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Summary record of the 1635th meeting

Topic:
<multiple topics>

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57. Mr. VEROSTA said that the Drafting Committee had discussed the question at some length, and the majority had agreed that it would be advisable to submit at least two articles to the forthcoming session of the General Assembly.

58. Mr. SCHWEBEL said that he could understand Mr. Šahović's reaction, since the two draft articles, standing on their own, seemed somewhat bare. Read together with the commentaries, however, they would be quite comprehensible and would constitute a useful, albeit preliminary, step in the preparation of the draft. Moreover, the two draft articles had been prepared with a view to laying the groundwork, without prejudice to any views that might be held on the differences which remained. He therefore trusted that the Commission would adopt those draft articles.

59. The CHAIRMAN said that Mr. Ushakov's point could perhaps be met by recording his proposal in the Commission's report. An appropriate reference could also be made to Mr. Šahović's reservations.

60. Mr. USHAKOV observed that the commentary could not alter the meaning of the article, but only explain it. He could not imagine a commentary dealing with a principle that was not embodied in the article. Moreover, the Special Rapporteur had tried to prove the existence of that principle in international law, in the considerations concerning article 6 put forward in his report.

61. Mr. ŠAHOVIĆ said that he had not made a reservation, but had expressed an opinion. In his opinion, only articles that had been carefully drafted after mature consideration should be submitted to the General Assembly.

The meeting rose at 1.15 p.m.

1635th MEETING

Thursday, 17 July 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

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

Also present: Mr. Ago.

Tribute to Mr. Santiago Torres-Bernárdez

1. The CHAIRMAN said it had been written in the *Bhagavad-gītā* (the Song of the Lord), some 2,000 years ago, that the God Krishna had spoken to the Prince Arjuna of knowledge as a sacrifice, a gift and an offering to the Gods. He, as Chairman of the Commission, wished in turn to refer to one whose patient search had brought the gift of knowledge to many—to an exemplary international civil servant, Mr. Santiago Torres-Bernárdez.

2. If the veil of anonymity with which Mr. Torres-Bernárdez had cloaked his work were lifted for a moment, he could be seen at the centre of every major codification conference convened by the United Nations. He had served the United Nations for more than twenty years, some fifteen of which he had spent as Deputy Secretary of the Commission. He had given not only of his knowledge but, more important, of his wisdom. With never-failing courtesy and good humour, he had made a vital contribution to the moulding of opinion within the Commission, and had guarded the essential traditions and strengths of the Commission with courage and firmness. He was, indeed, the very embodiment of its spirit.

3. But as the Commission stood to lose, so did the International Court of Justice stand to gain, for Mr. Torres-Bernárdez would serve the Court with the same high distinction with which he had served the Commission.

4. On behalf of the Commission, he congratulated Mr. Torres-Bernárdez on his appointment as Registrar of the International Court of Justice and wished him and his wife every success and happiness for the future.

5. Mr. TSURUOKA, speaking also on behalf of Mr. Pinto, Mr. Sucharitkul and Mr. Tabibi, the other Asian members of the Commission, expressed their pleasure at hearing that Mr. Torres-Bernárdez had been appointed Registrar of the International Court of Justice. That pleasure was tinged with a certain melancholy, however, for they were thus losing an associate with whom he himself had had bonds of friendship for over twenty years. In his new duties, Mr. Torres-Bernárdez would be able to continue making a valuable contribution to the cause of international law.

6. Rather than enumerate all his virtues, he would merely say that a splendid future certainly awaited him. He wished Mr. Torres-Bernárdez every success in his important post as Registrar.

7. Mr. BEDJAOUI, speaking also on behalf of Mr. Thiam, another African member of the Commission, said how moved they were at seeing Mr. Torres-Bernárdez leave for The Hague. A real pillar of the Commission, he had made a great contribution to the success of its work in recent years. The pleasure of seeing him take up the important post as Registrar of the Court was mixed with a feeling of melancholy at his departure from the Commission. Personally, he felt proud of having been the friend for more than a quarter of a century of the man who was leaving them after having given them so much.

