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A/CN.4/SR.1628

Summary record of the 1628th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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Committee) said that the text of article E had been harmonized with that of the articles already adopted. For example, the wording of paragraph 1 had been brought into line with that of paragraph 1 of article 13. The phrase "archives ... connected with the activity of the predecessor State" used in the original text of article E submitted by the Special Rapporteur had been replaced by the familiar phrase "archives ... for normal administration of the territory to which the succession of States relates". Paragraph 2, on the question of the passing or appropriate reproduction of State archives, paragraph 3, on supplying the best available evidence of documents from State archives bearing upon title to the territory or boundaries, and paragraph 5, on making available appropriate reproductions of documents of State archives, had all been redrafted to cover those three cases in a clearer manner and in harmony with the corresponding provisions elsewhere, more particularly in article B. The new paragraph 4 added to article E was likewise modelled on the corresponding paragraph of article B (paragraph 6).

51. Mr. USHAKOV pointed out that, when the draft articles were considered on second reading, the wording of paragraph 5 should be brought into line with that of article C, paragraph 4.

52. Sir Francis VALLAT said that the drafting point raised by Mr. Ushakov was rather important. Attention should be drawn to it in the commentary so that there was no risk of overlooking the matter on second reading.

53. Mr. ŠAHOVIĆ asked why article E, paragraph 1 (*b*), referred to the part of State archives of the predecessor State that related "directly" to the territory, while article C, paragraph 2 (*b*), referred to the part of State archives of the predecessor State that related "exclusively or principally" to the territory.

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had retained that difference, which was to be found in the report of the Special Rapporteur.

55. Sir Francis VALLAT said that, in his opinion, the explanation lay partly in a matter of substance and related back to Mr. Quentin-Baxter's point that the wording of article C, paragraph 2 (*b*), was believed to be narrower than the wording of article E, paragraph 1 (*b*). The distinction was intentional. Article C dealt with an actual transfer that could be settled by agreement between the two States, whereas article E contemplated the case of a breaking away. The distinction was therefore understandable and defensible, and he was convinced that the Special Rapporteur would explain it in his commentary.

Article E was adopted.

ARTICLE F[17] (Dissolution of a State)[18]

56. Mr. VEROSTA (Chairman of the Drafting Committee) said that the wording of paragraph 1 of article F had been made consistent with that of paragraph 1 of article 14. By dividing article F into six paragraphs, the Drafting Committee had, as far as possible, attempted to align the wording with that of the corresponding paragraphs of article E. The use of similar phraseology in the first five paragraphs of articles F and E, taking into account the substantive differences between the issues involved, had made for the necessary uniformity of terminology.

57. Paragraph 6 of article F safeguarded the unity of State archives in the application of the substantive rules regarding the passing of State archives set forth in paragraphs 1 to 5 of the article. It reflected the principle of the indivisibility of archives, which was enunciated in paragraph 2 (*b*) of the article as originally proposed by the Special Rapporteur, and was particularly relevant in the case of dissolution of a State, where a problem might arise regarding the fate of the central archives of the State that had disappeared.

Article F was adopted.

The meeting rose at 5.05 p.m.

[17] For consideration of the text initially submitted by the Special Rapporteur, see 1604th meeting, paras. 26 *et seq.*, and 1605th meeting.

[18] For text, see para. 27 above.

1628th MEETING

Tuesday, 8 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

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

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 34 (Self-defence)[1] (*continued*)

1. Mr. VEROSTA said that he wished to rectify

[1] For text, see 1619th meeting, para. 1.

some aspects of the historical review of the concept of self-defence contained in section 6 of document A/CN.4/318/Add.5–7, for the conclusions reached in that review and the proposed text for draft article 34 were, to his mind, based on an historical cliché that was not consistent with the history of public international law.

2. According to Mr. Ago, in the second half of the nineteenth century there had been a rule of law that had allowed States to start a war without any justification. In fact, in 1815, well before the adoption of the Covenant of the League of Nations and the Briand–Kellogg Pact after the First World War, the Congress of Vienna had outlawed all wars of conquest, and the Concert of Europe, the predecessor of the League of Nations, had maintained peace and stability in Europe until 1856. Thus, when Tsarist Russia had sought to seize the European part of the Ottoman Empire in 1853, a coalition consisting of Great Britain, France and Piedmont had opposed it, and in 1856 the Congress of Paris had restored peace and the *status quo* in Europe. At that time, there had been lawful wars and unlawful wars, according to public international law.

