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Summary record of the 1613th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1980, vol. I

1613th MEETING

Tuesday, 17 June 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

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

ARTICLE 33 (State of necessity)[1] (*continued*)

1. Mr. AGO said that, since lack of time had prevented him from introducing draft article 33 in detail at the previous meeting, he would begin his introduction anew.

2. It was important first, as he had said, to define the subject matter by distinguishing state of necessity from the other circumstances that could preclude wrongfulness. To begin with, emphasis should be placed on the voluntary and intentional nature of an act that a State sought to excuse by invoking necessity. Both *force majeure* and fortuitous event involved situations brought about by an irresistible external circumstance that cancelled *de facto* the will to act in conformity with a given international obligation, or else the awareness of acting in a way not in conformity with it. State of necessity also had to be differentiated from a situation of distress, in which the adoption of conduct required by an international obligation put an agent acting for the State in such a personal situation of peril that it could not in fact comply with the obligation. Lastly, the case of state of necessity was, of course, to be distinguished from a case of prior consent given by the injured State.

3. Again, it was important to emphasize the possibility, at least, of the innocence of the injured State, for in the other circumstances that precluded wrongfulness, an international obligation had been breached previously by the State in relation to which conduct not in conformity with an international obligation was adopted. State of necessity was therefore different from the legitimate application of a sanction or countermeasure as a result of an internationally wrongful act of another State. It was also different from self-defence, since the latter presupposed that the State in relation to which another State was resisting had committed the most serious of all internationally wrongful acts, an act of aggression. In the case of state of necessity, the State that sought to excuse its behaviour had injured a right or an interest of a State that had, strictly speaking, done nothing whatsoever wrongful. The excuse, if excuse there were, had to do with an external factor—namely, a grave and imminent danger, that might ever not have been in any way provoked by the conduct or will of the State committing the act.

4. In order to get a clear picture of the concept of state of necessity, it was important to clear away all vestiges of jusnaturalist theories, as embodied in the concept of the "fundamental rights of the State" and, in particular, the concept of the alleged "right to existence" or the "right of self-preservation". Some people had held to those concepts because they had thought it indispensable that the State invoking necessity as an excuse for its conduct, consisting of failure to respect the right of another, in so doing should put forward a subjective right of its own. They had therefore presented the situation as a conflict between two "subjective rights", and had taken the view that when two rights attributed to two different subjects by an objective right met and clashed, the right of the State entitled to invoke necessity in its behalf should prevail over the other, because it was more fundamental. However, it was quite wrong to claim that the State that invoked a state of necessity did so to protect a right. A subjective right was an option one subject had of requiring a certain performance or conduct of another subject. Necessity was by no means expressed in the possibility of requiring something of another subject; it was only a *de facto* situation brought about by a grave danger that threatened a State's interests, the result being that, in order to protect its interests, the State was compelled not to respect the rights of others. Hence the conflict was not between two rights but between the right of the injured State (the sole right that existed in that case) and an essential interest of the State that invoked a situation of necessity as a reason for not respecting the right in question.

5. Were there therefore, in international law as in internal law, situations in which a State that committed a breach of an international obligation toward another State could be regarded as not having committed an internationally wrongful act because the obligation could have been performed only by sacrificing an essential interest of the State that had committed the act? Viewed in such broad terms, the question could only be answered in the negative; otherwise it would be all too easy for a State to justify failure to comply with its international obligations. The problem had to be brought within the narrow confines of the practice that was followed.

