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**Summary record of the 2591st meeting**

Topic:
**State responsibility**

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# 2591st MEETING

*Tuesday, 22 June 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)**

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 30 bis (*concluded*)

1. Mr. CRAWFORD (Special Rapporteur) said Mr. Pellet had suggested (2590th meeting) that, because there was a functional connection between the maxim *exceptio inadimplenti non est adimplendum* and countermeasures, even though they were conceptually distinct, the Commission should wait until it was in a position to formulate the provisions on countermeasures before deciding whether the *exceptio* should be included in chapter V. He was perfectly ready to accept that suggestion, but suspected that conditions would be attached to the invocation of countermeasures that would not be appropriate for the *exceptio*. It would nevertheless be useful to hear the views of members on the substance of his proposal in article 30 bis (Non-compliance caused by prior non-compliance by another State).

2. In his second report on State responsibility (A/CN.4/498 and Add.1-4), a reference should have been included to the *Klöckner* v. *Cameroon* case decided by ICSID and involving an investment contract governed by the law of Cameroon, which for that purpose had been treated as being exactly the same as French law. The ICSID tribunal had applied the *exceptio* in favour of the respondent State. Citing the *Diversion of Waters from the Meuse* case, it had referred to the fact that the *exceptio* was recognized in international law, but had gone on to treat the *exceptio* as grounds for the termination of the obligation. The decision had subsequently been annulled by a review tribunal, which had indicated that its understanding of the *exceptio* was that it was the basis, not for the termination, but for the suspension, of an obligation. The point on which the decision had been annulled had thus been that a circumstance precluding wrongfulness had been involved, not grounds for the termination of a contract.

3. Mr. YAMADA said he found the proposed new article 30 bis interesting in that it was thought-provoking. He had always understood the Roman law maxim of *exceptio* as providing legitimate cause for objection for a party that was sued and as not questioning the legality of non-performance of an obligation by that party. Aside from that theoretical point, there were certain practical matters. What were the cases that were covered by article 30 bis alone among the articles in chapter V?

4. The proposed article was based on the narrow form of the *exceptio*, the key phrases in the text being "if the State has been prevented from acting in conformity with the obligation" and "as a direct result of a prior breach of the same or a related international obligation by another State". In other words, there must be a direct causal link between the non-performance of an obligation by a State and the preceding non-performance of an obligation by another State. That would seem to indicate that the article's scope was limited to the case of physical impossibility. Mr. Gaja (2590th meeting) had provided the example of a contract for the supply of Italian marble from State A to State B, which was to produce a sculpture from that marble. Failure to supply the marble resulted in the inability of State B to make a sculpture. That was a typical and clear example of physical impossibility: State B had no choice in the matter, and the case was undoubtedly covered by article 30 bis. However, could it not also be covered by force majeure?

5. He asked whether article 30 bis could be interpreted as applying more broadly? Suppose there was an agreement whereby State A undertook to supply a fixed amount of a commodity to State B on condition that State B made a 30 per cent down payment in advance of delivery. State B failed to make the down payment before the specified date, and State A withheld the delivery. For State A, the down payment constituted an essential component of the deal and there was a direct causal link between down payment and delivery. It was not clear from the language of article 30 bis whether that case was covered or not. It was not a case of physical impossibility, however. State A could choose to proceed with the delivery: there was no physical constraint to prevent it from doing so. If State A opted to withhold delivery, its non-performance of the obligation could be covered by article 30 bis. It could, however, also be covered by countermeasures. In his conclusions as to chapter V, in chapter I, section C, of the second report, in note 3 to article 30 bis, the Special Rapporteur cited the examples of ceasefire agreements or agreements for exchange of prisoners of war. It would thus appear that his intention was to exclude that kind of situation from the application of article 30 bis.

6. He had understood the Special Rapporteur to say that the article would apply with respect to non-performance not only of treaty obligations but also of obligations under customary law. Was there indeed a customary obligation that had a direct causal link with an obligation of another State? He could not think of one.

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.

7. Another question was what actually were the cases which could not be covered either by force majeure or by countermeasures? Again, he had the impression that there were none. He was therefore inclined to take a negative view of article 30 bis. Nevertheless, a definitive answer could not be given at the current time because the final texts concerning force majeure and countermeasures had not yet been elaborated. He had no objection, therefore, to referring article 30 bis to the Drafting Committee in the hope that the Drafting Committee would examine the need for the article in the context of other relevant circumstances precluding wrongfulness.