3. Between 1859 and 1870, European wars had destroyed the political system established by the Congress of Vienna because two pillars of the system—the British Empire in the West and Russia in the East—had refrained from intervening in the conflicts between European States, confining themselves to weak protests and accepting the outcome of those wars on the grounds that the unification of Italy and that of Germany were inevitable and irreversible processes. Furthermore, Piedmont had attempted to justify its conquests by holding plebiscites after it had taken over the various States of the peninsula. The Papacy had never recognized the annexation of the Papal States, and not until some sixty years later did Italy recognize under the Lateran Treaty the unlawfulness of the annexation of 1870 and its own international responsibility by paying the Holy See a considerable sum of compensation.

4. Bismarck himself, who had pleaded the need for unification of the German nation in a single State and affirmed his will to cement Prusso-German unity "by blood and iron", had attempted after 1871 to present himself as a champion of peace in the face of Russian ambitions, particularly at the Congress of Berlin in 1878.

5. As pointed out by Heinrich Lammasch, the famous Austrian internationalist, the practice of States in the second half of the nineteenth century had proved far less terrible than the writings of certain jurists who, particularly in Germany and Italy, had endeavoured *a posteriori* to justify unlawful actions and wars whose results had already been accepted by the Great Powers. Statesmen themselves had always sought to justify the use of force for political ends, even during the so-called "imperialist" period. By doing so, however, they had implicitly recognized the existence of a rule of public international law prohibiting wars of aggression and of naked conquest. That was why, in the treaties of alliance of the period, an attack by a third State upon an ally constituted a *casus foederis*.

6. State practice in that respect had been confirmed by public opinion. For example, the Boer War had outraged international opinion, which had judged it unjustified and unlawful, and had isolated Great Britain. Not for nothing had the British Government used the services of a professor of such repute as Westlake to publish articles in journals of international law demonstrating that it had been Boer imperialism that had forced Great Britain to make war upon the Boers. Mark Twain, the American humorist, had echoed that public repudiation when he had introduced the young Winston Churchill to an American audience in 1903 and said that England had "sinned" by waging a war which it could have avoided in South Africa, just as his own country had "sinned" by waging a similar war against Spain in the Philippines—thus recognizing that the two countries had waged unlawful wars.

7. When presenting the rules on the commencement of hostilities at the Second International Peace Conference (The Hague, 1907), the French delegation had stated that:

> In the first place, it is not thought necessary to consider the supposition of a war undertaken without some serious and apparent reason, or without some incident having arisen susceptible of giving rise to a discussion. An aggressive attack in time of ordinary peace and without any plausible motive is no longer compatible with the public sentiment in the nations of the civilized world which we are representing here.
>
> The war will then have for its cause some fact at least possessing a certain gravity and capable of producing an exchange of explanations. Then will ordinarily commence a period of diplomatic negotiations, during the course of which each Power will seek to induce the other to agree to such terms as may be required to satisfy its interests.
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> ...
>
> We also believe that the reasons for the declaration of war must be stated. It is thought that this condition should be readily accepted because the Powers, having resolved to resort to fighting only when they are convinced that they are in the right, ought not to hesitate to publicly proclaim their reasons. Furthermore, it is particularly desirable that the causes of the war should be communicated to the States not involved in the conflict but who are bound to suffer from its consequences and who have a right to know why they suffer. And finally, these same States, if they are informed as to the causes of the war, may be more disposed to tender their good offices while observing respect towards the interests in question.[2]

8. At the time of the First World War, the unlawful nature of the war started by Germany and the Austro-Hungarian Monarchy was immediately pointed

[2] J. B. Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1907* (New York, Oxford University Press, 1921), vol. III, pp. 162–163.

out not only by their adversaries but also by their two allies. Italy and Romania had promptly declared that they would remain neutral, on the grounds that the obligations stemming from their alliance with Germany and Austria-Hungary did not come into play because those two Powers had not been attacked and had started an unjustified war of aggression. Following the military defeat, the Paris treaties had established the unlawfulness of the war of aggression started by Germany and Austria-Hungary, as well as their international responsibility, with the ensuing consequences regarding reparations.

9. The Covenant of the League of Nations, by emphasizing respect for the territorial integrity and the political independence of the Member States and of States in general, had merely reaffirmed and codified a long-standing rule of public international law—the essential basis for any society composed of sovereign States. The new element in the Covenant had been the provision whereby any attack upon a Member State was to be deemed an attack upon all of the Member States, which were required to take collective measures against the aggressor. The failure of the League of Nations system had stemmed from the fact that the Member States, particularly Great Britain and France, had not fulfilled their obligations under the Covenant and from 1931 onwards had made concessions in the face of the thirst for domination of the Axis Powers.