6. First of all, it was obvious that, in principle, every international obligation had to be fulfilled; only very

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

rarely could failure to respect the rights of others perhaps be excused. Secondly, not every interest deserved to be protected. Moreover, it had been mistaken to assert that a State's interest in safeguarding its own very "existence" was the sole interest that had to be taken into consideration for the purposes in question. Such a view, in fact, constituted a vestige of positions that had given rise to many abuses and, at one time, had helped to detract from the concept of the state of necessity. The interest at stake must be a truly essential interest, but not necessarily that of the existence of the State. On the contrary, when an alleged necessity of safeguarding its existence was put forth, with a view to justifying thereby something totally unjustifiable, namely, that affected the existence of another State, the question then arose as to why the second State's existence should be sacrificed to the interest of the existence of the first State. The essential interests that had to be taken into account could relate to fields as varied as economics, ecology, and so forth. Finally, it was not possible to decide *in abstracto* whether an interest was essential and whether or not the protection of that interest took precedence over compliance with a given international obligation. Everything depended on the circumstances. In some situations a specific interest might prove to be essential, particularly taken in relation to an interest of little importance protected by the subjective right that was being sacrificed, whereas in others the threat against that interest might not justify at all the failure to observe a right of another providing for the protection of an important interest.

7. The threat against the interest that was allegedly being protected had to be extremely grave and imminent, and its supervening had to be independent of the will of the State invoking the plea of necessity. Moreover, the adoption of conduct not in conformity with an international obligation had to represent the sole means available to the State of protecting the essential interest at stake. If a State could, in protecting a given interest, choose between conduct that was in conformity with an international obligation and conduct that was not in conformity with that obligation but was less costly, the first of those courses of conduct was the one it must choose. Again, there had to be taken into account proportionality between the interest the State wanted to protect and the interest sacrificed through non-compliance with the international obligation. A State could not claim to be protecting an interest of some importance if it breached an obligation towards another State that protected an interest of equal or greater importance to that other State. In other words, the interest sacrificed must be inferior to the interest protected, particularly since originally one had been legally protected and the other had not.

8. In some instances particularly, the possibility of invoking necessity was simply ruled out, as in the case of an international obligation especially designed to apply in situations that placed specific interests in jeopardy. Obviously, if a State was in a position where it had to fulfil an obligation of that kind towards another State, it could not invoke necessity as a defence for non-compliance, and that because of the very nature of the obligation. The special scope of the obligation, moreover, might well be explicitly defined in the rule from which it stemmed or might be inferred from the nature of the rule.

9. The study of the concept of state of necessity had by now been considerably simplified by the fact that, in its codification work, the Commission had established the existence of obligations arising from a peremptory norm of international law. It was evident that, in the case of an international obligation regarded as so important that the State towards which it existed was prohibited from renouncing it by means of a treaty, the State on which the obligation was incumbent was with all the more reason obliged to comply with that obligation, even in a situation of necessity. Under the terms of draft article 29,[2] the consent given by a State to the commission by another State of an act not in conformity with an obligation arising from a peremptory norm of international law did not preclude the wrongfulness of that act. It was therefore indisputable that a peremptory obligation had to be respected even if the State towards which it existed consented to non-compliance with the obligation, and also that the State on which it was incumbent could not refrain from performing the obligation in order to safeguard an essential interest even when that consent had been given. The vast majority of cases in which the possibility of accepting the plea of necessity had been contested historically had been cases in which the obligation in question concerned respect for the territorial sovereignty or political independence of States. Since an obligation of that type clearly came under the heading of *jus cogens*, the plea of necessity was not admissible on that ground.

10. On the other hand, there was no reason for the principle of customary law providing for state of necessity as a circumstance precluding wrongfulness to apply in those cases in which a treaty provision enabled a State not to comply with a specific international obligation if the observation of the obligation jeopardized one of its essential interests. That was sometimes the case with obligations deriving from the law of war. Finally, it would be wrong to think that state of necessity meant that the wrongfulness of a course of conduct was precluded without any further consequences, more particularly with regard to compensation for any damages it might have caused.

11. Care should be taken not to follow the major part of the older doctrine, which had sought to justify state of necessity in terms of theories and principles. The

[2] For the text of all 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.

crucial element was the practice of States. At the Conference for the Codification of International Law (The Hague, 1930), States had not been asked the direct question of whether state of necessity should be viewed as a circumstance precluding wrongfulness. One State, Denmark, had nevertheless dealt with the issue and had shown that, in its opinion, necessity had standing in international law but that it was subject to strict limitations, which, however, were ill-defined at that time.