8. Mr. ECONOMIDES said the title of article 30 bis was repetitive and not in harmony with the content. Clearly, drafting work was needed. The situations covered fell somewhere between countermeasures and force majeure. If a State had the ability to act but did not fulfil its obligation to react to a prior wrongful act, then a case of countermeasures was involved. If, on the other hand, the State failed to react because of an inability, a physical or material impossibility, then the situation was one of force majeure. The Special Rapporteur appeared to be leaning towards the second instance, that of force majeure, since the draft article spoke, at least in the French version, of the State's inability to fulfil its obligation. It stemmed not, however, from irresistible force nor from an external event, but rather from the wrongful conduct of another State.

9. What was the identity of the other State, according to article 30 bis? If one accepted the premise of *exceptio inadimpleti contractus*, it was always a co-contracting State. The *exceptio* had always applied in the past in contractual and synallagmatic relations between two States, in other words, in bilateral relations. But article 30 bis did not specify whether the other State was the other party in a contractual relationship, a State in a non-contractual relationship, or even a third State, and that had to be made clear. He could agree to the inclusion in the draft of a restrictive provision covering cases when a State could not fulfil an obligation because of a prior internationally wrongful act by the other State in an essentially contractual, and notably bilateral, relationship.

10. He wished to comment on draft articles 29 ter (Self-defence) and 30 (Countermeasures in respect of an internationally wrongful act), even though they had already been referred to the Drafting Committee. Article 29 ter was essential and he merely wondered whether the word "lawful" in paragraph 1 was necessary, inasmuch as any measure of self-defence taken in conformity with the Charter of the United Nations was by definition lawful. The obligations of total restraint mentioned in paragraph 2 so strongly resembled the obligations essential for the protection of the international community referred to in article 19 (International crimes and international delicts), paragraph 2, that they should be considered jointly. Drafting work was required on paragraph 2.

11. As to article 30, he fully shared the Special Rapporteur's view that its consideration should be correlated with that of the articles in part two dealing with countermeasures.

12. Mr. KABATSI said he wished to expand on the question raised by Mr. Yamada as to what cases were covered by article 30 bis but not by other articles in chapter V. Should the non-performance of an obligation by a second State be deemed as not wrongful, or as a case in which the obligation did not arise in the first place, since the obligation for the second State arose only after the first State had fully complied with its own obligation? Depending on the answer, there might be no need for article 30 bis.

13. Mr. GOCO said that he, too, was not sure there was a need for article 30 bis. With regard to Mr. Yamada's example, he was not certain whether an element of wrongfulness was involved, because there was malicious intent on the part of the second State owing to the fact that the first State had not complied with its obligation. It was not a matter of physical impossibility: there had been prior non-compliance, and the second State had reacted by deciding that it, too, would not comply with its obligations. In such cases, under the law of contracts, the obligations incumbent on the two parties were extinguished because both parties had failed to perform their obligations.

14. Mr. CRAWFORD (Special Rapporteur), summing up the discussion, said the first issue that had arisen was the proper scope of the codified law of treaties in relation to the draft. The Commission, when elaborating the draft that was to become the 1969 Vienna Convention, could very easily have included a section on treaty performance, as opposed to treaty application, which had been covered. The Convention stated that treaties were binding, but did not deal with situations in which a State, without suspending or terminating a treaty's operation, was nonetheless excused from performance owing to particular circumstances. The Commission, under the former Special Rapporteur, Sir Humphrey Waldock, had deliberately decided not to deal with treaty performance, in the interests of limiting the Convention sufficiently to enable it to be completed.[4] The debate at the previous meeting, and the *Klöckner* v. *Cameroon* case, made it clear that the *exceptio* was not concerned with the termination or suspension of treaty obligations but rather with excuses for non-performance.

15. The second issue emerging from the discussion was the so-called domestic analogy. The same basic idea was recognized in many national systems and there was good authority for concluding that it was also recognized in international law. While some members of the Commission had doubts, others were of the opinion that a narrow formulation of the *exceptio* could find its place in the draft.

16. The *exceptio* might be acknowledged to be a distinct case from force majeure, and because it was taken not with a view to forcing the other State to comply, but in response to a prior unlawful act, it might thus be deemed to fall within the same field as countermeasures. However, he thought it slightly odd to speak of a breach by another State as being a case of force majeure. One normally thought of force majeure as something that came from outside a relationship between two States, but the

[4] See *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 31.

*exceptio* was part of the relationship between two States. In any event, the *exceptio* was connected to both force majeure and countermeasures, and that was why he had incorporated the relevant provision between articles 30 and 31 (Force majeure). If a narrow formulation such as that in the case concerning the *Factory at Chorzów* was adopted, one limited expressly to synallagmatic obligations, as he believed it must be, the question was whether the article was really necessary at all. The answer would depend on the outcome of the work on countermeasures.

