exception to that prohibition, self-defence definitely had a place in chapter V of the draft.

18. He agreed with Mr. Francis in the matter of interpreting the Charter. Admittedly, the Commission was not officially empowered to interpret that instrument, but it had to proceed with the codification and progressive development of international law, a task that permitted it to express its views on the meaning of certain provisions of the Charter. Obviously, in doing so, it was not acting in the same way as bodies composed of representatives of States, but it did have to take account of the preparatory work for the United Nations Conference on International Organization (San Francisco, 1945), the practice of bodies entrusted with the task of implementing the Charter and also the practice of States. In that respect, Mr. Ago could perhaps have engaged in more detailed research. In any event, the Commission should move in that direction so as to carry out its task of promoting the progressive development of international law. In order to formulate the article under consideration, it must also take account of the facts. The application of Article 51 of the Charter had given rise to enormous dispute, and the actual situations in which it had been applied had always been so delicate and had involved so many political interests that it had not been possible to adopt a clear position, something that might be pointed out in the commentary to draft article 34.

19. The wording of the article might be rather more explicit. The article could be drafted in terms that were closer to those of other provisions of the draft, more particularly of chapter V. The words "to defend itself or another State" did not clearly describe the substance of the problem. Again, he had some doubts about the need to refer to Article 51 of the Charter or even to the Charter itself, since up to now the Commission had not referred to them elsewhere in the draft. He for one was not opposed to mentioning the Charter as a source of international law and of the right to self-defence. It was up the Drafting Committee to find an appropriate formula. Lastly, the phrase "armed attack as provided for in Article 51 of the Charter of the United Nations" was not entirely satisfactory, for the concept of armed attack was found not only in Article 51 of the Charter but also in other texts.

20. Sir Francis VALLAT said that there seemed to be general agreement on the need to include an article on the question of self-defence in the draft. Indeed, omission of such an article could have very serious implications regarding the content of other draft articles that did not contemplate the use of armed force. However, the Commission had neither the means, nor possibly the mandate, to attempt a definition of the concept of self-defence or to take a position as to the interpretation of Article 51 of the Charter of the United Nations. That also appeared to be the view expressed in the report. The question of whether Article 51 of the Charter constituted an exhaustive definition of self-defence was a controversial one. The records of the 1945 San Francisco Conference and the reference in Article 51 to self-defence as an "inherent right" indicated that those who had drafted the Article had not attempted to codify the concept.

21. Moreover, the Commission was not seeking to define the circumstances in which it would be lawful to use armed force. If it did so, it would be endeavouring to accomplish something which had not been attempted by the General Assembly in adopting the Definition of Aggression. The Commission should take account of the views of the General Assembly as reflected in the Definition, which contained no specific reference to Article 51 of the Charter. The fifth preambular paragraph of the Definition described aggression as "the most serious and dangerous form of the illegal use of force", the implication clearly being that there were other uses of armed force which did not necessarily come under the heading of the concept of aggression and hence within the scope of self-defence. The seventh preambular paragraph mentioned "military occupation or ... other measures of force taken ... in contravention of the Charter", again a general reference. Article 2 of the Definition implied that, in some cases, the use of force could be regarded as lawful and wrongfulness was therefore precluded, and Article 4 gave the Security Council great leeway in determining whether or not a particular instance of the use of armed force constituted an act of aggression. Consequently, the Definition remained very flexible and was dependent on the Charter as a whole rather than on any one particular provision. Accordingly, it would be advisable for the Commission to refrain from expressly mentioning Article 51 of the Charter in draft article 34 and for it to refer to the provisions of the Charter as a whole, using a wording similar to that proposed by Mr. Schwebel. Indeed, a specific reference to Article 51 of the Charter would inevitably imply that the Commission was taking a position on the interpretation of that provision.

22. Another important consideration was the possible effect of draft article 34 in respect of third States. The wording of the draft article should not imply that measures of self-defence precluded wrongfulness in respect of every other State and in all circumstances. That could be avoided by adopting a wording along the lines of draft article 30.[3]

The meeting rose at 11.50 a.m.

[3] See 1613th meeting, foot-note 2.

1622nd MEETING

Monday, 30 June 1980, at 3.20 p.m.

Chairman: Mr. C. W. PINTO

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

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he was honoured to have the opportunity of welcoming to the meeting Mr. El-Erian, a former member and Special Rapporteur of the Commission, a distinguished jurist and a judge of the International Court of Justice. He recognized the visit as being particularly significant in that it was one of a series cementing the close relationship between the Commission and the Court.

2. Mr. EL-ERIAN said that it was a pleasure for him to have an opportunity of attending a meeting of the Commission. Members would appreciate the satisfaction he felt at being once more among his former colleagues. He endorsed the views expressed by the President of the International Court of Justice in a recent letter, emphasizing the value which the Court placed on its strong links with the Commission and its wish that those links should endure. The work of the Commission, particularly on codification, was of great significance, and in a very recent case before the Court