10. Self-defence was a right recognized and now codified in the Charter of the United Nations and, hence, lawful exercise of that right could not constitute a wrongful act. In his opinion, only excessive exercise of that right could be wrongful. It would therefore be inappropriate to include self-defence among the circumstances precluding wrongfulness. It was an illusion to believe that the right of self-defence would disappear in an international society that had an effective central authority. Even in a world State, the desirability of which was questionable, the right of self-defence would still exist.

11. The present international order was based on the plurality of sovereign States, which, in principle, defended themselves against any attack until other States—or since 1945, the United Nations—came to their assistance. The right of self-defence of every sovereign State was expressly confirmed by Article 51 of the Charter.

12. Furthermore, there was a category of States for which self-defence was not merely a right but a duty under international law: namely, the permanently neutral States, which had an abiding duty to exercise their right of self-defence, for their international status obliged them to defend their territorial integrity and political independence by all the means available to them. Failure to live up to that duty would on their part constitute a breach of an international obligation that, under draft article 30,[3] required them to adopt a particular course of conduct. Accordingly, for a neutral State the right and the duty of self-defence could not be a circumstance that precluded wrongfulness.

13. The concept of self-defence was, moreover, bound up with the concept of aggression. The Definition of Aggression adopted by the General Assembly in 1974[4] established several categories of aggression according to their gravity, as he (Mr. Verosta) had shown in his statement before the Sixth Committee at its 1472nd meeting, during the twenty-ninth session of the General Assembly[5]—yet the Assembly had not established rules on self-defence for any of those categories, nor had it given the Commission a mandate to do so.

14. As Mr. Riphagen had pointed out (1620th meeting), the Commission could, in the circumstances, choose from three possibilities: accept article 34 as proposed by Mr. Ago, which he (Mr. Verosta) found unacceptable in its present form; adopt a safeguard clause stating that nothing in the present articles impaired the right of self-defence and include a reference to general international law and the Charter of the United Nations; or make no mention of self-defence at all, and wait until such time as the General Assembly might request the Commission to codify the concept.

15. Mr. TABIBI said he believed that article 34 was particularly significant for two reasons: firstly, the right of self-defence emerging from the great body of customary and conventional rules as a general principle of international law was a right exercised by man throughout his history and a law of nature; secondly, the right of self-defence against any coercive measures, whether military, economic, political or psychological, was an inherent right that must be respected by the community of nations. In the modern world that right was all the more indispensable in that it was not always certain whether the Security Council, dominated by great military powers, was able and ready to repel armed attacks, which were usually directed against the weaker nations for whose protection the Charter of the United Nations had come into being. The rights of self-defence and of self-determination were what made the Charter more valuable than the Covenant of the League of Nations.

16. Historically, the peace treaties that had followed every war had attempted to arrive at some rules of conduct which States would regard as binding in their international relations. In that respect, in 1625, Grotius, in *De jure belli ac pacis*, had advocated the acceptance of specific rules of conduct. The principle

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

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

[5] *Official Records of the General Assembly, Twenty-Ninth Session, Sixth Committee*, 1472nd meeting, paras. 31–33.

of such rules of conduct had assumed greater value with the rise of the oppressed peoples of Asia, Africa and Latin America and the protection, by people of conscience all over the world, of human rights and of mankind against tyranny. War become a crime against humanity when it was not waged to uphold international law, a concept that was all the more vital as warfare became more destructive.

17. The First World War, a flagrant violation of international law, had focused attention on the inadequacies of the existing laws and machinery. The Covenant of the League of Nations, subsequent treaties (such as the Geneva Protocol of 1924 and the Briand–Kellogg Pact of 1938) and the Charter of the United Nations were instruments that, for the first time, had required all member States to refrain from the threat or use of force against the territorial integrity or political independence of any State. The Charter also recognized, in Article 51, the inherent right of individual or collective self-defence against armed attack until the Security Council had taken measures necessary to maintain international peace and security. The inherent right of self-defence took on more importance to victims of armed aggression when the Security Council proved incapable of fulfilling its obligations.

18. Like Mr. Ago, he believed that it was far more interesting to look at the opinions of the many writers who had discerned a logically indispensable connexion between the progress made in their times by the trend in favour of the prohibition of the use of armed force and the concurrent acceptance in international law of the concept of self-defence as a necessary limitation of that prohibition. He also agreed with Mr. Ago that the conviction that there existed in customary general international law a principle specifically removing the wrongfulness normally attaching to an action involving the use of armed force if the action in question was taken in self-defence had become part and parcel of the thinking of publicists when the principle of such wrongfulness had itself moved from international treaty law to customary general international law.