8. Although it was true that the Commission was losing a great servant in the person of Mr. Torres-Bernárdez, the Court was gaining a most valuable associate. He would be rejoining many former members of the Commission, so that neither he nor they would feel exiled.

9. In conclusion he wished to draw attention to the modesty of Mr. Torres-Bernárdez, who on more than one occasion had produced most valuable ideas, which the Commission had taken up, leaving their author anonymous.

10. Mr. CALLE Y CALLE, speaking on behalf of the Latin American members of the Commission, said they wished to join in the tributes which previous speakers had paid to Mr. Torres-Bernárdez.

11. Mr. Torres-Bernárdez, on whose devotion to duty the Chairman had already remarked, was an outstanding example of an international civil servant. Throughout his long career in the service of the United Nations, he had made many valuable contributions, especially to the work on codification. An active associate of the Commission, he was also one of the chroniclers and interpreters of the United Nations in the Commission's field of endeavour.

12. In congratulating Mr. Torres-Bernárdez on his appointment as Registrar of the International Court of Justice, he felt bound also to congratulate the Court on its choice of a man with such great intellectual and human qualities.

13. Mr. USHAKOV, speaking also on behalf of Mr. Yankov, expressed his satisfaction at the choice made by the International Court of Justice in appointing Mr. Torres-Bernárdez as Registrar. It was sad to see him leaving the Commission, but they must be glad that he could continue his legal activities at the Court. With him, the Court was gaining not only an outstanding and well-qualified lawyer, but also a man of attractive, enthusiastic and devoted character.

14. He was convinced that Mr. Torres-Bernárdez had not yet reached the summit of his carrer, and hoped to see him again, either in the Commission or at the Court, performing other duties. He wished him every success.

15. Sir Francis VALLAT, speaking on behalf of the Western European members of the Commission, said that of the many qualities of Mr. Torres-Bernárdez, he had been struck in particular by two: his scholarship and his devotion to duty. He had also had occasion, when he had served with Mr. Torres-Bernárdez as a Director of Studies at the Centre for Studies and Research at The Hague in 1970, to appreciate his remarkable grasp of the law of treaties and his ability to apply his knowledge for the benefit of the students. Among his many contributions to the Commission's endeavours, Mr. Torres-Bernárdez would be especially remembered for his work in connexion with the draft convention on the law of treaties and the draft articles on State responsibility.

16. With the departure of Mr. Torres-Bernárdez and his wife, the members of the Commission were losing two friends whom they looked forward to seeing again. The Commission's loss was, however, the Court's gain.

17. Mr. ŠAHOVIĆ said that he felt the appointment of Mr. Torres-Bernárdez as a great loss to the Commission and to himself, since he had been his friend for twenty years. Not only in the Commission, but also in the Sixth Committee of the General Assembly and at various diplomatic conferences for the codification and progressive development of international law, he had had occasion to appreciate the qualities of Mr. Torres-Bernárdez. By his personal work and the help he had given members of the Commission, he had undoubtedly made a most valuable contribution. He wished him every success in his professional life.

18. Mr. QUENTIN-BAXTER said that previous speakers had already indicated how much the Commission stood to lose and the International Court of Justice to gain from Mr. Torres-Bernárdez' departure.

19. Institutions were never any stronger than those who served them, and it was extremely important that there should be long periods of service that would allow traditions to be built up and maintained long after the men who had created them had moved on. Mr. Torres-Bernárdez was one such man; his influence would remain with the Commission and continue to be of significance to it.

20. Mr. VEROSTA said he endorsed all that had been said about Mr. Torres-Bernárdez. Since first meeting him at the 1961 session of the General Assembly, he had often had occasion to work with him. As President of the United Nations Conference on Consular Relations at Vienna in 1963, he had appreciated his coolness and composure and the many other qualities that members of the Commission had already spoken of. On more than one occasion Mr. Torres-Bernárdez had held fearlessly to his point of view, thus giving most valuable support to the President of that Conference.