17. Mr. Kabatsi had asked whether, in those cases where the *exceptio* did apply, one could say that an obligation had actually arisen. It would be perfectly possible to deal with many cases of the *exceptio* by incorporating in the synallagmatic relationship a suspensive condition not requiring the performance of an obligation by one party until the other party had fulfilled its obligation. That would mean applying a strict distinction among primary obligations, something that was not done anywhere else in chapter V. The fact was that many doctrines on the secondary law of obligations had emerged from an initial inference from the circumstances: that was precisely how the *exceptio* had come to be recognized in French law. Mature systems of law recognized such doctrines as having their own limitations and as not being merely interpretative presumptions. That had happened in the law of treaties, and there was no reason why that should not happen in the law of responsibility.

18. Mr. Yamada had raised what was perhaps the most interesting question of all, namely, what was meant by one non-performance of an obligation being caused by another non-performance? The underlying idea came up in the law of watercourses, exchanges of prisoners of war, and many other fields. It was not that something was impossible to perform, but that the natural consequence of an earlier non-performance was that a party was not obliged to perform an obligation. On the other hand, it was not obliged to terminate the relationship either. Its best interests might be to keep on with the relationship to keep open the possibility of performance for the future.

19. His own view, in agreement with the comments by Mr. Economides, was that it was appropriate, in the light of the legal tradition in the field, to retain the idea of the *exceptio* as distinct from force majeure and countermeasures, but that its precise formulation and indeed the need for it in the draft could be properly assessed only when the articles on countermeasures had been formulated.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to retain article 30 bis pending a final decision on the provisions on countermeasures.

*It was so agreed.*

ARTICLES 31 TO 33

21. Mr. GAJA said he supported the Special Rapporteur's proposal to align paragraph 2 of article 31 with article 61 of the 1969 Vienna Convention. As also pointed out by ICJ in the *Gabčíkovo-Nagymaros Project* case, there might be cases in which impossibility excused non-compliance but did allow termination or suspension of the treaty. He was also basically in agreement with the proposed text for article 33 (State of necessity) and, in particular, welcomed the reference to "the protection of some common or general interest" in paragraph 1 (*b*) (ii). He wondered, however, whether it would not be desirable to indicate that necessity could be invoked not only as a factor in balancing the interests of the offending State with those of the victim State but also as between the interests of the offending State and those of the international community as a whole, for example in the case of a ship polluting the high seas by dumping dangerous chemicals.

22. Mr. KATEKA welcomed the deletion of the subjective requirement of knowledge of wrongfulness from article 31 as reformulated by the Special Rapporteur, but remarked that it might have been even better to use the language in the *Rainbow Warrior* arbitration,[5] namely, absolute and material impossibility. The reference to the assumption of risk in paragraph 2 (*b*) of article 31 gave rise to some doubts. In view of the technological progress in the modern world, some States might assume obligations whose magnitude they did not fully understand. It might be wiser to leave the point to the discretion of the judge in each particular case. As for article 32 (Distress), it should be confined essentially to situations in which human life was at stake, widening the scope of application of the notion of distress could open up possibilities of abuse. The use of the word "extreme" in paragraph 1 of the version adopted on first reading had a certain psychological value and should not be dispensed with.

23. Lastly, with reference to article 33, he drew attention to the danger of abusive reliance on the doctrine of humanitarian intervention. It was difficult to reconcile oneself to the contention that genuine humanitarian action could be excused because it did not violate a peremptory norm. If a European State dispatched paratroopers to an African country, allegedly to protect its nationals, and in the process killed some of that country's nationals, could it invoke necessity on humanitarian grounds? Recalling a case which had arisen in nineteenth century English domestic law, when a shipwrecked seaman had killed and eaten a teenage boy and had then pleaded his own necessity to survive, he said that the whole issue of necessity on humanitarian grounds should be treated with the greatest circumspection.

24. Mr. ROSENSTOCK asked the Special Rapporteur whether the issue of non-wrongful conduct by the affected State, ruled out as having no relevance to article 31, did not perhaps have a certain relevance in the context of article 35 (Consequences of invoking a circumstance precluding wrongfulness) as proposed by the Special Rapporteur. The total elimination of that aspect of the problem from the draft would not, in his view, be necessary or prudent. Referring to article 32, he said that he generally agreed with the Special Rapporteur but wondered if restricting it to persons with whom the State had a special relationship was fully in accord with contemporary thinking on human rights law. While recognizing the danger of elusive criteria, he was concerned at the apparent rigour of the criteria applied to the notion of distress. As for article 33, expressly incorporating the precaution-

[5] See 2567th meeting, footnote 7.

ary principle would create too many problems. He agreed that the criterion was not, in all cases, the individual interest of the complaining State but the general interest protected by the obligation, and he therefore accepted the wording proposed by the Special Rapporteur.