19. Modern international law was quite different from traditional international law, since traditional laws had been evolved primarily to meet the needs of Europe, with the emphasis on the interest of the States concerned rather than of the community of nations. Nowadays, the rules were not merely for the benefit of a few States, even if those States were powerful from the military point of view, but for the protection of the community of nations and the right of each nation to exist.

20. In the period since the Charter had come into being, the community of nations had experienced rapid changes that were reflected in international law by the many instruments adopted. The inescapable question at the present time was what value could be placed on the rules of international law, both customary and conventional, if they could be broken at the will of one or a few major Powers. In its early years, the Commission had, in the preamble and in article 14 of the Draft Declaration on Rights and Duties of States,[6] drawn the attention of the world to the importance of the supremacy of international law over national interests.

21. The Charter of the United Nations was an indivisible whole aimed at maintaining international peace and security, saving succeeding generations from the scourge of war and acknowledging the inherent right of self-defence and all the other values held dear by mankind. The provisions of the Charter, like all other principles of general and customary international law, were for the good of mankind, and their usefulness mirrored the needs of society and the changes that took place in society. In that context, article 34 in its present form did not meet all the requirements of the principle of self-defence in the case of aggression and armed attack, and those requirements could not be covered by the narrow meaning of Article 51 of the Charter. He therefore agreed with the comments of previous speakers with regard to the question of the scope of the article and its place in the draft. As to the latter point, the principle was so crucial that it should not appear among the articles precluding wrongfulness and it should have a special place. As to its scope, the article should be extended to encompass all the relevant matters, such as self-defence against economic, political, psychological and other coercive measures. For those reasons, he supported Mr. Tsuruoka's proposed amendment to article 34 (1627th meeting, para. 1) and trusted that the Drafting Committee would submit an expanded text to the Commission.

22. Mr. SUCHARITKUL said he did not think that the Commission should consider draft article 34 as exhausting the list of circumstances precluding the wrongfulness of an act of a State. In his view, except where there was consent or agreement between the parties concerned, state of necessity, as covered by draft article 33,[7] was simply an attenuating circumstance. It could, in certain cases, diminish the seriousness of the injurious consequences of an internationally wrongful act, but it was not a circumstance that precluded wrongfulness. Hence, as a circumstance precluding the wrongfulness of an act, state of necessity must be strictly limited in scope.

23. With regard to self-defence, he was in favour of Mr. Ago's proposed wording for draft article 34, which did not set out to codify the concept of self-defence or to define it with any degree of precision. The concept had always existed in every legal system, whether international, regional or national.

[6] See *Yearbook ... 1949*, p. 287.

[7] For text, see 1612th meeting, para. 35.

24. As a concept in municipal law, self-defence did not have the same significance in every country, for it depended on certain sociological factors. Under Thai penal law, for example, the concept covered not only a person's right to defend himself but also the right to defend his family and property and the reputation of his family. It was almost a religious conception of self-defence, and the lawfulness of the right depended on the way in which it was exercised.

25. In international law, the concept of self-defence had evolved progressively as war or the use of force had come to be considered less and less lawful and it had become increasingly easy to identify acts of aggression. Article 51 of the Charter confirmed the existence of the inherent right of self-defence without actually defining it and associated it closely with the role played by the Security Council as the organ responsible for the maintenance of international peace and security. As past United Nations history showed, however, the Security Council was not the only body to deal with issues related to the maintenance of peace, and other principal and subsidiary organs within the United Nations system were from time to time called upon to play a decisive role in that area, more particularly the General Assembly, and also the International Court of Justice, which had delivered judgements on the scope of the right of self-defence in a number of cases. Other bodies, too, such as committees of inquiry, conciliation commissions and good offices missions, could be required to define the lawfulness of the exercise of that right by the State. Accordingly, in order to define the scope of the right of self-defence as embodied in Article 51 of the Charter, reference should be made to general international law, which was developing, and also to the United Nations system, without defining the concept of self-defence, even for the purposes of article 34 alone.

