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Summary record of the 1642nd meeting

Topic:
Other topics

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the last sentence so that it would read: "... amending paragraph 2 of the resolution so as to substitute ...".

Paragraph (18), as amended, was approved.

Sub-headings

75. Mr. SCHWEBEL (Special Rapporteur) said that in drafting the commentaries he had not inserted any sub-headings, as he had been under the impression that they were not used in such reports. It would be useful, for example, to insert a sub-heading such as "Navigational uses", before paragraph (33). He suggested that the Secretariat should be requested to insert sub-headings throughout the commentary, as appropriate.

76. The CHAIRMAN agreed that the Secretariat might insert sub-headings, preferably employing phrases from the text as it stood and provided the expressions used were chosen with due caution.

It was so decided.

Paragraph (77)

77. Mr. SCHWEBEL (Special Rapporteur) suggested that the last part of the last sentence be amended to read: "... their use in one system State affects a use in another system State—is carried through in this article as well".

Paragraph (77), as amended, was approved.

Paragraph (79)

78. Mr. ŠAHOVIĆ said he regretted that the principle of the permanent sovereignty of States over their natural resources had not been mentioned in the draft report in connexion with article 5, because he thought one could not speak of shared natural resources without taking that principle into account.

79. The CHAIRMAN said that, in view of Mr. Šahović's comment, the Commission might wish to consider the insertion of an additional sentence to indicate that the view had been expressed that the absence of any mention of that principle was an omission.

80. Mr. SCHWEBEL (Special Rapporteur) said that the Commission should bear in mind that the point raised was a very controversial one. He himself considered that it was not relevant in the present context. He recognized that there had been a difference of opinion on the matter, but did not think it vital to the operative conclusions. There was a fleeting mention of permanent sovereignty over natural resources in the quotation from General Assembly resolution 34/186 in paragraph (19) of the commentary to article 5, which would seem to confirm the principle. It was not through an oversight, however, that there was no further mention of that principle, but because he had thought it might lead to a discussion which would not be productive at that stage.

81. He did not see the merit of discussing permanent sovereignty in general in the present context. It was a controversial principle and might prejudice the possibility of reaching agreement on the topic under consideration. It was true, however, that the principle had been referred to in the Commission's discussions, and if it was considered necessary, he would be agreeable to mentioning it; but he would wish any reference to be balanced. It might perhaps be stated that some members believed that the principle of permanent sovereignty over natural resources had a bearing on the evolution of articles in the field under consideration and that another member did not.

82. The CHAIRMAN suggested that an additional paragraph (80) should be inserted along these lines.

It was so decided.

Paragraph (79) was approved.

83. Sir Francis VALLAT said that, as some concern had already been expressed about the length of the commentary, he wondered whether it would be possible to insert, as a new paragraph (2), a short summary to serve as an index to what followed. Such a summary would facilitate the reading of the report.

84. Mr. SCHWEBEL (Special Rapporteur) said that he appreciated Sir Francis's point and that he himself was rather concerned about the question of the length of commentaries, particularly the commentary to article 5. He wondered whether in future it might be desirable to adopt a policy of taking only a few examples to illustrate comments and referring, for other examples, to the relevant report of the Special Rapporteur.

The commentary to article 5, as amended, was approved.

Commentary to article X (Relationship between the present articles and other treaties in force)

The commentary to article X was approved.

Chapter V, as amended, was approved.

The meeting rose at 6.05 p.m.

1642nd MEETING

Friday, 25 July 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, 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.

Draft report of the Commission on the work of its thirty-second session (concluded)

CHAPTER III (State responsibility) (concluded)*

Commentary to article 33 (State of necessity) (A/CN.4/L.320/Add.1/Parts I and II)

The commentary to article 33 was approved.

Commentary to article 34 (Self-defence) (A/CN.4/L.320/Add.2)

1. Mr USHAKOV said that the Commission should be wary of interpreting or explaining the concept of self-defence as it had done in paragraphs (1) to (22) of the commentary. In his view, those paragraphs were unnecessary, and the commentary should start at paragraph (23), in which the Commission noted the existence of a "primary" rule on self-defence.

2. Mr. AGO pointed out that Mr. Ushakov's position was duly recorded in paragraphs (26) and (27).

3. Mr VEROSTA referring to the phrase "or, to put it another way, in the exercise of what the Charter called the 'inherent right of self-defence'", at the end of paragraph (1), said that it might give the impression that the Commission subscribed to Mr. Ago's view that self-defence as an inherent right did not exist. If that phrase was retained, it would be sure to provoke criticism by those who regarded the United Nations Charter as an instrument of positive public international law, one provision of which qualified self-defence as an inherent right.

