Document:-

A/CN.4/SR.2592

Summaryr ecord of the 2592nd meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1999, **vol. I**

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.

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.

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.

went beyond mere references to primary rules. Mr. Ago had introduced the subjective element as a constitutive element, not of the internationally wrongful act, but of circumstances precluding wrongfulness, in the form of a draft article on fortuitous event, which would have exonerated a State from responsibility if it had been impossible for the author of the conduct attributable to the State to realize that its conduct was not in conformity with the international obligation. The effect of that wording had been to shift the burden of proof.

5. At its thirty-first session, in 1979, the Commission had merged that proposal with a separate proposal, also by Mr. Ago, on force majeure, thereby creating the rather monstrous article 31, which had rightly been criticized by the current Special Rapporteur. Having deleted article 11, paragraph 2 (Conduct of persons not acting on behalf of the State), the Commission could now delete article 23 and any reference to fortuitous event in article 31. By so doing, it would deconstruct the edifice built by Mr. Ago and create a situation where the only defence available to a State accused of a breach of international law and trying to argue that it had done everything that could have reasonably been expected of it under the circumstances would be to claim force majeure. But force majeure was particularly unfit to accommodate the case in point, which was essentially a claim of a breach of an obligation of prevention. Duties of prevention were enacted with a specific event in mind, namely, the event to be prevented. If that event occurred, the State must not be able to claim force majeure to justify the non-performance of its obligation because the event could very well have been foreseen. There was clearly a lacuna in the draft articles in that regard. The theory of fault was based on a legitimate concern which was not dispelled by primary rules. The concept of due diligence turned that concern into an objective standard which could and must be applied across the board (except where expressly excluded by saving clauses in a *lex specialis* providing for absolute responsibility).

6. The CHAIRMAN pointed out that due diligence and the subjective element were general concepts that permeated the entire draft. It would be preferable to take them up at the end of consideration of the topic.

7. Mr. HAFNER, continuing Mr. Simma's explanations, said that he had two solutions to propose. The first could be found in the context of chapter III (Breach of an international obligation). Article 16 (Existence of a breach of an international obligation) in its present formulation, as drawn up by the Drafting Committee ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of the origin or the character of that obligation"), could be supplemented with a sentence reflecting the following idea: "However, such an act does not constitute a breach of an international obligation if this act occurred despite the application of due diligence".

8. The second solution would consist, in the framework of chapter V (Circumstances precluding wrongfulness), of an addition to article 31 to reflect the following idea: "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act occurred despite the application of due diligence".

9. When choosing between those two solutions, the consequences of the choice must be taken into consideration. Those consequences related in particular to the onus of proof and the object to be proven. According to the first solution, the non-application of due diligence would be a condition for the existence of a breach and the claimant would have to prove that due diligence had not been met, in addition to all the other elements of the breach. According to the second solution, due diligence would be considered a circumstance precluding wrongfulness and the claimant would have to prove only the well-known elements of the breach, it being the duty of the respondent to prove that due diligence had been implied so that no responsibility arose. Hence, the second solution would impose the duty to prove due diligence on the respondent, whereas the first would impose it on the claimant. If the basic principle that a State was presumed to behave lawfully was taken into account, there was no question but that the second solution should take precedence. But a definitive decision did not have to be taken as yet, it was simply a matter of pinpointing the various consequences of the two solutions which should be taken into account.

10. The rule of due diligence was difficult to formulate and had not been precisely defined in diplomatic practice or jurisprudence; hammering out a clear-cut definition which would satisfy everybody was impossible. That was why Mr. Simma and he proposed that the relevant draft article should not contain a definition of due diligence, but only refer to it, as was done in certain judgements, while the commentary should provide an explanation.

11. To corroborate his assertion, he referred to the 1975 terrorist attack on a ministerial meeting of OPEC held in Austria.[6] Austria had rejected any responsibility for the success of the attack, arguing that it had applied due diligence, as proven by the fact that a police officer had been killed and other persons seriously wounded. In such a case, the object and purpose of the duty of protection was to thwart such attacks; they could thus not be considered to be an unforeseen event. It would have been possible to avoid the incident by placing half the Austrian army around the conference premises, but a State could hardly be expected to go to such extremes. That was why article 31 as it stood could not apply and another limit on responsibility, expressed in particular by the rule of due diligence, should be established.