25. Mr. HE said that he agreed that article 31 should be retained with the changes proposed by the Special Rapporteur. In particular, he welcomed the proposed change in the title of the article. In paragraph 1, a clearer definition of force majeure would perhaps be helpful. A distinction should be drawn between actual or material impossibility of performance, on the one hand, and increased difficulty of performance, on the other. In the *Rainbow Warrior* arbitration, the arbitral tribunal had drawn such a distinction by stating that the excuse of force majeure was not of relevance because the test of its applicability was that of absolute and material impossibility and because a circumstance which rendered performance more difficult did not constitute force majeure. In addition to the definition provided in paragraph 1, a more extensive explanation could perhaps be provided in the commentary to the article.

26. Mr. ELARABY said that the concept of state of necessity enunciated in article 33, called for the utmost precision. He agreed with other members that every effort should be made to exclude certain matters from the domain covered by the plea of necessity. The Special Rapporteur's position on the question of humanitarian intervention abroad—a position with which he had no fundamental disagreement—was clearly stated in paragraph 287 of the second report. In that connection, he drew attention to paragraph (25) of the commentary to article 33[6] as adopted on first reading, which claimed that there was only one known case in which a State had invoked a state of necessity to justify violation of the territory of a foreign State, namely, the dispatch of parachutists to the Congo by the Belgian Government in 1960. In actual fact, the plea of a state of necessity had also been used in 1956 by the United Kingdom of Great Britain and Northern Ireland and France when informing the Egyptian Government that, failing Egypt's immediate withdrawal from the Suez Canal, they would have to occupy the Canal because of the necessity to safeguard navigation.[7] As to article 31, he agreed with the Special Rapporteur's proposal to delete the subjective element of knowledge of wrongfulness from paragraph 1.

27. Mr. LUKASHUK said that, in principle, all three articles were well founded and deserved to be referred to the Drafting Committee. However, in order to avoid conveying the impression that the proposed provisions diverged substantially from the rule set forth in article 61 of the 1969 Vienna Convention, he would recommend making it clear in the commentary that force majeure, distress and necessity did not suspend international obligations but could merely, in the cases specified, preclude the wrongfulness of failure to comply with those obligations. In connection with article 33, he noted with regret that paragraph 2 did not include any reference to the Charter of the United Nations. It was to be hoped that the Special Rapporteur and the Drafting Committee would further improve the drafting of the article so as to set stricter limits on the possibility of invoking necessity to include so-called humanitarian intervention.

28. Mr. CRAWFORD (Special Rapporteur) said that the question of humanitarian intervention was governed by substantive international law and above all by the Charter of the United Nations. It was not governed by article 33 of the draft and hence there was no difficulty attaching to the exclusion of peremptory norms from the scope of that article. It would not be useful for the Commission to take a position on the extremely controversial issue of humanitarian intervention involving the use of force. While he had largely followed the text of article 33 as adopted on first reading, he did not—as would be seen from the second report—entirely subscribe to the commentary to that article.

29. Mr. YAMADA said that he supported the Special Rapporteur's proposal to delete the reference to "fortuitous event" from the title of article 31 and to omit the reference in paragraph 1 to the State's knowing that its conduct was not in conformity with the obligation. Noting that the Special Rapporteur retained the term "unforeseen external event", as well as the term "irresistible force", in paragraph 1, he drew attention to paragraph (5) of, and footnote 616 to the commentary to, article 31[8] as adopted on first reading, in the light of which the reference to "unforeseen external event" appeared unnecessary. The point could, however, be left for the Drafting Committee to decide.

30. Mr. PELLET said that he had no love for the circumstances precluding wrongfulness and was pleased to note that judges were rarely impressed by arguments used as an excuse for failing to carry out international obligations. While he had no major objection to the texts being proposed, he rather regretted the Special Rapporteur's tendency to tone down the articles adopted on first reading. For example, the deletion of the reminder, in paragraph 2 of article 31, of the fact that the State must not have contributed to the occurrence of the situation of material impossibility, the removal of the word "extreme" from article 32, and the insertion of the word "materially" in article 33, paragraph 2 (*c*), were all instances of that tendency. On the other hand, with reference to article 32, he had never understood why a situation of distress should be confined to cases of saving human life. After all, some people held honour or moral integrity to be more precious. Again, he had always had some doubt as to the need for three articles. With reference to article 31, the Special Rapporteur had said in connection with article 30 bis that force majeure arose outside the sphere of contractual relations. Nothing seemed to justify the Special Rapporteur's affirmation concerning the *exceptio non adimpleti contractus*. The irresistible force or the event should be external, but external to the act of the State and not to the contractual relationship between the States concerned. If that was true, it should be stated, at least in the commentary, to paragraph 1 of article 31.