4. Further, the words "Another premise", in the second sentence of paragraph (2), should be replaced by "Another element", since a premise that was not indispensable" was not a premise.

5. Mr. USHAKOV proposed that paragraph (27) should be worded as follows: "In the view of one member of the Commission, who of course approved of the substance of the article, the text could not possibly begin with a reference to 'an act of a State not in conformity with an international obligation of that State'; for an act of a State which constitutes a measure of self-defence is not contrary to any international obligation." In addition, the words "*un recours*" in the French text of foot-note 37 should be replaced by the words "*ce recours*".

6. Mr. AGO said he was surprised by Mr. Verosta's first comment, since the phrase in question had been added precisely to allay his misgivings; however, it could be deleted. He also agreed that the word "premise" could well be replaced by the word "element".

7. The amendments proposed by Mr. Ushakov should also be taken into account, since they were designed to make his position clearer.

It was so decided.

The commentary to article 34, as amended, was approved.

Chapter III as amended, was approved.

8. The CHAIRMAN put to the vote the draft report of the Commission on the work of its thirty-second session as a whole, as amended.

The draft report as a whole, as amended, was adopted.

Tribute to Mr. Ago

9. The CHAIRMAN said that at the end of the Second World War the subject of State responsibility had remained, as far as States were concerned, a loose collection of rules, without a recognized conceptual framework that would facilitate their clarification, systematic exposition and application. Although the topic had been among the first selected by the Commission for codification, in 1949, it had not been until 1955 that a Special Rapporteur, Mr. Garcia Amador, had been appointed for it. In 1960, after a series of six detailed reports had been submitted, the General Assembly and the Commission had decided that codification of the rules of State responsibility should be accorded priority and that the study should be undertaken *de novo*.

10. In 1962, the Commission had decided to entrust preliminary work on the study to a Sub-Committee on State Responsibility, under the chairmanship of Mr. Ago, and, at its fifteenth session, in 1963 having unanimously approved the general conclusions of the Sub-Committee, had appointed Mr. Ago Special Rapporteur for the topic. Mr. Ago had already won wide acclaim for his pioneering studies on State responsibility and had all the qualities of intellect and accomplishment required for leadership of the Commission in the monumental task that lay ahead. He had brought to his work a wealth of experience, meticulous scientific method and, most important of all, a commitment to the ideals of justice which the work must ultimately serve.

11. Beginning in 1969, in a series of brilliant reports that had won universal acclaim and admiration, not only in the Commission and the Sixth Committee of the General Assembly, but also among jurists and scholars everywhere, Mr. Ago had sketched the grand design for the work of the Commission. In considering the topic of international responsibility, the Commission would concentrate on a study of State responsibility and, within that subject, on a study of the responsibility of States for internationally wrongful acts. The study would not seek to define the so-called "primary" rules of international law, which imposed specific obligations on States, but would concentrate on the elaboration of "secondary" rules determining the legal consequences of failure to fulfil the obligations established by "primary" rules. The work would involve studies, first, of the origin of international responsibility of a State; secondly, of the

* Resumed from the 1640th meeting.

content, forms and degrees of that responsibility; and thirdly, of the settlement of disputes and the "implementation" stage of international responsibility. Mr. Ago had asked the Commission to undertake, in the first instance, the essential task of establishing the fundamental rules for determining State responsibility and to take as a starting point the concept of the internationally wrongful act as a source of international responsibility. He had then undertaken to guide the Commission's work in completing the all-important fundamental study.

12. Since 1972, at the request of the General Assembly the Commission had accorded the topic the highest priority, and Governments had received the draft articles submitted by the Special Rapporteur in instalments for comment. The Commission's adoption, at the current session, of the commentaries to draft articles 33 (State of necessity), 34 (Self-defence) and 35 (Reservation as to compensation for damage) completed on first reading the entire series of draft articles comprising the first phase of the work. Many of the features of the draft represented outstanding and innovative contributions to legal science and to the progressive development of international law. The set of draft articles ranked among the greatest creative achievements of the Commission and would be acclaimed not only as a legislative framework of exceptional merit and as a highly original systematic exposition of the fundamentals of a complex subject, but also for the profound scholarship of its commentaries, which, in themselves, formed a modern treatise on State responsibility.

13. There were few countries whose philosophers had so dedicated themselves to the achievement of an ordered world as had those of Italy. Judge Ago's work must take its place with the work of others conceived and created in that noble tradition, inspired not merely by a fascination with science, but also by a love of justice.