12. Mr. CRAWFORD (Special Rapporteur) said that the issue of force majeure as formulated on first reading and irrespective of the intentions of Mr. Ago was a different matter from the question raised by Mr. Hafner and Mr. Simma. A discussion on due diligence would be entirely relevant, but it would be more appropriate in the context of part two.

13. In practice, force majeure was taken to be distinct from the general principle of fault. An article defining force majeure in its traditional sense and at the same time

[6] See "Chronique des faits internationaux", edited by C. Rousseau, RGDIP (Paris), 3rd series, vol. LXXX (1976), No. 3, pp. 892 et seq.

taking up the issue of fault as a failure to observe due diligence would be seen to have two separate objectives.

14. As the Chairman had suggested, it would be best to complete the consideration of articles 31 to 33.

15. Mr. ADDO said that he did not quite follow the conclusions of Mr. Simma and Mr. Hafner. Were they suggesting that article 31 should be deleted if it was decided that the question of diligence should not be included in it? Taking the example of a State faced with the material impossibility of paying its debt because of an unexpected collapse in the price of its main export commodity, it might be asked what the point would be for it to respect due diligence. What precautions might be taken to prevent such a situation? Would that not be a case of force majeure? How might the very idea of diligence be applied in such a case?

16. Mr. LUKASHUK said that the extremely complicated rules which had been discussed could only have been born in the minds of law professors. Professors' law was not always of great practical utility. In retrospect, that had long been the case with *exceptio inadimplenti non est adimplendum*. Members should perhaps try to achieve greater clarity.

17. Mr. KUSUMA-ATMADJA said that articles 31 to 33 gave rise to complex problems of both form and substance. With regard to force majeure (art. 31), he wondered whether the provisions of article 18 of the United Nations Convention on the Law of the Sea, cited by the Special Rapporteur as embodying the general principle of customary international law according to which force majeure had an exonerating effect, were not contradicted by those of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. For example, if a ship transporting plutonium stopped, invoking force majeure, and seriously polluted its mooring site, should it be freed from responsibility?

18. It was also possible to imagine that the case of force majeure which prevented compliance with an obligation simply resulted from a governmental regulation. What would happen then?

19. Regarding due diligence, a State could respect the principle of precaution, for example, by prohibiting the use of mercury in the production of gold, but, if the ban was ignored by the mining companies, should a State which fulfilled its international environmental protection obligations still be held responsible? The Timor Gap Treaty[7] was a similar example. The question became more complicated if the person who committed the offence was not a State official or civil servant, but the Head of State himself.

20. There were thus many problems and it might be preferable to decide not to deal with them in the draft articles and merely to refer to them in the commentary or even relegate them to a footnote. The Special Rapporteur's desire for perfection and exhaustiveness was praiseworthy, but, as the famous example of Schubert's *Unfinished Symphony* showed, the quality of a work was not necessarily judged by its degree of completion.

21. Mr. KATEKA said that he could very well accept the desire for perfection. To give an illustration, and remaining in the maritime area, he told an anecdote about a landlocked country which felt it necessary to have a navy.

22. Mr. DUGARD said that, regrettably, duress had not been contemplated as a circumstance precluding wrongfulness; he was not sure whether it was covered by the articles on force majeure, distress or even state of necessity. He referred to the situations set out in articles 51 and 52 of the 1969 Vienna Convention: if the representative of the State of Ruritania was coerced by the representative of the State of Utopia to deport all Arcadian nationals in the State of Utopia back to Arcadia, was it a case of force majeure which came under article 31 or a situation of distress (art. 32) in which the State of Ruritania "had no other means ... of saving [the] life ... of persons entrusted to [its] care"? What if the State of Utopia threatened the State of Ruritania with invasion? It was difficult to say because the word "duress" appeared nowhere in the commentary and because there were various forms of duress, ranging from subtle coercion to direct military threat.