[6] See 2587th meeting, footnote 12.

[7] See 2576th meeting, footnote 7; see also *Yearbook of the United Nations, 1956* (United Nations publication, Sales No. 1957.I.1), pp. 19 et seq. and 53 et seq.; and ibid., *1957* (United Nations publication, Sales No. 1958.I.1), pp. 44 et seq.

[8] See 2587th meeting, footnote 8.

31. Article 33 was very restrictively worded, which was extremely important, and it was gratifying that paragraph 2 (*a*) specifically said that necessity could not be invoked if the international obligation arose from a peremptory norm of general international law; that precaution was essential. But why was it included in article 33 and not elsewhere? Why could *jus cogens* be violated in cases of distress, force majeure and, possibly, consent, but not in the present instance? At issue was a fundamental principle which should be extended to all the circumstances precluding wrongfulness. That was certainly the case with consent: if the article was reintroduced, it was difficult to imagine that a State could consent to the violation of a peremptory norm of general international law. That might also simplify the problems posed by article 29 ter, paragraph 2: a *jus cogens* norm could not be violated on the pretext of self-defence. There was no doubt about countermeasures, but the peremptory norm exception was already covered by article 50 (Prohibited countermeasures) of chapter III of part two. It was also obvious for article 30 bis, on the *exceptio non adimpleti contractus*. He therefore suggested extending the exception of the peremptory norm of general international law to all circumstances precluding wrongfulness. It would be easier to do so by means of a separate article than to add it to each provision.

32. He was not always in agreement with the drafting, which was sometimes rather loose and weak. It was important to limit to the greatest possible extent the invocation of the circumstances in question.

33. Mr. ECONOMIDES said that the wording of article 31 needed to be considerably simplified. He was in favour of using the definition adopted on first reading, which had subsumed the new one. He proposed that the two sentences in paragraph 1, should be combined to read:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible to perform the obligation."

The words "in the circumstances" were superfluous. He asked in that context whether, in the French version, the words *d'exécuter l'obligation* (to perform the obligation) meant the same thing as *se conformer à l'obligation*, which was the more common and, to his mind, preferable usage.

34. Paragraph 2 (*a*) contained the term "wrongful", which had been added by the Special Rapporteur. In his opinion, that was very restrictive, unlike the wording in the version adopted on first reading, which had used a better phrase, namely "if the State in question has contributed to the occurrence of the situation of material impossibility". The word "contributed" implied an intentional action. It might be wrongful or not, and it might be at the limit of wrongfulness, but once a State contributed to the situation, it was reasonable and fair for it to bear the consequences. He therefore favoured the version adopted on first reading and proposed deleting the word "wrongful", which greatly restricted the scope of force majeure.

35. Article 31, paragraph 2 (*b*), was a new and interesting idea, but he wondered whether it might not be better reflected in the commentary.

36. As to article 32, the version proposed by the Special Rapporteur substantially weakened the article adopted on first reading by introducing the words "reasonably believed", which greatly broadened the scope of distress. The article adopted on first reading was rigid and restrictive, whereas the proposed new version was more flexible. Perhaps a compromise wording could be found, for example by saying that the State "did not reasonably have any other way than the one chosen". His remarks concerning article 31, paragraph 2 (*a*), applied equally to article 32, paragraph 2 (*a*).

37. It was questionable whether article 33 was necessary. The article was such a delicate balancing act that he did not see how it could be implemented in reality. So many things had to be proved that he thought it could perhaps be deleted. The Special Rapporteur had formulated the provision very cautiously. He agreed with Mr. Kateka, Mr. Elaraby and the Special Rapporteur, who had all spoken of the need to avoid any abuse which might be based on the provision. The Special Rapporteur had himself pointed out that article 33 did not cover humanitarian intervention. The commentaries to the contrary contained in the earlier drafts should be deleted from the new commentary in order to avoid any misunderstanding.

38. Again, article 33 spoke of "necessity" rather than "state of necessity", so as to avoid repeating "State", but the Commission had grown accustomed to the words "state of necessity", and he was not certain that "necessity" alone was equally good. The Drafting Committee should give careful consideration to that matter.

39. With regard to paragraph 1 (*b*) (i), he failed to see why the interest of a State towards which the obligation existed had to be essential, whereas the interest of the international community did not. The interest of the international community also had to be essential. Lastly, like Mr. Pellet, he had misgivings about the word "materially", in paragraph 2 (*c*).