21. Mr. Torres-Bernárdez was not only an eminent jurist; he was also a model international official, devoted to the cause of the United Nations. In him, the Commission was losing a most valuable associate who had been promoted to higher duties, in the performance of which he wished him great success.

22. Mr. SCHWEBEL said that Mr. Torres-Bernárdez, who had always shown the deepest interest in the progressive development not only of international law, but of the United Nations itself, had made an outstanding contribution to the work of the Commission and to the codification process. He had provided the Commission with very valuable support

and would undoubtedly make a remarkable Registrar of the International Court of Justice.

23. He joined previous speakers in wishing Mr. Torres-Bernárdez and his wife every success and happiness at The Hague.

24. Mr. AGO, speaking as a former member of the Commission, said that during his long service on the Commission he had seen Mr. Torres-Bernárdez arrive and develop his personality and ability through the work on codification. He had appreciated his qualities not only in the Commission, but also in New York and Vienna. Of the members of the Commission, he had himself certainly been the one to benefit most from the co-operation of Mr. Torres-Bernárdez, whose preliminary research on circumstances precluding wrongfulness had been extremely useful to him as Special Rapporteur on the first part of the topic of State responsibility. Moreover, the contribution of Mr. Torres-Bernárdez to the drafting of the Commission's final reports had been invaluable. The modesty with which he had always covered his competence and his wide knowledge had only been exceeded by his extraordinary devotion to the cause he had been appointed to serve.

25. If he were still a member of the Commission, he would deeply regret seeing Mr. Torres-Bernárdez leaving for other spheres and taking up other duties; but as a member of the Court, how he welcomed his arrival!

26. Speaking as a member of the Court, he referred to the enthusiasm with which those of its members who had recently been members of the Commission had proposed Mr. Torres-Bernárdez as Registrar and supported his candidature. That bore witness to their appreciation of all that he had done for the Commission. He would not feel exiled at The Hague, because he had already worked at the Academy of International Law, which had its headquarters there, and especially because at the International Court of Justice he would find many friends who had known him in the Commission and had long appreciated his qualities. Referring, in particular, to the nationality of Mr. Torres-Bernárdez, he said he was sure he would prove a worthy inheritor of the great tradition established by the late lamented Julio López Oliván.

27. He himself had shown that a former member of the Commission never entirely ceased to belong to it; he thought that Mr. Torres-Bernárdez, too, would never entirely cease to have links with the Commission and to visit it from time to time, in so far as his new duties permitted. It was a good omen that an eminent offical of the Commission was now to become the principal officer of the Court. At a time when the international community was not giving the law all the attention it merited, it was highly desirable that closer co-operation should be established between the two main legal organs of the United Nations. He was confident that Mr. Torres-Bernárdez would be able to do much to further that end, and it was with the expression of that wish that he would conclude.

28. The CHAIRMAN invited Mr. Torres-Bernárdez to address the Commission.

29. Mr. TORRES-BERNÁRDEZ (Deputy-Secretary to the Commission), thanking the members of the Commission for their kind words, said that he did not regret the twenty-one years he had spent in the cause of the progressive development and codification of international law.

30. He had joined the secretariat of the Commission in 1960, the year in which it had been completing the first reading of the draft articles on consular relations. That had been a decisive time in its work of codification. Behind had lain the years when the Statute had been drawn up and when the Commission had first embarked on its task; behind, too, had lain the cold war, and decolonization had reached its peak, with all the positive influence that such political events had for promotion of the codification process and its universal dimension. By then, the Commission had gained considerable experience and confidence; the doubts about codification that dated from the Conference for the Codification of International Law (The Hague, 1930), and the doubts that had arisen within the Commission as a result of the reaction of States to the draft articles on arbitral procedure had been fully overcome.

31. There had been one development in particular which had shown that the codification of international law was feasible. He was referring, of course, to the four conventions on the law of the sea adopted in 1958 on the basis of draft articles prepared by the Commission. The failure of the Second Conference on the Law of the Sea to agree on certain outstanding matters had in no way undermined the Commission's confidence, either in regard to the mandate entrusted to it by the General Assembly or to the feasibility of its fulfilment in practice.