12. He had divided the cases considered in his report (A/CN.4/318/Add.5 and 6, sect. 5) into two broad categories, depending on whether state of necessity was invoked to justify a breach of an obligation "to do" or a breach of an obligation "not to do". Among the cases in the first of those categories, he had started out by mentioning those relating to obligations of a financial nature, and had also drawn a distinction between debts contracted by one State with another State and debts contracted by a State with a foreign bank or finance company. Even in the latter instance, practice showed that it was possible to plead necessity.

13. An example of a financial obligation by one State towards a foreign State was the *Russian indemnity* case (*ibid.*, para. 22). The Ottoman Empire, which had incurred a debt towards the Russian Empire, had been in such a difficult financial position that there came a time when it had not been able to meet its commitments, and the case had been brought before the Permanent Court of Arbitration. Instead of invoking in its argument an essential interest that must necessarily be safeguarded, the Ottoman Government had preferred to invoke the defence, considered more striking, of *force majeure*. However, a plea of *force majeure* should have signified, according to concepts the Commission has adopted, that there had been an effectively material impossibility to pay; yet such a material impossibility did not exist. In fact, the Ottoman Government had been in a situation of necessity, since performance of its obligation would have placed it in great danger. The Permanent Court of Arbitration found that the Russian Imperial Government had accepted that a State's obligation to implement a treaty could give ground if the very existence—or, rather, the economic existence—of the State was imperilled by performance of that obligation. The Ottoman Government, beset by serious financial difficulties, had argued that repayment of the loan in question would have imperilled the existence of the country or, at the very least, seriously jeopardized its internal and external situation. The principle itself had not been contested, and the entire discussion had therefore centred upon a point of fact: had the danger invoked actually existed? The negative reply to that question did not affect recognition of the principle.

14. Financial difficulties had also been invoked in the *Central Rhodope Forests* case (*ibid.*, para. 23). In an arbitral award, Bulgaria had been ordered to pay a certain sum of reparations to Greece. It had failed to comply with the award within the specified time, and Greece had taken the case to the Council of the League of Nations. Bulgaria had invoked the financial difficulties which payment of the amount in cash would unfailingly have caused for the country and had made an offer of payment in kind, which had been accepted. Both Governments had therefore recognized that very serious financial difficulties could justify, if not repudiation by a State of an international debt, at least recourse to means of fulfilling the obligation other than the means actually envisaged by the obligation.

15. As to obligations contracted towards foreign banks or other finance companies, the first case in point was the reply given by the Government of the Union of South Africa to the request for information made by the Preparatory Committee for the 1930 Codification Conference (*ibid.*, para. 25). Regarding the repudiation of debts, the South African Government had pointed out that a State which was in such a position that it really could not meet all its liabilities was virtually in a position of distress. It then had to rank its obligations and first make provision for those which were of more vital interest. A State could not, for example, be expected to close its schools, universities and courts, disband its police force and neglect its public services to such an extent as to expose its community to chaos and anarchy, merely to provide the money wherewith to meet its foreign moneylenders.

16. The second paragraph of Basis of Discussion No. 4, like the other bases of discussion, drawn up by the Preparatory Committee in the light of the replies from Governments, therefore stated:

> A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity. (*Ibid.*)

The notion of necessity had therefore been clearly admitted in that connexion.

17. The *French Company of Venezuela Railroads* case (*ibid.*, para. 26) referred to the French/Venezuelan Mixed Claims Commission, had arisen as a result of rights assigned to France by Venezuela in territories which Venezuela had considered as its own but were being claimed by Colombia. To avoid risking a war with Colombia, Venezuela had been obliged to break its contract with France. The umpire had taken the view that Venezuela's conduct had been lawful because it could not have been expected to risk a war in order to meet the obligation incumbent upon it.