23. While not necessarily drawing a parallel with articles 51 and 52 of the 1969 Vienna Convention, the Commission should at least recognize that duress as a circumstance precluding wrongfulness arose in specific cases and should be discussed at some stage. It was interesting to note that duress as a ground for excluding individual criminal responsibility was specifically mentioned in article 31, paragraph 1 (*d*), of the Rome Statute of the International Criminal Court.[8] There was a case for including duress by way of analogy in the draft articles on State responsibility or at least mentioning it in the commentary.

24. Mr. HE, referring to article 33, said that there was a considerable difference between state of necessity, on the one hand, and force majeure (art. 31) or distress (art. 32), on the other. Whereas in the latter cases, the author of the wrongful act had no choice but to act in a certain way, in the former, he was fully aware that he was deliberately acting in a manner not in conformity with international obligations. Recognition of state of necessity as a circumstance precluding wrongfulness might open the door to abuse: state of necessity might be invoked as a justification for annexation, occupation by armed forces, and so forth. It should also be noted that necessity could not be invoked where it was expressly or implicitly excluded by a treaty.

25. As necessity was generally recognized in customary international law as a circumstance precluding the wrongfulness of an act not in conformity with an international obligation, article 33 could not be entirely deleted, but, in order to prevent the above-mentioned abuse, it should be formulated with very strict conditions and limitations on

[7] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Sea, 11 December 1989), *Australian Treaty Series 1991, No. 9* (Canberra, Australian Government Publishing Service, 1995).

[8] See 2575th meeting, footnote 10.

its application. That might be the reason why the text adopted on first reading and the text proposed by the Special Rapporteur both used a negative wording: "A state of necessity may not be invoked by a State ...".

26. Paragraphs 286 and 287 of the second report on State responsibility (A/CN.4/498 and Add.1-4), concerning article 33, dealt with humanitarian intervention. In view of the controversy over that concept, which was not really recognized by international law, the Commission should, as in the past, refrain from taking a position on it when formulating secondary rules of State responsibility. As a matter of fact, it seemed that humanitarian intervention was not really regulated in article 33, but it would nevertheless be better to make that point in the commentary to ensure that state of necessity was not improperly invoked in that field as well.

27. Mr. KAMTO said that the concept of force majeure which was covered in article 31 and was well established in many legal systems and in international law unquestionably belonged in chapter V, but the way in which the Special Rapporteur dealt with it called for a number of comments.

28. Beginning with the title, he said that, although the distinction between force majeure and fortuitous event was not always very clear, article 31 did in fact deal with two different situations, namely, "irresistible force"—which corresponded exactly to the definition of force majeure—and "an unforeseen external event", which was actually a fortuitous event. The fortuitous case fitted perfectly in the classical theory of unforeseeability and the title might therefore read: "Force majeure and unforeseeability". The legal consequences of those two distinct circumstances were the same and that justified treating them jointly.

29. His second comment related to the conditions in which force majeure operated as a circumstance precluding wrongfulness. In the *Rainbow Warrior* case, to which the Special Rapporteur had referred, the Court of Arbitration had set out two such circumstances: absolute impossibility and material impossibility. The Special Rapporteur had retained only the latter. He would have liked to see an explanation in the commentary on why the Special Rapporteur had discarded absolute impossibility. Furthermore, the conditions contained in paragraph 260 on the ignorance of a State's legal obligations, far from helping understand the subject, complicated matters. All in all, it would be better to revert to the definition of force majeure contained in article 31 as adopted on first reading, possibly combining the two sentences proposed by the Special Rapporteur, as suggested by Mr. Economides.

30. Turning to article 32, he said that the Special Rapporteur's comments were very clear and that he fully endorsed his narrow conception of distress, which should only apply to ships and aircraft, and on no account should it be possible to invoke it to justify a humanitarian intervention.

31. On the other hand, the new wording proposed by the Special Rapporteur gave rise to a number of problems because it changed the spirit of the article by shifting the emphasis from the material aspect (the author of the wrongful act "had no other means") to the psychological aspect (the author "reasonably believed" that there was no other way). It did not seem to be a good idea to introduce that subjective aspect into article 32 and he suggested the following formulation for the Drafting Committee's consideration: "... if, reasonably, the author of the act in question had no other means of saving his life or that of persons entrusted to his care because of the situation of distress in which he found himself". In other words, the State which was the author of the wrongful act should not be judged on its intentions, but on its acts.