32. Since that time, the Commission's record of achievement had been impressive. In the first place, the following codification conventions had been adopted by States on the basis of drafts prepared by the Commission: the Vienna Convention on Diplomatic Relations, and the Convention on the Reduction of Statelessness, in 1961; the Vienna Convention on Consular Relations, in 1963; the Vienna Convention on the Law of Treaties and the Convention on Special Missions, in 1969; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, in 1973; the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, in 1975; and the Vienna Convention on Succession of States in respect of Treaties, in 1978. In addition, the Commission had completed the draft articles on the most-favoured-nation clauses and had concluded the

first reading of the draft articles on succession of States in respect of matters other than treaties and the draft articles on treaties concluded between States and international organizations or between international organizations, as well as the first reading of Part I of the draft on State responsibility for internationally wrongful acts.

33. It was not for him to expand on the achievement which that major work of codification represented in intellectual and diplomatic terms. But he had no doubt whatsoever that when the textbooks came to deal with developments in general international law during the twentieth century, they would emphasize that it had been in the course of the two preceding decades, and as a result of the part played by the Commission, that the character of international law had started to change; for alongside the customary rules and the unwritten practice from which such law traditionally derived, there had gradually emerged a body of written rules which, also general in terms of their purpose and actual or potential scope, constituted a genuine codified *common* international law. Indeed, that was already evident from recently published textbooks, which recognized the impact on international law of the work of codification and progressive development in which the Commission had played such a central part.

34. If he were to be asked what the Commission's most significant contribution over the years had been, he would look for the answer not in an examination of the relative merits of the various drafts prepared thus far, but in something that seemed far more important to him, namely, the strengthening of the fundamental concept of an "international community", in the sense not only of the sum of its parts, but also of a genuine community with its own aims and aspirations. Such a concept emerged clearly from the draft articles prepared by the Commission, in which those on *jus cogens* took pride of place, but other examples abounded throughout practically all the Commission's work. The aims and aspirations of the international community had also been taken into account in selecting the topics to be studied by the Commission; it should not be forgotten that topics in which the individual and common interests of States converged, such as offences against the peace and security of mankind and the law of the sea, had been among the first to be considered by the Commission. The same applied to other topics on the current programme, in particular to "International liability for injurious consequences arising out of acts not prohibited by international law".

35. Indeed, the very existence of the Commission attested to the fact that the concept of the "international community" was a legal reality to which States, taken individually, were alive. It was States which had created an International Law Commission composed not of governmental representatives, but of representatives of the main forms of civilization and the main legal systems of the world, thereby enabling the Commission to take account in its drafts of the interests and aspirations not only of various States or groups of States, but of the international community as a whole. Thus, both by its composition and in its work, the Commission had transcended the narrow and unduly individualistic conception of international law that had prevailed until recently.

36. That was why the drafts prepared by the Commission carried the weight they did. The reaction of States in the Sixth Committee of the General Assembly to the Commission's drafts and the ultimate codification of various topics at plenipotentiary conferences or by the General Assembly had not come about by chance, nor had they been solely the result of the undoubtedly high quality of the Commission's work. The real reason was that the Commission presented the features of a body that was genuinely a body of the international community. Thus the results of the Commission's work were seen as objective findings based on the interests and aspirations of the international community as a whole, and were accordingly examined as such by the representatives of States when the time came to draw up codification instruments. The Commission was therefore far more than just a subsidiary body of the General Assembly.

37. He had been fortunate in that he had been able to follow the Commission's work during decisive years when international law had seen significant progress. He had also been fortunate in that he had taken part, with respect to several topics, in the full cycle of the codification process, from the first to the last stages, and had thereby also become acquainted with its diplomatic dimensions. The experience he had thus gained had convinced him that the codification process constituted an integral whole and that its various stages should not be isolated. The process of progressive development of international law and its codification, in which the Commission participated, called for a combined diplomatic and scientific approach. There, in fact, lay the difference between the Commission's method and the tasks performed by the various special or *ad hoc* committees of the United Nations which made a diplomatic contribution to the development and codification of international law; there, too, lay the difference between the codification work carried out by the Commission and that carried out by scientific bodies concerned with international law.