18. The case concerning the payment of various *Serbian loans* issued in France (*ibid.*, para. 27) had related to gold franc debts inherited by the Serb-Croat-Slovene State and contracted before the First World War. In its defence, that Government had pleaded *force majeure*, namely, the fact that it was materially impossible for it to pay off the debts in gold francs because the Banque de France no longer supplied them. However, the terms of the loans had in no

way prevented the debtor from discharging its debts by paying the creditors the equivalent in paper francs of the gold franc value of the debts. On the other hand, the creditors had not been willing to regard debts initially specified in gold francs simply as debts in paper francs. Furthermore, the Serb-Croat-Slovene Government had pleaded the state of necessity in which it found itself, by its account, because of its financial condition as a result of the war, and pointed out that France itself had called on its citizens, after the war, to agree, in a spirit of sacrifice, to a compulsory rate of exchange of one paper franc for one gold franc. In reply, the agent of the French Government, Mr. Basdevant, had not denied the existence of the principle that a plea of necessity should be admissible in a really serious and otherwise insurmountable situation, but had maintained that in the circumstances the situation had not been so serious as had been alleged.

19. The *Société Commerciale de Belgique* case (*ibid.*, paras. 28–31) had been brought before the Permanent Court of International Justice. By the terms of two arbitral awards, Greece had been required to pay a sum of money to the Belgian company in repayment of a debt contracted with the company. The Greek Government had not contested the existence of its obligations, but had argued that it had been under an "imperative necessity" to "suspend compliance with the awards having the force of *res judicata*" (*ibid.*, para. 29), maintaining that a State had a duty not to execute an international obligation if public order and social tranquillity might be disturbed by carrying out the award or if the normal functioning of public services might be jeopardized thereby. The entire discussion had then centred on whether or not such an "imperative necessity" had in fact existed. In the end, the two parties themselves and the Court had recognized the principle that, in international law, a duly established state of necessity constituted a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation.

20. A case involving an obligation "not to do" was the case of *Seal fisheries off the Russian coast* (*ibid.*, para. 33). At the end of the nineteenth century, the Russian Imperial Government had been concerned about the extent of the increase in sealing by British and United States fishermen near Russian territorial waters. To avert the danger of extermination of the seals, and despite the fact that the hunting took place outside its territorial waters, the Government had issued a decree prohibiting sealing in an area that indisputably formed part of the high sea. It had emphasized that the action had been taken because of "absolute necessity", in view of the imminent opening of the hunting season, and had stated that the action was essentially provisional. Finally, it had proposed the conclusion of an agreement for a permanent settlement of the problem. The case was therefore one that highlighted the concept of state of necessity as well as its strict limits.

21. An interesting case relating to the treatment of aliens was an Anglo-Portuguese dispute dating from 1832 (*ibid.*, para. 40). The Portuguese Government, bound to Great Britain by a treaty requiring it to respect the property of British subjects resident in Portugal, had invoked the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances as a justification for its appropriation of property owned by British subjects. Not only had the urgency of the situation been invoked by Portugal but it had also been recognized by all those who had to do with the case.

22. In the *Oscar Chinn* case (*ibid.*, para. 41), the Belgian Government had adopted measures which had benefited a Belgian company and had created a *de facto* monopoly on river transport in the Belgian Congo. Those measures had harmed a British subject and been contested by the United Kingdom, which had brought the case before the Permanent Court of International Justice. The Court had held that the *de facto* monopoly was not prohibited in the case in question and therefore had not needed to rule on the existence of a state of necessity as ground for excluding wrongfulness. However, the question had been taken up in the individual opinion of Judge Anzilotti, who had taken the view that if proof had been furnished that there was an internationally unlawful monopoly, the Belgian Government could only have excused its action by proving in turn that it had acted under necessity. Judge Anzilotti's definitions remain classic on the subject.

23. Again, the case concerning *Rights of Nationals of the United States of America in Morocco* brought before the International Court of Justice by the United States of America and France in 1952 (*ibid.*, paras. 42–43) also provided considerable support for recognition of the applicability of the plea of necessity, since the Court had not denied the value of the argument based on state of necessity advanced on that occasion by the agent of the French Government.

24. Similarly, the *S.S. "Wimbledon"* case (*ibid.*, paras. 44–46) attested to the admissibility in general international law of state of necessity as a circumstance precluding wrongfulness, and also made it possible to determine, from the arguments of the agents of the Governments concerned, the conditions under which the circumstance might be invoked: immediate and imminent danger, the absence of any other means of protection, and the continued existence of the danger at the time of the act.