40. Mr. PELLET said that he fully agreed with Mr. Economides' objection to the word "wrongful" and his proposal to restore "contributed to the occurrence of the situation of material impossibility" in articles 31 and 32, as well as his remark on "materially". However, he saw no reason, in article 33, to create a balance between essential interests of States and of the international community. States had particular interests, and he did not follow the logic for drawing such a parallel, which would be purely artificial.

41. Mr. LUKASHUK said that from the outset he had had doubts about article 33 and the commentary. Perhaps it would be wiser to do without it.

42. The CHAIRMAN suggested that a decision on articles 31 to 33 should be suspended until the next meeting because a number of members wished to speak on the subject at that time.

*It was so agreed.*

ARTICLES 34 bis AND 35

43. Mr. LUKASHUK said that he had no objections of principle to articles 34 bis (Procedure for invoking a circumstance precluding wrongfulness) and 35 (Consequences of invoking a circumstance precluding wrongfulness) but paragraph 2 of article 34 bis, which pertained to a completely different section, namely dispute settlement, should be deleted.

44. Article 35, subparagraph (*b*), contemplated compensation for any actual harm, something that raised the question of the legal basis for such compensation. Compensation for acts which were not wrongful was involved and, the thing at issue was either responsibility for harm as a result of acts which were not wrongful or obligations stemming from the causing of harm. Neither concept had a sufficiently promising basis in international law for the moment, and an appropriate explanation should be provided in the commentary.

45. Mr. CRAWFORD (Special Rapporteur) said that article 35, subparagraph (*b*), was appropriate because, although a State might invoke distress or necessity as a reason for its action, there was no reason for it to require the other, innocent State to bear the costs. For example, if a ship in navigational distress put into a port and caused some oil pollution of the port as a result of leakage, it was appropriate for the State concerned to pay for the clean-up costs. It was not a wrongful act that was involved, but a condition for invocation of a circumstance precluding wrongfulness. That was within the scope of the draft articles and it did not raise the general question of liability for lawful acts, a subject which fell outside the subject of the draft.

46. He did not object to the deletion of article 34 bis, paragraph 2, provided it was understood that the Commission must revert to the question of dispute settlement later on. The paragraph was simply there *pro memoria*.

47. Mr. ECONOMIDES said that the Special Rapporteur had rightly spoken of innocent States in cases of force majeure, distress and a state of necessity. Could there not also be cases of innocent third States which incurred damage arising out of self-defence or countermeasures? In those cases, it was important to distinguish between two situations: that of the wrongdoing State which had committed the initial wrongful act and for which no compensation was conceivable, and that of innocent third States which also incurred damage as in a state of necessity or distress. He wondered whether, for the same reason, that eventuality should not also be covered.

48. Mr. SIMMA, referring to article 35 and cases in which compensation should or should not be envisaged, said it seemed to him that there were two criteria. One was apparent in paragraph 338 of the second report, which said that the United Kingdom welcomed article 35 as applied to cases where the circumstance precluding wrongfulness operated as an excuse rather than a justification. That would be one way of looking at the question of compensation. The other criterion was mentioned in paragraph 342, where it was stressed that if the conduct of the "target" State had been wrongful, there was no basis to compensate it, whereas a State must pay compensation for infringing the rights and interests of an innocent State. First, how did those two criteria interrelate, and secondly, what was the difference between an act which was justified, an act which was excused and an act for which responsibility did not exist?

49. Mr. HAFNER said he agreed with the Special Rapporteur that article 34 bis should merely serve as a reminder. As such, he thought it could probably be covered in the commentary. Paragraph 2 could certainly be omitted and he wondered what purpose was served by the words "should" and "as soon as possible" in paragraph 1, which considerably weakened its impact.

50. He endorsed Mr. Economides' comment regarding article 35 and asked why it was necessary to confine the question of financial compensation to articles 32 and 33. In the case of force majeure, it was not inconceivable that other States might suffer more than the State invoking it. Should not some form of compensation be envisaged to equalize the burden among the States concerned? For that reason, he slightly preferred the wording of article 35 as adopted on first reading.

51. Mr. PELLET said it was gratifying to hear that the Special Rapporteur was willing to delete article 34 bis, paragraph 2, to which he was strongly opposed, not because of its content but because it took the existence of a future part three for granted and prejudged the form of the future articles—only a convention could provide for binding means of settlement of disputes.

52. He was not so sure that article 34 bis, paragraph 1, was merely a reminder. He saw it as a sound contribution to the progressive development of international law that would help to curb the enthusiasm of States for the invocation of circumstances precluding wrongfulness in order to shirk unwelcome obligations. Accordingly, he greatly favoured paragraph 1, but the wording should be improved. It would be better to say "as soon as possible after the occurrence of the circumstance" instead of "as soon as possible after it has notice of the circumstance". Moreover, the commentary should explain the *ratio legis* of the provision in greater detail.