26. Inevitably, the exercise of the right of self-defence raised a number of delicate issues in the practice of States. In what circumstances was a State entitled to defend another State, for instance? Against whom or what could a State invoke the right of self-defence in the name of another State? Did the existence of a mutual military assistance clause in a co-operation agreement between two States entitle one of them to invoke the right of self-defence on behalf of the other? Did a clause of that nature mean that the weaker State renounced its right to defend itself and delegated that right to the stronger State? Since the concept of self-defence permitted the State itself, or a group of States to which it belonged, to exercise that inherent right, the question was how to ascertain the genuineness of the weaker State's consent to be defended against an external threat. There was also a risk that a self-defence clause in a mutual friendship and assistance treaty might be used to intervene in a neighbouring State that was a party to the treaty, not to defend it against an external armed attack but to put down an indigenous national liberation movement or political opposition movement.

27. As far as all those matters were concerned, international law was by no means pinpointed in the practice of States. He therefore considered that the time was not ripe to attempt to codify the right of self-defence in general, and that it was sufficient to include a reference to international law and to the Charter of the United Nations. Moreover, the exercise of self-defence must not be confined to the use of armed force. A State that was under attack could resort to other diplomatic, economic, cultural and even political measures to repel an armed attack that posed a threat to its political independence or territorial integrity.

28. In conclusion, he expressed the hope that draft article 34 would be brought more into line with the text proposed by Mr. Tsuruoka, for it had the support of several members of the Commission.

Co-operation with other bodies (*continued*)*

[Item 10 of the agenda]

Statement by the Observer for the European Committee on Legal Co-operation

29. The CHAIRMAN invited Mr. Harremoes, Observer for the European Committee on Legal Co-operation, to address the Commission.

30. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation) said that the Council of Europe attached great importance to close collaboration with the International Law Commission and he wished to assure the Commission that he would do everything possible to pursue his predecessor's policy in that regard. At its session in November 1979, the European Committee on Legal Co-operation had been pleased to receive a visit from Mr. Riphagen, who had reported on the Commission's work; he trusted that the Commission would also be represented at the Committee's session in November 1980.

31. During the previous year, the Council of Europe had prepared a number of conventions and draft conventions. The first of those conventions, which had been opened for signature at Berne on 19 September 1979, related to the conservation of European wildlife and natural habitats, one of its objectives being to promote co-operation among States. Under the terms of the convention, the contracting parties undertook to promote national conservation policies, with particular regard to conservation in regional planning policies and to pollution abatement. Since many of the problems encountered could not be solved within the territorial context of the Council of Europe, the convention had been drafted with a view to enabling the greatest possible number of States that were not members of the Council of Europe to become

* Resumed from the 1611th meeting.

contracting parties. Thus, Finland had been permitted to sign the convention as soon as it had been opened for signature—the first time that such an opportunity had been made available before the entry into force of a convention. The convention had also been signed by a member of the Commission of the European Communities and by the Chairman of the Council of Ministers of the European Communities. In addition, the Committee of Ministers of the Council of Europe had invited Yugoslavia to sign the convention, although Yugoslavia had not participated in the preparation of it. For internal constitutional reasons, Yugoslavia had not been able to sign the convention in Berne, but he trusted that it would do so in the near future. The Committee of Ministers could likewise invite non-member States to accede to the convention after its entry into force, for which five ratifications were required. Eighteen of the 21 member States of the Council of Europe had signed the convention on the day it had been opened for signature; only Cyprus, Iceland and Malta had not done so.

32. Another convention concluded during the previous year was the Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children, which had been opened for signature on 20 May 1980. The purpose of the convention was twofold: recognition and enforcement of decisions concerning custody of and access to children; and restoration of custody in the event of the removal of the child to the territory of another Contracting Party. Specifically, the Convention provided that, in the event of improper removal of a child, in cases where both parents and the child were citizens exclusively of the State in which the decision regarding custody was delivered and the child was normally resident in that same State, custody should be restored forthwith if an application was made within six months of the child's removal. In cases where the requirements regarding nationality and residence were not met, the convention provided for restoration of custody, but listed a limited number of grounds of refusal that related in the main to rights of defence and to other decisions on custody already delivered in the requested State. In cases where a request was submitted after the six-month period had expired, the Convention provided for more numerous grounds of refusal, since the child might already have been integrated into the surroundings to which he or she had been removed. The convention had been immediately signed by all member States of the Council of Europe except for the four Scandinavian countries, Malta and Turkey.