25. The case of the *"Neptune"* (*ibid.*, paras. 47–48) tended to demonstrate that a state of war did not rule out a state of necessity. Moreover, it confirmed that state of necessity could be invoked only in a case of truly extreme and irresistible necessity.

26. On the question of so-called "necessity of war" and "military necessity", he referred members to paragraphs 49 *et seq.* of his report and said that, in his opinion, the concept should not play any part in the work of the Commission in relation to the subject under consideration.

27. As to the essential question of whether state of necessity might constitute a circumstance that precluded the wrongfulness of any breach of a State's obligation to respect the territorial integrity of other States, in modern international law any use of armed force by a State for an assault on the territorial integrity of another State—for example, by annexation, occupation or use for military purposes of all or part of its territory—was indisputably covered by the term "aggression" and, as such, was subject to the most typical and indisputable prohibition of *jus cogens*, both in general international law and in the United Nations system, and no state of necessity could be invoked as a circumstance precluding the wrongfulness of an act thus prohibited by international law. No effect of a "ground" could therefore be attributed to a claim of necessity, even if genuine, by the State using force. Article 5, paragraph 1, of the Definition of aggression[3] stated that

> No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

28. Paragraphs 56 *et seq.* of his report discussed a number of opinions on well-known cases of intervention in which "necessity" had often been invoked by the Governments concerned even though such a circumstance had not been admissible in the event. In fact, the Governments in question had not considered their justifications as legal arguments so much as political justifications proffered to world opinion, that of neutral countries or their own public, for a Government's need to defend itself vis-à-vis its own public opinion might be of particular importance—for example, on the brink of war.

29. The prohibition of the use of force against the territorial integrity or political independence of any State was set forth in Article 2, paragraph 4, of the Charter of the United Nations and, even before that, had formed part of the legal thinking of the members of the international community. Since the prohibition was a rule of *jus cogens*, it followed that no plea of necessity could justify the commission of such a grave and flagrant assault against the sovereignty and territorial integrity of a State, although the question might arise of whether the recognition in principle of a state of necessity as justification for an otherwise wrongful act might have the effect of precluding the wrongfulness of certain limited acts of force in foreign territory. It was a difficult question to answer, as there were conflicting opinions even within the United Nations system.

30. Before the Second World War, interventions of that type had definitely been considered lawful when justified by necessity. In support of such an assertion, it was possible to cite the "*Caroline*" case (*ibid.*, para. 57), cases of intervention in foreign territory in "hot pursuit", or cases of intervention in foreign territory for "humanitarian" purposes on behalf of nationals or foreigners threatened by insurgents, hostile groups, etc. In such varied cases, the possibility of invoking necessity as justification had been generally admitted.

31. With the introduction of the principle of prohibition of the use of armed force and the adoption of the Charter of the United Nations after the Second World War, it could well be asked whether acts of such a kind might still be justified by a state of necessity. Unfortunately, the practice of States and of the United Nations was not entirely conclusive. In the case of the Belgian intervention in the Congo in 1960, the Belgian Government had indeed invoked the state of necessity as a basis for its act, but its arguments had been neither refuted nor admitted in any decisive way. In a number of more recent cases of armed action carried out in foreign territory for "humanitarian" purposes to assist nationals or free hostages from terrorist groups, etc., the Governments concerned had not invoked state of necessity but the "consent" of the State on whose territory the raid had taken place (Mogadishu, 1977; Larnaca, 1975), or "self-defence" (Entebbe, 1976). State practice simply gave an impression of a prevailing trend towards an attitude of the greatest severity to acts against the territorial sovereignty of States.

