

Document:-
A/CN.4/L.318

Draft articles on State responsibility. Texts adopted by the Drafting Committee: articles 33 to 35 - reproduced in document A/CN.4/SR.1635, paras. 42, 53 and 62

Topic:
State responsibility

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

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

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

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

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

[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE**

ARTICLE 33¹ (State of necessity)

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

Article 33. State of necessity

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

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

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

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

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

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

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

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

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

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

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

* Resumed from the 1629th meeting.

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

45. The Drafting Committee had recast the article adopting as a sign of caution the negative approach used in article 62 of the Vienna Convention on the Law of Treaties³ concerning fundamental change of circumstances. The new text of the draft article before the Commission contained only two paragraphs. Unlike the original paragraph 1, its first paragraph did not state when the wrongfulness of an act would be precluded by a State of necessity, but stipulated, negatively, that a state of necessity could not be invoked as a ground for precluding wrongfulness unless the two conditions set out in subparagraphs (a) and (b) were met.

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

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

of the text proposed by Mr. Ago. However, unlike that paragraph, which referred to “the situation of ‘necessity’ . . . caused”, paragraph 2 (c) introduced the concept of contribution, thus maintaining conformity with the similar concept already used in article 31, paragraph 2 and article 32, paragraph 2.⁴

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

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

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

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

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

It was so decided.

ARTICLE 34⁵ (Self-defence)

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

Article 34. Self-defence

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

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

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

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

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

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

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

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

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

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

reference to self-defence could apply only to Article 51. The text proposed by the Drafting Committee to some extent weakened the import of the original draft.

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

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

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

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

It was so decided.

ARTICLE 35 (Safeguard clause on compensation for damage)

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

Article 35. Safeguard clause on compensation for damage

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

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

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