33. At its latest session, the European Committee on Legal Co-operation had finalized the draft convention for the protection of individuals with regard to automatic processing of personal data. The text was to be submitted to the Committee of Ministers in the autumn of 1980, and it was hoped that it would be approved before the end of the year and opened for signature early in 1981. The draft convention aimed at reconciling respect for privacy with freedom of information, regardless of frontiers. It covered personal data held on files in the private and public sectors, irrespective of whether such data were processed within one country or transferred internationally. Under the convention, contracting States would undertake to apply in their municipal law certain principles that were, or should be, common to all countries, such as accuracy of data, prevention of misuse, security of storage and access by the data subject. A certain degree of harmonization of substantive legal rules was therefore involved. Special restrictions designed to protect citizens against infringement of their rights as a result of data flow across frontiers were not allowed, since the controls were meant to be common to all countries and such restrictions were therefore unnecessary. Special machinery would be provided to assist a person in one country to defend his rights when a data file containing information about him was stored in another country. That rule was particularly relevant to multinational corporations, which could store information at places that were convenient for them but not for the data subject.

34. The preparation of the draft convention, which was to be an "open" convention, had taken place in consultation with the OECD and the ECE and in the presence of observers from Australia, Canada, Finland, Japan and the United States of America. It was hoped that, in view of their importance in the field of data processing, some of the non-European countries would eventually become contracting parties to the convention.

35. The European Outline Convention on transfrontier co-operation between territorial communities or authorities had been opened for signature in May 1980 and had been signed by eight member States of the Council of Europe. That Convention laid down the conditions for international co-operation between local authorities, and set forth in its appendices a number of model agreements.

36. No further ratification of the European Convention on State Immunity (and Additional) Protocol (1972) had been received since the Commission's thirty-first session. The Convention was in force as between Austria, Belgium, Cyprus and the United Kingdom, but the Protocol was not yet in force because only three of the requisite five ratifications had been deposited with the Secretary-General of the Council of Europe.

37. The 1957 European Convention on the Peaceful Settlement of Disputes had been ratified by 13 of the 21 member States of the Council of Europe, but only seven of those countries had accepted the Convention in its entirety. The Assembly, wishing to encourage States to make more frequent use of the Convention, had proposed that it should be re-examined with a view to replacing the competence of the International Court of Justice by that of the European Court of Human Rights and to vesting the latter with competence for

arbitration in extrajudicial disputes. Those proposals, however, had not met with the unanimous approval of the European Committee on Legal Co-operation. Some delegations had been reluctant to accept any pre-arranged compulsory settlement system that went beyond the terms of the convention, although they had favoured *ad hoc* machinery for the settlement of existing disputes. Other delegations had considered that the existing systems, and in particular those which vested competence in the International Court of Justice, were perfectly satisfactory, and had seen no justifiable reason for establishing yet more international tribunals.

38. Those views had been communicated to the Committee of Ministers, which had decided to request the European Committee on Legal Co-operation for a further opinion regarding the action that the Committee of Ministers might take on the Consultative Assembly's recommendation. The relevant Steering Committee was to discuss the matter in November 1980, but it was highly doubtful whether it would recommend any revision of the Convention.

39. As to the role of the Council of Europe in the wider context of the legal activities of the United Nations, he said that the work of the two bodies must necessarily be complementary. It was clear that a regional organization such as the Council of Europe, which had relatively few members, could more easily find an acceptable common denominator than could an international organization that had many members; it was equally clear that the regional similarity in political traditions and social structures could make such common denominators more significant in practical terms. Regional organizations, taking a lead from the United Nations, could therefore transform into reality what might otherwise remain a dead letter.

40. Again, regional organizations could act as laboratories for new ideas that were not ripe for discussion at the wider geographical level, and for new projects that could be tested critically with a view to proving or disproving their value. If the ideas and projects could be made to work in one part of the world, it was perhaps easier to apply them progressively in the rest of the world.

41. A third function of organizations such as the Council of Europe was to facilitate contacts between their member States and to ensure that, in activities being carried out at the world level, due regard was paid to regional traditions and interests. The Council of Europe would appear to be the ideal forum for such work and for making a significant contribution to the activities undertaken in New York and Geneva. For example, in September 1979 it had organized a meeting on the most-favoured-nation clause and national experts had exchanged views on aspects of the Commission's work, with a view to preparing the written comments that the Secretary-General of the United Nations had invited Governments to submit. The exchange of views, which had been conducted in an open and constructive spirit, would undoubtedly help to advance the cause of international law.