32. In that regard, it should be emphasized that it was not the task of the Commission to interpret the provisions of the Charter of the United Nations, since there already existed for that purpose competent bodies whose judicial opinion in regard to those matters could not be considered definitive. However, by concluding that it was certainly inadmissible to invoke state of necessity in order to justify an act that breached the peremptory rules of international law, the Commission would be covering the most important aspects of the matter. If the interpretation of the Charter, which must prevail, was that the peremptory character of certain prohibitions extended to any form of assault—even partial, limited or involving a restricted aim—on the territorial integrity or the political independence of another State, it was obvious that the essential situations would also be covered. However, as an additional precaution, the draft articles should indicate that, whatever the admissibility of the value of a plea of state of necessity, under certain conditions and within certain limits, in general international law, it should always be understood as being subject to any different conclusion warranted in a given area, not only as a result of the existence of a rule of *jus cogens*, but also as a result of any explicit provisions of a treaty or other international instrument, or the inferences to be drawn therefrom on implication.

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

33. Lastly, summing up the main aspects of the doctrine on the basic question of recognition by general international law of "state of necessity", he said that for the classical writers necessity had unquestionably been a circumstance that, if established, justified an act and precluded wrongfulness. However, writers had gradually introduced indispensable limitations to the recognition of such justification before and above all had become seriously concerned at the obvious abuses of that doctrine in the nineteenth century. It was at that time that the theory of the fundamental rights of States had emerged and had been greatly abused in order to justify the most arbitrary acts. That attitude had led to a reaction against recognition of the plea of necessity in general, a reaction that certain authors, such as Westlake, had however criticized. In the inter-war years and after the Second World War, opinions had been divided. Most writers had remained favourable in principle to the admissibility of state of necessity as a justification precluding the wrongfulness of an act, but the number of writers hostile to the applicability of that concept in international law had increased (A/CN.4/318/Add.5 and 6, paras. 70 *et seq.*). However, he doubted whether there was genuine conflict between two different schools of thought. In fact, the conflict was not as marked as it seemed, since the two schools reached similar conclusions after starting out from different positions. In short, nearly all writers ruled out the possibility of invoking necessity in the case of an assault on the territorial sovereignty of the State, but were prepared to accept it in other less dangerous cases.

34. In conclusion, he was convinced that international law recognized, and had to recognize, the concept of state of necessity, even though it might limit its use. From the point of view of the progressive development of international law, it was to be noted that no single legal order had entirely done away with the concept of state of necessity. Of course, its application had to be ruled out where it was particularly dangerous, but it was equally necessary to admit it where it was useful, if only as a safety valve to guard against the untoward consequences of too strict an application of the letter of the law, as reflected in the adage *summum jus, summa injuria*. It should not be forgotten that too sweeping and too rigid a prohibition ran the risk of shortly being bypassed by the spontaneous evolution of the law. The most advisable attitude was to acknowledge the applicability of state of necessity, if need be limiting its effect or even ruling it out altogether in certain areas; but the concept could not be ignored, since it was rooted in every system of law, whether it be internal law or international law.

The meeting rose at 1 p.m.

1614th MEETING

Wednesday, 18 June 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

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

ARTICLE 33 (State of necessity)[1] (*continued*)

1. Mr. RIPHAGEN noted that, in paragraph 9 of Mr. Ago's report (A/CN.4/318/Add.5 and 6), Verdross was cited as having demonstrated that, in the situation described by the term "state of necessity" the conflict was not between two "rights", but between a "right" and a "mere interest", however vital. Yet how could such a conflict be resolved, under any circumstances, by giving legal precedence to the mere interest of one State over the legally protected right of another State? Such a result of precedence could be arrived at logically only by recognizing that international law gave a measure of protection to such a "mere interest", which was tantamount to saying that the Commission was confronted with a conflict between different abstract rules of international law arising from a fortuitous set of circumstances not allowing the respect of both rules at the same time.

2. That interpretation of the problem underlying article 33 provided an intellectually more acceptable explanation of the fact that the possible preclusion of the wrongfulness of a given act committed by a State, if accepted in a particular case for reasons of "necessity", would not in itself preclude the consequences for which the State committing the act in question would otherwise be held responsible under international law by reason of the wrongfulness of that act, as stated in paragraph 18 of the report. That interpretation also provided an explanation of the fact that some rules of international law were immune from being legitimately breached on the ground of "state of necessity", whereas other rules were not. It did not imply recognition of a right of self-preservation, whether as a fundamental right, or simply as a right, of every State. Recognition of a subjective right to act in order to preserve oneself was quite different from

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