32. For the same reasons, on the face of it, he was in favour of the deletion of article 33 because, once again, the state of necessity was a notion subject to a subjective assessment criterion. However, as noted by the various special rapporteurs, it was a recognized ground for exoneration under customary international law. If it could not be discarded, it should at least be very rigorously delimited and, accordingly, it might be possible to remove the element of uncertainty which the words "for the protection of some common [...] interest" had introduced in paragraph 1 (*b*) (ii), proposed by the Special Rapporteur in his second report, a phrase which might well lead to dangerous abuse. In sum, regardless of the eventual fate of article 33, paragraph 1 (*b*) should be reformulated more rigorously.

33. Mr. GOCO, referring to the distinction between force majeure and fortuitous event, pointed out that the two situations actually related to the same law of obligations and contracts. The new wording of article 31 proposed by the Special Rapporteur seemed to be particularly well put and welcome and should be retained.

34. Mr. CRAWFORD (Special Rapporteur), summing up the debate on articles 31 to 33, noted that most of the suggestions made by members of the Commission were essentially matters for the Drafting Committee.

35. With regard to article 31, he agreed with Mr. Kamto's suggestion that paragraphs 1 and 2 should be joined together and wondered whether the same could not be done with article 32. He also agreed that the introduction of the qualifying adjective "absolute" did not seem necessary, notwithstanding the use of that word by the arbitral tribunal in the *Rainbow Warrior* case.

36. For the reasons which he had stated when introducing the draft and which most members had endorsed, he was opposed to the reintroduction of the concept of "fortuitous event" in either the title or the body of the article. Not all legal systems regarded the occurrence of a fortuitous event as a circumstance precluding wrongfulness. The French system did so, but in an article of the Civil Code combining fortuitous event with force majeure. At the international level, the term "force majeure" had achieved very substantial currency—admittedly, in most cases, in a commercial context. In article 31, it was sufficient by itself because it covered both "an irresistible force" and "an unforeseen external event". It should be recalled that not all unforeseen external events which made it in some sense impossible to do something precluded responsibility for fault. For example, a massive drop in the price of a commodity could not be considered an "irresistible force" even if it was an unforeseen external event and even if it could be invoked under the head-

ing of "fundamental change of circumstances". The definition of force majeure given in article 31 seemed adequate.

37. Article 31, paragraph 2 (*a*), proposed in his second report was better than the wording adopted on first reading, which had spoken of the State having "contributed to the occurrence of the situation of material impossibility". In English at least, the verb "to contribute" did not have the narrower meaning which it had in French and to which Mr. Economides had referred (2591st meeting), placing emphasis on the element of intention. For example, it could be said in English that someone who attended the Pope's arrival at Cracow together with some hundreds of thousands of others "contributed" to the event. His own problem with the English expression, especially in the light of the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case, which concerned the relationship between "material impossibility" as a ground for terminating a treaty and "force majeure" as a circumstance precluding unlawfulness, was that article 31 was more narrowly confined than article 61 of the 1969 Vienna Convention yet the Court had suggested it should be wider.

38. Some members had proposed that paragraph 2 (*b*) should be deleted, arguing that what it said was obvious. Yet the qualification it contained was important, especially as the Commission wanted to give a narrow definition to force majeure. In all legal traditions which recognized force majeure, it was impossible to plead it having assumed the risk of a specific event. For example, an insurer who offered cover against the risk of earthquakes certainly could not claim the occurrence of a real earthquake to evade responsibility. Similarly, the builder of a dam which collapsed was considered to have assumed that risk. The only question that remained to be settled was therefore whether the reference to risk should be included in the article itself or in the commentary.