14. Mr. TSURUOKA, speaking on behalf of the Asian members of the Commission, heartily congratulated Mr. Ago. In completing the study of a subject of capital importance for international law, the Commission had laid the foundations for a new monument of codification. It could be proud of that work, which had only been successfully accomplished thanks to the experience, knowledge, advice and devotion of such a personality as Mr. Ago.

15. Mr. THIAM, speaking on behalf of the African members of the Commission, associated himself with the tributes paid to Mr. Ago and expressed the admiration of African jurists for the immense contribution he had made to international law. Since he had become a member of the International Court of Justice, Mr. Ago had, over and above all his other well-known qualities, shown great affection for the Commission. Not only had he continued to give it the benefit of his knowledge in the study of State

responsibility, but as before, he had shown a keen interest in all its work.

16. Where others had failed, Mr. Ago had succeeded in completing a project which would mark a memorable date in the history of international law. The clarity and simplicity with which he had always presented even the most difficult questions had sometimes made them look easy. He hoped Mr. Ago would return for the second reading of the draft articles and that the Commission would long continue to benefit from his wise counsel.

17. Mr. FRANCIS said that Mr. Ago had served the Commission for many long years and had, in a sense, become an institution in himself. A renowned scholar and eminent jurist, he had made an outstanding contribution to the codification process and would go down in the annals of the Commission as a colossus of his time.

18. Speaking also on behalf of Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda and Mr. Díaz González, he expressed the hope that Mr. Ago's contacts with the Commission would continue and that his work in his new field of endeavour would also be crowned with success.

19. Mr. USHAKOV, speaking also on behalf of Mr. Šahović and Mr. Yankov, congratulated Mr. Ago and thanked him warmly for his great work. Mr. Ago had needed great boldness to attack the task entrusted to him and great ability to bring it to a successful conclusion. The work he had accomplished would undoubtedly be a peak in his scientific life, for he had studied the problem of State responsibility for nearly fifty years. Mr. Ago's devotion was shown by the fact that after becoming a member of the International Court of Justice he had taken such pains to complete the task he had begun. Not only would his efforts enrich the science of contemporary international law, they would also benefit States, particularly if the draft articles one day became a convention. The task of a Special Rapporteur was a thankless one, for he was constantly exposed to the criticism of his colleagues; but Mr. Ago had acquitted himself with patience and in an atmosphere of friendship which his departure could not diminish.

20. Mr. QUENTIN-BAXTER, speaking on behalf of Mr. Reuter, Mr. Schwebel, Sir Francis Vallat and Mr. Verosta, said that all the members of the Commission had a sense of a vast work accomplished, and of an association that carried special meaning for each one of them.

21. The great contribution of law to international affairs was that it provided the means whereby an appeal could be made to something beyond mere partisan interests, and shared ideals could be brought into play; no one of his generation had contributed to that aspect of the law more fully than Mr. Ago.

22. He expressed his gratitude to Mr. Ago for his outstanding contribution to the work of the Commission and to the cause of international peace and goodwill in general. He also paid a tribute to Miss Spinedi, who had done so much to assist Mr. Ago in his great work.

23. Mr. RIPHAGEN said that the Commission owed an immense debt of gratitude to Mr. Ago and would continue to be imbued with the spirit that had pervaded his work. Members took their leave of Mr. Ago with a sense of awe, but knew that they could always count on him for assistance in their further work on the topic of State responsibility.

24. The CHAIRMAN invited the Commission to adopt the following draft resolution:

“The International Law Commission,

“Having adopted, provisionally, draft articles on the origin of international responsibility, constituting Part 1 of the draft on the responsibility of States for internationally wrongful acts,

“Desires to express to the former Special Rapporteur, Judge Roberto Ago, its deep appreciation for the extraordinarily valuable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring the first reading of these draft articles to a successful conclusion.”

The draft resolution was adopted.

25. Mr. AGO said that he was both surprised and moved by all the compliments paid him. He felt as though the umbilical cord between a set of draft articles in gestation and the person responsible for drafting them had just been cut. The work on which he had spent more than ten years had been no ordinary task for him; it had enabled him to reflect in his work many ideas which he had formulated over the long years of his scientific life. Like a conductor, however, he had not been alone in shaping success: every member of the orchestra had contributed to it, and under the baton of his successor they would have to continue the work begun. After codifying diplomatic law, the law of treaties and other important matters under study, the Commission would certainly deserve well of the international community when it had also completed codification of the subject of the international offence and its consequences. He assured the members of the Commission that he would remain at their disposal.

Closure of the session

26. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-second session of the International Law Commission closed.

The meeting rose at 12.30 p.m.