38. In that connexion, he wished to stress the importance of retaining, as the general method of codifying and progressively developing international law, what was regarded as "the Commission's method". For although to some it might seem unduly restrictive or slow, it was, as already noted by the Commission, an excellent method for carrying out the task assigned to the Commission by the General Assembly pursuant to Article 13, paragraph 1, a of the Charter of the United Nations: the progressive development of international law and its codifications;

that, and elaboration of new law were not identical concepts, as those who criticized the Commission's method appeared to think.

39. The drafters of the Commission's Statute had done an excellent piece of work, and the subsequent achievements were the surest confirmation of the suitability of the method adopted. If any efforts were needed in that regard, they should be directed to consolidating "the Commission's method" and removing any slight defects it might have, with a view to guaranteeing its continued effectiveness.

40. One important feature of "the Commission's method" was that it benefited from the constant presence of a specialized secretariat: the Codification Division of the Office of Legal Affairs. The Commission therefore had a real interest in the composition of that Division and its strengthening. Of the many functions performed by the Codification Division, two merited special mention. The first consisted in providing information to members of the codification bodies served by the Division and ensuring co-ordination between such bodies. That function, which was carried out publicly and also by procedures that were not so immediately apparent but were equally necessary and effective, was essential for the codification process in general and for "the Commission's method" in particular. The second function consisted in following administrative developments within the Organization and advising the administrative services responsible, so as to ensure that certain problems that might otherwise waste the Commission's time were settled in advance. The staff of the Codification Division, to whom he wished to pay a tribute, were therefore required not only to have a knowledge of international law and codification procedures, but also to be totally dedicated to their work, tactful, and faithful to the codification process.

41. Lastly, the honour which the International Court of Justice had conferred on him by his appointment as Registrar could be attributed to all he had learned during his time with the Commission. He trusted that the Commission and its members would enjoy continued success, and, for his part, he would do his utmost to strengthen the ties that already existed between the Commission and the International Court of Justice.

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

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 33[1] (State of necessity)

42. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Committee of article 33 (State of necessity) (A/CN.4/L.318), which read:

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(*a*) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(*b*) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(*c*) if the State in question has contributed to the occurrence of the state of necessity.

43. Mr. VEROSTA (Chairman of the Drafting Committee) pointed out that draft article 33, as originally proposed by Mr. Ago (A/CN.4/318/Add.5–7, para. 81),[2] had contained three paragraphs. The first paragraph had stated positively the conditions under which the wrongfulness of an act of a State not in conformity with what was required of it by an international obligation was precluded by a state of necessity, namely, if the State had no other means of safeguarding one of its essential interests which was threatened by a grave and imminent peril, and only in so far as failure to comply with the obligation towards another State did not entail the sacrifice of an interest of that State comparable or superior to the interest which it was intended to safeguard.

44. Paragraphs 2 and 3 of the original draft article had then stipulated three situations in which paragraph 1 would not apply, namely, if the occurrence of the situation of necessity was caused by the State claiming to invoke it as a ground for its conduct (para. 2); if the international obligation with which the act of the State was not in conformity arose out of a peremptory norm of general international law, and in particular if that act involved non-compliance with the prohibition of aggression (para. 3 (*a*)); if the international obligation with which the act of the State was not in conformity was laid down by a conventional instrument which, explicitly or implicitly, precluded the

* Resumed from the 1629th meeting.

[1] For consideration of the text initially submitted by Mr. Ago, see 1612th meeting, paras. 34 *et seq.*, and 1613th–1618th meetings.

[2] Text reproduced in 1612th meeting, para. 35.

applicability of any plea of necessity in respect of non-compliance with the said obligation (para. 3 (*b*)).