39. Turning to article 32, he recalled that Mr. Economides had expressed doubts (ibid.) about the use of the words "reasonably believed" and had suggested that it should be replaced by the words "had no other reasonable way". Mr. Economides would agree that, when an aircraft was in distress, there was no time to carry out tests so as to establish that the risk of a crash was real. Situations of that kind called for a certain latitude within the limits of which immediate measures had to be taken. The idea could no doubt be expressed differently and the Drafting Committee would certainly benefit from Mr. Economides' suggestion.

40. He did not think that it would be wise to expand the concept of distress to include persons other than those entrusted to the care of the author of the act in question, as stated in article 32. If other persons were involved, the situation was no longer one of compulsion, but, rather, one of moral choice, with which article 32 did not deal.

41. As to the problem of "duress" raised by Mr. Dugard, it would appear on consideration that all the circumstances which justified the termination of a treaty according to the 1969 Vienna Convention were already covered in chapter V of the draft articles. The problem of coercion had already been discussed in connection with chapter IV, when it had emerged that most cases of coercion could be reduced to situations of force majeure, dealt with in article 31.

42. With regard to article 33, there seemed to be a clear consensus in favour of providing the narrowest possible definition of necessity in terms of precluding wrongfulness and also in favour of maintaining the article adopted on first reading. As Mr. Gaja had suggested, it might be desirable to create a parallelism between article 33 and the article on force majeure (art. 31), where the definition was indeed the narrowest possible.

43. The Commission also seemed to take the view that article 33 did not cover the use of force because it excluded the violation of a peremptory norm of general international law from circumstances precluding wrongfulness. In any case, the use of force was governed by the Charter of the United Nations and the primary rules associated with it. That would have to be stated with absolute clarity in the commentary. Similarly, the article could hardly be used as the vehicle for a debate on the question of humanitarian intervention involving use of force in the territory of another State.

44. He hoped for guidance from the Drafting Committee on whether a general reference to peremptory norms of international law should be included in chapter V or even, perhaps, in the draft as a whole, as Mr. Pellet had suggested. For his own part, he was not entirely convinced that to speak of responsibility being precluded in the event of a violation of a peremptory rule of law would be a good idea within the framework of chapter V. As had been pointed out, the question was relevant to that of consent as well as that of necessity, but he could not see how such a situation could really arise in connection with distress. In his view, it would be better to prepare a more general provision and try to find an appropriate place for it in the draft. He was therefore in favour of maintaining article 33, paragraph 2, in the form adopted on first reading.

45. Article 33 had survived the debate materially unscathed, no doubt because ICJ had approved it almost word for word in its judgment in the *Gabčikovo-Nagymaros Project* case. Those who were wary of incorporating it in the draft should recall that the same concerns had been expressed in connection with "fundamental change of circumstances" in the context of the 1969 Vienna Convention. Yet those concerns had proved unfounded; the *rebus sic stantibus* argument had rarely been invoked and had been rejected in most cases. Lastly, the discussion had shown that to include a clause on the precautionary principle in article 33 would be difficult. The Commission could undoubtedly mention the principle in the commentary and he would agree with that solution.

46. In conclusion, he proposed that articles 31 to 33 should be referred to the Drafting Committee.

47. Mr. AL-BAHARNA said that he had wanted to make a comment on the use of the word "contribute" in articles 31 and 32, but, in line with a suggestion by the Chairman, he would submit it to the Drafting Committee.

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 31 to 33 to the Drafting Committee.

It was so agreed.

49. Mr. CRAWFORD (Special Rapporteur), referring to the continuation of work on the topic, said he hoped that the Commission would find time to convene a working group to work through his new commentaries, which would be issued shortly and which he believed to be very important. He would also submit a new introduction to the draft as a whole, as well as a new introduction to part one. The recommendations of such a working group would be of great assistance in the preparation of commentaries to articles yet to come.

50. Two points remained to be settled in connection with his second report. The first concerned countermeasures, a subject which some thought went beyond the framework of the topic. He would do his best to prepare a working paper on the subject. The second was that of the "clean hands" doctrine. Those members who had spoken on that subject seemed to hold convergent views; no one had wanted the doctrine to be mentioned in chapter V of part one. That was to be welcomed, since the "clean hands" argument, in any of its versions, could not be advanced as an excuse for unlawfulness. The doctrine could, perhaps, be analysed in part three in connection with the loss of the right to invoke State responsibility.