42. Lastly, with regard to the Council of Europe's future activities in regard to legal matters, the European Committee on Legal Co-operation and the European Committee on Crime Problems were currently reviewing their programmes in order to identify priority activities in the second medium-term plan, which was to take effect at the end of 1980. He hoped that operation would confirm the leading role in the field of European co-operation that the Conference of European Ministers of Justice had assigned in 1973 to the Council of Europe. Furthermore, he was confident that the proposals made would lead to a realistic programme and enable the Council of Europe to continue to make an essential contribution to the development of international law. The programme would emphasize three main types of activities: first, harmonization of substantive law and promotion of inter-State co-operation especially with regard to family law, administrative law and criminal law, and in such new areas as the law governing the use of computers in society, labour law, medical law and the law governing the urban habitat: secondly, exchange of views and information among member States regarding their legislative activities, aimed particularly at preventing further discrepancies between national legal systems; and, thirdly, encouragement of the study of comparative law.

43. All those activities were to be viewed in the light of the Council of Europe's continuing concern for the protection of human rights. That concern, reflected in every instrument prepared by the Council, was the link between all the activities undertaken in the work programme and the medium-term plan, including those in the legal sector.

44. It was his conviction that the Council of Europe's achievements justified and would continue to justify its aspiration to remain the principal organization for legal co-operation in Europe.

45. Mr. CALLE Y CALLE, speaking on behalf of the Latin American members of the Commission, said that the presence of the Observer for the European Committee on Legal Co-operation at the present and at previous sessions of the Commission attested to the importance of the collaboration between the two bodies.

46. In his account of the Committee's activities, Mr. Harremoes had referred to three conventions which had been concluded since the Commission's thirty-first session. The first, relating to conservation of European wildlife and natural habitats, was particularly important in the modern world, where the predatory activities of man and the harmful consequences of industrial development imperilled the natural heritage; for that reason, close co-operation among States was essential. The second convention, relating to custody of children, was designed to cater for a situation which

arose largely because marriage as an institution no longer rested on such firm foundations and divorce often involved spouses of different nationalities or places of residence. Complex issues of that kind could only be settled by conventional means. The third convention, concerning protection of persons in the automatic processing of personal data, was highly relevant at a time when computerization and data processing could affect such rights of the individual as the right to privacy. Those rights should therefore be protected both at the national and at the international level.

47. He thanked Mr. Harremoes for the interesting information with which he had supplied the Commission, and expressed his best wishes for the future work of the European Committee on Legal Co-operation.

48. Mr. THIAM, speaking on behalf of the African members of the Commission, said how much they appreciated the annual account of the activities of the European Committee on Legal Co-operation. Europe and Africa were linked not only by their history but also by the economic and cultural co-operation that had grown up between them. The African members of the Commission therefore took a keen interest in developments in the law in Europe, for it had had a strong impact in Africa. Family law was, of course, still peculiar to that continent but, for the rest, the French-speaking countries had been profoundly influenced by Roman law and the English-speaking countries by common law. Since relations between Europe and Africa were constantly developing, it was important for African jurists to keep abreast of legal developments in Europe and to draw on them so far as was necessary. With regard to the protection of minors, for example, the presence of numerous Europeans in Africa and Africans in Europe inevitably raised all kinds of problems. In conclusion, he expressed the hope that African circles would one day have the opportunity to inform European bodies of matters pertaining to law in Africa.

49. Mr. TSURUOKA, speaking on behalf of the Asian members of the Commission, congratulated the Observer for the European Committee on Legal Co-operation on his interesting statement and remarked that he had been struck by the fact that many of the Committee's concerns had much in common with those of the Commission and of the Asian-African Legal Consultative Committee. The three conventions to which Mr. Harremoes had referred were of the utmost relevance both to Europe and to Asia. The work of the Committee was unquestionably a valuable source of inspiration for the countries of Asia. Co-operation between the Committee and the Commission was proving to be increasingly fruitful, and must certainly be developed further.

50. Mr. USHAKOV said that the Commission felt honoured by the presence of Mr. Harremoes. He drew attention to the progress made by the Council of Europe in the particularly important and serious matter of environmental protection: the drafting of a convention on the subject showed the path which all States should follow in order to protect the human environment. The Committee was also to be congratulated on its work in the field of private international law, one with which the Commission was not directly concerned but was of obvious relevance to some of its activities, for instance in the topic of the jurisdictional immunities of States and their property. The Committee's activities were of benefit not to the European countries alone but to the whole of mankind, and it was to be hoped that relations between the Committee and the Commission would continue to prosper.

51. Mr. REUTER, speaking on behalf of the European members of the Commission, said that they fully appreciated the work of the Council of Europe. Admittedly, it was a Europe being built up slowly step by step—by means of small practical achievements such as the drafting of conventions—but it was done quite openly. Mr. Harremoes had clearly demonstrated that the European Communities were opening their doors increasingly wide to the European States. True, Europe's geographical limits were uncertain, but the tendency neither to exclude nor yet to annex any country was to be welcomed.