53. He had the impression that article 35 addressed an issue that belonged in another part of the draft, since it concerned implementation. If it was merely a precautionary clause, as in the case of article 35 adopted on first reading, he would be able go along with it, but it should probably be re-examined following the adoption of part two. He was in favour of referring the article to the Drafting Committee on that understanding. The title of the article was misleading because the main consequence of invoking a circumstance precluding wrongfulness was that no compensation was due inasmuch as the normal consequences of a breach of obligation had been ruled out. The article thus dealt with exceptional consequences rather than consequences in general. He was very much in favour of subparagraph (*a*), which dealt with an issue that had been addressed at length in the *Gabčíkovo-Nagymaros Project* case. International obligations should clearly be respected as far as possible.

54. As to subparagraph (*b*), he was inclined to agree with Mr. Hafner and thought it was unwise to cite certain articles and omit others. Moreover, the obligation to pay

financial compensation did not necessarily arise in all circumstances. The subparagraph should be rewritten in more general terms, not confining it to articles 32 and 33 and making it clear that the question of financial compensation depended on the circumstances prevailing in individual cases.

55. With reference to the question put by Mr. Economides, he suggested that the Special Rapporteur should give further thought to the issue of the fate of third States in the cases in question, including perhaps cases of a breach of an obligation *erga omnes*.

56. Mr. ECONOMIDES, referring to article 34 bis, paragraph 1, asked why a State which was defending itself by invoking a circumstance precluding wrongfulness was required to do so before being attacked by another State.

57. Mr. HAFNER said he had described article 34 bis as a reminder because he thought it should be taken up again in the procedural part of the draft articles (part three).

58. Mr. SIMMA argued in favour of keeping article 34 bis in its present place because of the difficulty of including such a provision in part three. It was, in his view, an important and beneficial step in the progressive development of international law. He supported the proposal to delete the reference in article 35 to articles 32 and 33.

59. Mr. PELLET took issue with Mr Economides' reference to an "attack" by another State. The question of "attack" or "defence" did not arise. As States were obliged to respect international law, it was only logical that they should inform other States when they realized that they were unable to perform or failed to respect an obligation. Even Article 51 of the Charter of the United Nations, which recognized the right of self-defence, required States to inform the Security Council immediately of their intention to exercise that right. Article 34 bis, paragraph 1, clearly represented progressive development of the law. It would be interesting to know from the draft commentary whether there were any precedents of States warning their partners of their inability to comply with an obligation.

60. Mr. ROSENSTOCK said he had some doubts about the use of the word "should" in article 34 bis, paragraph 1. Would it apply in all cases or only in circumstances in which such action could contribute to the mitigation of damages? The words "in writing" also suggested a rigour and formality that was out of place. He thought that the point made in the article probably belonged in the commentary.

61. He suggested that article 31 might be of relevance to article 35, subparagraph (*b*), in a situation in which the State had contributed to the situation, albeit not by a wrongful act. It might be prudent to reflect that point in article 35, subparagraph (*b*).

62. Mr. PELLET drew attention to an inconsistency between the French and English versions of article 34 bis, paragraph 1: "should" in English became *doit* in French. He was actually more partial to the French version, which created a clear obligation.

63. Mr. CRAWFORD (Special Rapporteur), summing up the discussion, said he was grateful for all constructive drafting suggestions, many of which could be dealt with by the Drafting Committee. He was also pleased that the new elements in article 34 bis, paragraph 1, and article 35, subparagraph (*a*), had been reasonably well received. The latter innovation was more important because it remedied an omission in the draft articles adopted on first reading which had given rise to confusion, for example where States thought that the invocation of a circumstance precluding wrongfulness nullified the obligation, which was obviously not the case.

64. He had deliberately used the word "should" in article 34 bis, paragraph 1. Although he supported the progressive development of international law that it entailed, he did not wish to give the impression of creating a new obligation to inform. He had envisaged the requirement to inform as a consequence of the situation and not as an independent norm. Naturally, if the requirement could be reinforced while maintaining that distinction, he would be happy to do so. A notification requirement seemed to be essential to the credibility of the circumstances precluding wrongfulness. It was specifically enjoined by the Charter of the United Nations in the case of self-defence. With regard to the words "in writing", the problem with unwritten communications was that they were difficult to prove. The *exceptio* could actually be invoked in court after the event. His impression of State practice was that the invocation of circumstances precluding wrongfulness was taken seriously, for example the invocation in writing of a state of necessity in the *Gabčíkovo-Nagymaros Project* case.