51. The CHAIRMAN recalled that the problem of due diligence had been raised by Mr. Hafner and Mr. Simma.

52. Mr. CRAWFORD (Special Rapporteur) said that Sir Humphrey Waldock, as Special Rapporteur for succession in respect of treaties, had had to face the problem of the scope of the text and to settle thorny issues such as that of objective regimes and that of excuses for non-performance of a treaty, but had succeeded in circumscribing the subject by limiting it to the treaty as an instrument. The decision had enabled the Commission to bring its work to fruition, although other solutions would also have been possible. There was thus a link with a part of the problem dealt with in chapter V, that of the relationship between the law of treaties as codified and the law of State responsibility.

53. So far as the latter topic was concerned, opinions varied as to the scope of the draft articles. At the twenty-second session of the Commission, the then Special Rapporteur, Mr. Ago, had proposed the distinction between primary and secondary rules,[9] a distinction which was certainly useful but, to some extent, arbitrary and difficult to draw and which Mr. Ago himself had transgressed in relation to some of the articles. But he had been right, as the proposal by Mr. Hafner and Mr. Simma demonstrated: it was completely impossible to codify the law of primary obligations. Primary obligations in international law which gave rise to State responsibility could be formulated in a thousand ways, whereas there were general excuses such as force majeure the equivalent for which could be derived from the sources of international law and, to a significant extent, from comparative law. But it was impossible to find any equivalent in relation to primary obligations and, in particular, in the definition of the concept of fault.

54. He did not like the terminology which distinguished between objective and subjective responsibility, equivocal terms which could create more difficulties than they resolved, and had made no use of that terminology in his commentary. Certain primary rules created an absolute responsibility, in the sense that the State had undertaken something in the nature of a guarantee or a warranty in relation to a given situation. Others gave rise to responsibility based on the idea of fault. But the precise content of those primary obligations varied from one case to another and could not be encapsulated in any formula whatever, whether due diligence or anything else. He agreed that it was interesting to discuss the precise nature of due diligence and that it would be good to solve that problem, but, first of all, that could not be done in the context of the draft articles without spending a further five years on the topic and, secondly, even if the problem were resolved, that would in effect be based on the presumption that any primary rule, or a certain class of primary rules, contained a qualification of due diligence. Would it be for the claimant State to demonstrate that there had been a lack of diligence or for the respondent State to demonstrate that it had shown due diligence? The draft articles did not set out to settle the burden of proof problem.

55. The example quoted in the commentary showed the wisdom of referring those issues to the primary rules. To do so was not only sensible in principle, but also necessary in practice if the draft was to be completed before the end of the current quinquennium. The Commission's position on the draft articles should be the defensible one it had maintained since its fifteenth session, in 1963. That position would have to be explained in the commentary, which, as currently drafted, quoted Ago to that effect.

56. Generally speaking, the question whether an international obligation had been breached, leaving aside circumstances precluding wrongfulness, was not one that could be resolved by any formula. The only solution was to interpret the obligation if it was a textual one, or to construe it if it was a customary law obligation, but in any case to analyse the facts of the case. That important task was for courts to perform and it could not be performed by reference to the secondary rules. The Commission was not called upon to reformulate obligations already undertaken by States; it could only establish the framework within which those obligations, whatever they might be, would be applied—and that was already a great deal.

57. Like Mr. Hafner and Mr. Simma, he would like to know in what precisely due diligence consisted. In common law, too, it was necessary to define in what negligence consisted; sometimes it had to be invoked by the claimant, while in other cases it was the respondent who had to demonstrate that he was not guilty of it. In common law, there could not be negligence in the abstract and the same thing could be said of due diligence in international law. Due diligence depended not only on the circumstances, but also on the specific context of the rule concerned. What diligence was involved, for example, in the case of the attack against OPEC representatives that Mr. Hafner had mentioned? For those reasons, while sympathizing with Mr. Hafner's and Mr. Simma's call, he would invite the members of the Commission not to accept it.