52. Turning to the problems that the Committee was seeking to resolve, he observed that some issues, such as the protection of nature, did not concern Europe alone, whereas others were more specifically European. As to family law, each region naturally had its own particular features, but in the case of the custody of children, for instance, some problems unquestionably went beyond national frontiers. The Commission might do well one day to turn its attention to certain topics, such as family law, which it had for the time being left to one side. In that way, the work being done by the European Committee in that field might prove to be the foundation stone of an entire edifice to be built up later.

53. In speaking of the draft convention for the protection of individuals with regard to automatic processing of personal data, the Observer for the European Committee had mentioned the problem of multinational corporations, yet there were also a number of international organizations that kept personal data and had sufficient financial resources to use electronic equipment for that purpose. Depending on the State in whose territory they were located, those organizations might well find themselves confronted with delicate legal problems regarding their rights and duties. The work carried out by the European Committee in that domain was of very definite interest to the Commission.

54. Lastly, he wished to point out that, in ascertaining laws and the practice of States in respect of the topics with which it was concerned, the Commission made abundant use of the documentation supplied by

regional groups such as the European Community on Legal Co-operation.

55. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation, on behalf of the Commission, for his interesting account of the Committee's work. Europe occupied a very special place so far as all forms of law and social organization were concerned, since much of the world lived by the social precepts that had been systematized and propagated by European countries. Possibly Europe's greatest gift to the world was that of a system, whether economic, legal or political, which helped to give life a minimum degree of predictability and hence increased the likelihood of survival.

56. The European Committee on Legal Co-operation was to be congratulated on its many achievements. It was in the vanguard of the move to develop systems to promote social progress, for it was concerned not only with environmental protection and family law but also—possibly most important of all—with protection of the individual against encroachment by the apparatus of the State and other concentrations of power, such as the transnational corporations, on life, liberty and privacy.

57. The Commission, which greatly valued its links with the Committee, would make every effort to send an observer to the Committee's session in November 1980.

58. He requested Mr. Harremoes to convey to the Secretary-General of the Council of Europe the Commission's highest esteem and the hope that the links between the two bodies would be strengthened in the future.

59. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation) thanked the Chairman and members of the Commission for their kind and encouraging words.

The meeting rose at 12.40 p.m.

1629th MEETING

Wednesday, 9 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

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

Also present: Mr. Ago

Visit of a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Sette Câmara, Judge at the International Court of Justice and former member of the Commission.

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

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*concluded*)

ARTICLE 34 (Self-defence)[1] (*concluded*)

2. The CHAIRMAN invited Mr. Ago to reply to the questions raised in the course of the discussion of draft article 34.

3. Mr. AGO said that he wished first of all to remind the Commission of a number of considerations to which they had subscribed on more than one occasion, and particularly those that appeared in the report of the Commission on the work of its thirty-first session.

4. With regard to Chapter V (Circumstances precluding wrongfulness), the Commission had stated that the chapter was

> intended to define those cases in which, despite the apparent fulfilment of the two conditions for the existence of an internationally wrongful act, its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such an inference. The circumstances usually considered to have this effect are consent, countermeasures in respect of an internationally wrongful act, *force majeure* and fortuitous event, distress, state of emergency [necessity] and self-defence. It is with each of these separate circumstances precluding wrongfulness that chapter V is concerned.[2]

The Commission had then stated that, in its commentary to draft article 2 (Possibility that every State may be held to have committed an internationally wrongful act), it had said that:

> the existence of circumstances which might exclude wrongfulness . . . did not affect the principle stated in article 2 and could not be deemed to constitute an exception to that principle. When a State engages in certain conduct in circumstances such as self-defence, *force majeure*, or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it would normally have to respect, so that there cannot be a breach of that obligation.[3]

The Commission had thus shown that the existence of one of the circumstances contemplated in chapter V had the effect of suspending or doing away altogether with the duty of complying with an international obligation.

5. In the same passage in its report, the Commission had also referred to the replies given by certain Governments to the Preparatory Committee for the

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[1] For text, see 1619th meeting, para. 1.

[2] *Yearbook ... 1979*, vol. II (Part Two), p. 106, document A/34/10, chap. III, sect. B.2, para. (1) of the commentary to chapter V.

[3] *Ibid.*, pp. 106–107, para. (2) of the commentary.