45. The Drafting Committee had recast the article adopting as a sign of caution the negative approach used in article 62 of the Vienna Convention on the Law of Treaties[3] concerning fundamental change of circumstances. The new text of the draft article before the Commission contained only two paragraphs. Unlike the original paragraph 1, its first paragraph did not state when the wrongfulness of an act would be precluded by a State of necessity, but stipulated, negatively, that a state of necessity could not be invoked as a ground for precluding wrongfulness unless the two conditions set out in subparagraphs (*a*) and (*b*) were met.

46. Those two conditions, while basically the same as those laid down in the original text, had been redrafted to attain greater clarity and precision. Accordingly, the earlier reference to a "comparable or superior" interest had been dropped. Instead, both subparagraphs (*a*) and (*b*) of paragraph 1 referred simply to "an essential interest", it being understood that the double reference implied a comparison between the two interests involved. In addition, the reference in the original paragraph 1 to an act which "does not entail the sacrifice of an interest" had been replaced in the new paragraph 1 (*b*) by a reference to an act which "did not seriously impair an essential interest".

47. Paragraph 2 covered, in three subparagraphs, the three situations in which a state of necessity could not be invoked by a State as a ground for precluding wrongfulness. Those three situations were basically the same as those dealt with in subparagraphs 3 (*a*) and (*b*) and paragraph 2 of the text proposed by Mr. Ago. The introductory sentence of paragraph 2, like that of paragraph 1, had been drafted in the negative form he had already indicated, whereas both paragraphs 2 and 3 of the former text had used the formula "paragraph 1 does not apply". Paragraphs 2 (*a*) and (*b*) of the new text corresponded to paragraphs 3 (*a*) and (*b*) of the former text. However, paragraph 2 (*a*) did not include the reference to "non-compliance with the prohibition of aggression" contained in the former text, since it had been considered not only unnecessary, in view of the comprehensive terms of paragraph 2 (*a*), but also likely to give rise to differences of interpretation regarding the prohibition of the use of force under international law. In paragraph 2 (*b*), the Drafting Committee had replaced the cumbersome phrase "precludes the applicability of any plea of 'necessity' in respect of non-compliance with the said obligation" by the phrase "excludes the possibility of invoking the state of necessity with respect to that obligation". Finally, paragraph 2 (*c*) corresponded to paragraph 2 of the text proposed by Mr. Ago. However, unlike that paragraph, which referred to "the situation of 'necessity' ... caused", paragraph 2 (*c*) introduced the concept of contribution, thus maintaining conformity with the similar concept already used in article 31, paragraph 2 and article 32, paragraph 2.[4]

48. Mr. USHAKOV said he still did not believe that article 33 was justified in the draft. The concept of an essential interest which a State might invoke to evade its responsibility was very subjective. To a State, every one of its interests was essential. There was always competition between the interests of the two States concerned; it might therefore be asked who was to decide which interest should prevail. If such a subjective criterion was retained, a State might be tempted to invoke the state of necessity abusively as a ground for preclusion of wrongfulness.

49. Mr. VEROSTA (Chairman of the Drafting Committee) said that Mr. Ushakov had drawn the attention of the Drafting Committee to his view. Nevertheless, the majority of the members of the Committee had felt that such a draft article should be included in Chapter V of the draft.

50. Sir Francis VALLAT said that, in order to maintain a proper balance, it should be noted that the point raised by Mr. Ushakov had been taken into account by the members of the Drafting Committee and that some members had expressed the view that, at the appropriate time, it would be necessary to include in the draft a satisfactory article dealing with the settlement of disputes, possibly by arbitration or judicial settlement.

51. Mr. REUTER said he could accept Draft article 33, taking into account article 31, in which the concept of *force majeure* had a very narrow meaning. If that were not so, draft article 33 might have been drafted differently.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to adopt draft article 33, with the reservation expressed by Mr. Ushakov.

It was so decided.

ARTICLE 34[5] (Self-defence)

53. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's text of article 34 (A/CN.4/318), which read:

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act

[3] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. Hereinafter called "Vienna Convention".