58. The main point remained that the Commission had to finish its text for the sake of its own credibility. It could explain its concerns, develop the concept of fault—

[9] *Yearbook ... 1970*, vol. II, p. 179, document A/CN.4/233, para. 11.

which, by the way, should not be equated with lack of due diligence—and say in the commentary that lack of diligence could take many forms, but it could not formulate a primary rule, especially in chapter V and certainly not in article 31.

59. Mr. SIMMA said that, in his view, the comparison between the Fitzmaurice approach and the Waldock approach was not particularly relevant because, while it was true that the latter had decided to jettison a number of issues, such as that of objective regimes, the outcome had been the 1969 Vienna Convention that contained an article 73 which stipulated that the provisions of the Convention were not to prejudge any questions that had been set aside. Instead of completely ignoring the issue of due diligence by relegating it to the area of primary obligations, the codification of which—it should be borne in mind—did not form part of the Commission's mandate, the Commission could draw inspiration from that approach by incorporating a similar provision, thereby responding to the concern expressed by Mr. Hafner and himself.

60. However, he persisted in believing that due diligence formed part of the secondary rules and was a principle that pervaded the field of State responsibility. Many writers took the view, at least in cases of omission, that the due diligence standard would have to apply across the board in the area of State responsibility. Moreover, no real argument had been advanced during the current discussion in support of the assertion that due diligence formed part of the primary rules.

61. Mr. HAFNER said he agreed with the Special Rapporteur that it was important for the Commission to complete the draft articles on State responsibility by the end of the quinquennium. At the same time, he joined Mr. Simma in stressing that due diligence belonged to the category of secondary rules—at least according to Hart's definition[10] of the concept. Moreover, the issue of due diligence came up more and more frequently in practice and would have to be discussed.

62. As some members were opposed to the idea of mentioning it in the commentary to article 31, something that was understandable inasmuch as the present version of the article was far removed from the original version drafted by Mr. Ago, which could have accommodated to some extent a reference to the issue of due diligence, he wondered where—in the commentary to which article—it could be covered and whether it could be addressed exhaustively in that context. He therefore suggested that the Commission should decide not to address State responsibility in its entirety, but to confine itself to the most important and most urgent aspects, thereby indicating that it did not rule out the possibility that the regime of State responsibility also encompassed other rules.

63. Mr. ECONOMIDES said he shared the Special Rapporteur's view that the obligation of due diligence belonged essentially, if not exclusively, among the primary rules and that a great number of provisions existed that imposed such an obligation. According to article 16, there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. All eventualities were covered by that provision and reference should therefore be made to the primary rule to establish what form the State's conduct should take.

64. The basic hypothesis underlying the rules laid down in chapter V was an act by a State that was not in conformity with an international obligation. But, if the obligation of due diligence had been respected, the State had not breached an international obligation. There was thus a clear-cut difference between the question of responsibility itself and the question of wrongfulness. For responsibility to exist, there should have been a breach of an international obligation.

65. It would certainly be possible to include additional elements on the obligation of due diligence in the commentary to article 16, as proposed by Mr. Hafner and Mr. Simma, but it would take far too long to devote a separate article to the idea, not to mention that it would be almost impossible to define due diligence and to differentiate it from other obligations of vigilance that were more flexible or more rigid.

66. Mr. GAJA said that, while he understood some of the concerns that had led to the proposal to mention due diligence, he shared the Special Rapporteur's view that it would be difficult to formulate a general rule to the effect that the absence of due diligence was a necessary requirement for the existence of a wrongful act. The same was true even if the rule was limited to omissions. Notwithstanding Mr. Hafner's argument based on the case of OPEC ministers being taken hostage by terrorists in Vienna, he did not see the need to justify Austria's conduct by a reference to due diligence in the commentary to article 31, as the case was already covered by the fortuitous event hypothesis. One could contemplate, as Mr. Hafner had suggested, mentioning due diligence in the commentary to another article or else, as proposed by Mr. Simma, referring to it in a "without prejudice to" provision.