65. Article 34 bis, paragraph 2, did not prejudice the form of the draft articles or the question of dispute settlement, as expressly stated in the note thereto, contained in the conclusions as to chapter V of the draft, in chapter I, section C, of the second report. However, he would be willing to omit it on the understanding that the issue would be addressed in the framework of part three.

66. With regard to Mr. Pellet's suggestion that it should be referred to the Drafting Committee on the understanding that it might need to be re-examined under part three, the problem was that part three had not yet been fully thought out. It had been drafted on the assumption that the draft would take the form of a convention, which was an open question. In any case, it was concerned with the implementation of responsibility and not, or not only, with dispute settlement. It was only after consideration of the important elements of part three to be presented at the next session that the Commission would be able to take a final decision as to where article 34 bis belonged. In the meantime, he agreed with Mr. Simma that the existing placement of article 34 bis was appropriate.

67. He took Mr. Pellet's point that the title of article 35 failed to address the main consequence of invoking a circumstance precluding wrongfulness. The Drafting Committee might wish to consider whether that main circumstance, i.e. the State not being responsible for the incompatible conduct, might be dealt with in that context. To do so might actually solve the problem of ensuring consistency between chapter III of part two and chapter V of part one.

68. He had taken note of the view that it was undesirable to limit article 35, subparagraph (*b*), to articles 32 and 33 and also deferred to the view that the Commission should not attempt to elaborate in detail the content and bases for compensation. Mr. Simma would have preferred more detail but it would be unwise to overload the text and the circumstances that could be envisaged for the allocation of losses among parties raised a whole range of issues that went beyond the scope of the draft articles. The solution was to reword subparagraph (*b*) in general terms, indicating that it might be applicable in certain circumstances to third parties, at least where they were beneficiaries of the obligation in question. In the legal systems with which he was familiar, the courts were usually empowered to adjust the financial consequences of a situation in which obligations were suspended or brought to an end.

69. He suggested that article 34 bis, paragraph 1, and article 35 should be referred to the Drafting Committee, bearing in mind that the question of the placement of article 34 bis might need to be reconsidered in the light of part three.

70. Mr. HAFNER asked why article 35 referred only to the fact of cessation, without any reference to the duty of cessation.

71. Mr. CRAWFORD (Special Rapporteur) said that the main point being made in article 35 was that the obligation subsisted. So long as that was clear, he thought the Drafting Committee could deal with problems such as that raised by Mr. Hafner.

72. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 34 bis, paragraph 1, and article 35, with all relevant observations and suggestions, to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1 p.m.*

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## 2592nd MEETING

*Wednesday, 23 June 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)**

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 31 TO 33 (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 31 (Force majeure), 32 (Distress) and 33 (State of necessity).

2. Mr. SIMMA said that he wished to make a joint statement with Mr. Hafner on article 31.

3. The draft articles, as they currently stood, made no reference to due diligence as a standard to be applied in the performance of international law obligations. The question of what was to be expected of States if they wanted to avoid responsibility for a breach of an obligation was still unanswered. In determining that the answer to the question was in the realm of primary rules, the Commission, in its earlier composition, had been refusing to respond to the concerns of the real world of international law. The fact was that the standard of due diligence was taken into consideration by primary rules only in rare cases, but the responsibility of a State that had committed a breach of an international obligation must certainly not be seen as absolute. In the codification of State responsibility, the degree of diligence shown by a State must be addressed as a matter of secondary rules in a general and comprehensive way.

4. One way of dealing with the issue would be to require that the element of fault (with intent or by negligence) should be made part of the conditions for the existence of an internationally wrongful act, but that approach was very much on the retreat in the literature. On the other hand, the view that fault was a necessary element of internationally wrongful acts consisting of omissions or, in other words, of violations of obligations of prevention, was still widely held. It appeared that the Commission had been strictly opposed to the introduction of any subjective element into a standard of due diligence. A closer look, however, demonstrated that the exclusion of the subjective element had never been as total as might appear prima facie. For example, in article 11 (conduct of private individuals), paragraph 2,[4] proposed by a former Special Rapporteur, Mr. Roberto Ago, he had allowed for the attribution of acts of private persons to States. Subsequently, he had proposed article 23 (Breach of an international obligation to prevent a given event)[5] which provided for an obligation of prevention. True, references to subjective elements appeared only in the commentary, never in the text of the draft articles, but they certainly

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.

[4] *Yearbook ... 1972*, vol. II, p. 126, document A/CN.4/264 and Add.1.

[5] *Yearbook ... 1978*, vol. II (Part One), p. 37, document A/CN.4/307 and Add.1 and 2.