[4] For the text of the draft articles adopted so far by the Commission, see *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

[5] For consideration of the text initially submitted by Mr. Ago, see 1619th to 1621st meetings, 1627th meeting, paras. 1–25, 1628th meeting, paras. 1–28, and 1629th meeting.

constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that draft article 34, as originally proposed by Mr. Ago (A/CN.4/318/Add.5–7, para. 124),[6] had provided that the wrongfulness of an act of a State not in conformity with an international obligation of that State was precluded "if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations". On the basis of the discussion of the original text in the Commission, and taking into account, in particular, the difference of views on the extent of the right of self-defence under international law, the Drafting Committee had decided to replace that phrase by the more general wording "if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations".

55. Mr. USHAKOV said that he approved of the substance of the article, but found its wording unacceptable because it had too many defects. In the first place, it was unnecessary to state that the wrongfulness of an act constituting a lawful measure of self-defence was precluded, since it was presumed that what constituted self-defence was lawful *ab initio*. Secondly, it should be indicated that self-defence must be exercised in conformity with Article 51 of the United Nations Charter. Thirdly, to state that lawful measures could be taken in self-defence implied that unlawful measures could also be taken, which would be contrary to the very concept of self-defence. As self-defence was a natural right, the measures which it presupposed were always lawful. Fourthly, it was strange to speak of preclusion of the wrongfulness of lawful measures. Fifthly, it was also strange to say that an "act constitutes a ... measure". Logically, it was rather a measure which constituted an act.

56. For all those reasons he suggested the following model for the wording of draft article 34:

> "Recourse by a State to self-defence in conformity with Article 51 of the Charter of the United Nations precludes the wrongfulness of an act of that State constituting such recourse to self-defence."

57. Mr. FRANCIS said that, while he did not wish to raise a formal objection to the compromise text proposed by the Drafting Committee, he preferred the text originally submitted by Mr. Ago. During the Commission's consideration of draft article 34 (1621st meeting), he had warned against any implicit or explicit attempt to amend the Charter of the United Nations. A general reference to the non-use of force in conformity with the Charter could be taken as a reference to Article 2, paragraph 4, Article 42, Article 51, or Article 52 of the Charter, whereas any explicit reference to self-defence could apply only to Article 51. The text proposed by the Drafting Committee to some extent weakened the import of the original draft.

58. Mr. DÍAZ GONZÁLEZ said that although, like Mr. Francis, he did not wish to object formally to the draft proposed by the Drafting Committee, he agreed with the comments made by Mr. Ushakov. Article 51 of the Charter contained a specific reference to the inherent right of self-defence, the exercise of which could not be wrongful. Consequently, the text of the draft article could be made much clearer by replacing the words "a lawful measure of self-defence taken" by "action taken in the exercise of the right of self-defence".

59. Mr. RIPHAGEN said that self-defence was a motive, not a concrete series of acts. Any act—including genocide or a serious violation of human rights, which were not lawful measures—could be described as self-defence. Consequently, the inclusion of the word "lawful" was essential.

60. Mr. YANKOV said that while he had no formal objection to the text proposed by the Drafting Committee, he agreed with the views expressed by Mr. Ushakov, Mr. Francis and Mr. Díaz González. The text would be better if it followed more closely the wording and meaning of Article 51 of the Charter and contained a specific reference to that Article. Accordingly, the insertion of the words "in the exercise of its inherent right of self-defence" after the word "taken" would leave less room for different interpretations.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to adopt draft article 34, as proposed by the Drafting Committee, taking into account the comments made by the members of the Commission and the specific reservation entered by Mr. Ushakov.

It was so decided.