67. Mr. PELLET said he thought it could be argued that due diligence formed part of the secondary rules if they were defined, according to Hart, as norms relating to the formation, production and application of the law. However, he did not think that that argument warranted the inclusion of the body of rules applicable to due diligence in the draft articles on State responsibility because the obligation of vigilance existed on a different plane, in his view, from the draft articles.

68. In response to the question of what State responsibility was, the Commission had eventually replied, in line with Ago's position, that the term covered all consequences of the breach of primary rules of international law. Unlike Mr. Hafner and Mr. Simma, he was convinced that due diligence did not relate to such consequences, but arose at an earlier stage. It could be argued that, while many international obligations entailed an obligation of due diligence, many other principles (the principle of good faith, the duty to act reasonably, the prohibition of abuse of right) operated in the same way. In all such cases, conditions were attached to the validity of conduct pursu-

[10] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford, Clarendon Press, 1994), in particular, pp. 79-99.

ant to the primary rule which, if they were not fulfilled, gave rise to State responsibility. If the Special Rapporteur agreed to get involved in the consideration of due diligence, he should be asked to carry out a similar study of the other rules, which, in the final analysis, formed the body of secondary rules governing the application of international law.

69. Mr. GOCO noted that due diligence had introduced a new theme that the Special Rapporteur had not contemplated in his report, even though the concept was familiar to jurists. He feared it was not a wise approach, since it would impose an additional burden on a State that invoked a circumstance precluding wrongfulness to relieve itself of responsibility, that of demonstrating that it had exercised due diligence.

70. Mr. SIMMA said that his concerns could be adequately met by either of the two options contemplated: either a reference to the principle of diligence in the commentary to an article or an additional article stating that, in the Commission's view, the subject came within an area that it did not propose to codify, without prejudice, however, to its relevance to State responsibility.

71. Mr. CRAWFORD (Special Rapporteur) said that the discussion had been useful in that it had brought to light a real problem of differentiation between primary and secondary rules. The draft articles would obviously have to include a provision comparable to article 73 of the 1969 Vienna Convention, i.e. a "without prejudice to" clause that would clarify the scope of the draft articles. That would meet the concerns that had prompted Mr. Hafner and Mr. Simma to raise a question of substance which had actually been dealt with already in the commentaries to certain articles, especially articles 23 and 26 (Moment and duration of the breach of an international obligation to prevent a given event), the main elements of which should be included in the commentary to article 16. All of the foregoing should bring it home to States that the Commission had been unable to exhaust the topic of State responsibility even after working on it for 44 years.

The meeting rose at 1 p.m.

2593rd MEETING

Thursday, 24 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Unilateral acts of States (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on unilateral acts of States (A/CN.4/500 and Add.1).

2. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, in terms of both structure and spirit, the 1969 Vienna Convention was the appropriate frame of reference for the Commission's present work. That did not mean the rules applicable to treaty acts laid down in the Convention were applicable mutatis mutandis to unilateral acts. If that were so, there would be no need to regulate the functioning of unilateral acts, which were to be understood as autonomous or independent acts with their own distinctive characteristics and were to be distinguished from unilateral acts which fell within the scope of treaties and for which specific operational rules could be formulated.

3. There were important differences between treaty acts and unilateral acts. The former were based on an agreement (a joint expression of will) involving two or more subjects of international law, while the latter were based on an expression of will—whether individual or collective—with a view to creating a new legal relationship with another State or States or with subjects of international law that had not participated in the formulation or elaboration of the act.

4. While a treaty act was the product of negotiations in which States coordinated their will to enter into a commitment, the elaboration, or rather the formulation, of a unilateral act was based on the sole participation of a State or several States, which incurred an obligation towards another State that had not participated in its elaboration. It was therefore a heteronormative act.

5. To determine the specific character of unilateral acts and justify the formulation of specific rules, possibly based on different criteria from those applicable to treaty acts, it should be borne in mind that a State usually formulated a unilateral act when it could not or did not wish to negotiate a treaty act, that is to say when, for political reasons, it did not wish to enter into negotiations. He would consider in due course whether, for example, unilateral declarations containing negative security guarantees in the context of disarmament negotiations, guarantees formulated outside the context of bilateral or multilateral negotiations, could be classed as legal unilateral acts. For

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