ARTICLE 35 (Safeguard clause on compensation for damage)

62. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Committee of draft article 35 (A/CN.4/L.318), which read:

Article 35. Safeguard clause on compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

63. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Commission, at its thirty-first session, during its discussion of the article on *force majeure* and fortuitous event, had considered whether, bearing in mind the comments already made, it should add to the article a third paragraph stating that preclusion of the wrongfulness of an act of a State

[6] Text reproduced in 1619th meeting, para. 1.

committed in the circumstances indicated in paragraphs 1 and 2 of that article did not affect the possibility that the State committing the act, might, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question. The Commission had found, however, that a stipulation of that kind would also have to apply to other circumstances precluding wrongfulness dealt with in chapter V. It had decided, therefore, that at its thirty-second session, after completing its consideration of the various circumstances precluding the international wrongfulness of an act of the State, it would examine the advisability of inserting such a proviso in chapter V.[7] At the current session, the Drafting Committee had considered the possibility of preparing such a draft article.

64. On the basis of a text submitted to it by Mr. Ago, the Committee had adopted the text of draft article 35 now submitted to the Commission for its approval. The text enumerated the four articles under which the wrongfulness of an act of a State could be precluded, and stated that such preclusion did not prejudge any question that might arise in regard to compensation for damage caused by that act. The article, which constituted a safeguard clause, served as a convenient link between the provisions of part 1, which had already been completed, and those of part 2, which would be adopted in the future. The contents of those future provisions might determine whether or not article 35, as drafted, would need to be retained.

65. Mr. REUTER said that in French legal terminology the word "*compensation*" had a completely different meaning from that used by the Drafting Committee. He suggested that it should be replaced by "*indemnisation*".

66. He wondered whether the idea of doubt expressed in the French text by the words "*des questions qui pourraient se poser*" was adequately rendered in English by "any question that may arise". Until such time as the Commission had decided whether the circumstances referred to in articles 29, 31, 32 and 33 might create an obligation to make reparation, it was important to refer to that question in very cautious terms. He himself was not yet in a position to answer it.

67. Mr. DÍAZ GONZÁLEZ said that the word "or" in the reference to articles 29 and 31 to 33 should be replaced by "and". Furthermore, the word "*compensación*", in the Spanish text, should be replaced by "*indemnización*".

68. Mr. USHAKOV said that, while he accepted that draft article 35 was a safeguard clause, he thought it was not necessary to mention it expressly in the title. Taking guidance from article 73 of the Vienna Convention, the Commission might entitle the article "Cases of indemnification for damage".

69. Sir Francis VALLAT said that he had doubts about the use of the words "safeguard clause" in the title, because they did not reflect the content of the draft article.

70. The CHAIRMAN suggested that the title might read simply "Compensation for damage".

71. Mr. AGO said that he approved the replacement of "*compensation*" by "*indemnisation*" in the French text.

72. He thought that to entitle draft article 35 "Compensation for damage" would be to take a position on the question that had not yet been settled by the Commission. If the Commission did not like the expression "safeguard clause", it could be guided by the Vienna Convention, as Mr. Ushakov had suggested.

73. Mr. REUTER proposed that the article should be entitled "Possible compensation for damage".

74. Mr. ŠAHOVIĆ said he understood the reservations to which the expression "safeguard clause" might give rise, but it was a good description of the provisional situation in which the Commission found itself. That expression might possibly be placed in square brackets.

75. If the word "possible" was included in the title of article 35, its meaning would have to be defined, which might be inconvenient.

76. Mr. AGO suggested the title "Reservation as to compensation for damage", since in fact the Commission wished to reserve that question.

77. Following an exchange of views concerning the advisability of replacing the word "or" by "and" and the word "may" by "might", the CHAIRMAN said that, if there were no objections, he would take it that the commission wished to adopt the English text of the draft article without amendment, to replace the words "*compensation*" in the French text and "*compensación*" in the Spanish text by the words "*indemnisation*" and "*indemnización*" respectively, and to amend the title of the draft article to read "Reservation as to compensation for damage".

It was so decided.

Article 35, as amended, was adopted.

78. The CHAIRMAN thanked Mr. Ago and the Drafting Committee and its Chairman.

The meeting rose at 1.15 p.m.

[7] *Yearbook ... 1979*, vol. II (Part Two), p. 133, document A/34/10, chap. III, sect. B.2, article 31, para. (42) of the commentary.