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Summary record of the 1615th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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mentioned in support of draft article 33 described a genuine situation of dire necessity; hence, the draft article had no raison d'être.

The meeting rose at 1 p.m.

1615th MEETING

Thursday, 19 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. DÍAZ GONZÁLEZ said that he wished to lodge a formal protest regarding the quality of the Spanish version of documents submitted to the Commission. Specifically, he had noted a number of errors, not only of form but also of substance, in document A/CN.4/318/Add.5 that made it difficult at some points to understand what was meant. To cite but three examples, the term "self-defence" had been translated by "*autodefensa*", which had an entirely different legal meaning in Spanish, since "*autodefensa*" did not necessarily signify self-defence; in addition, "*autotutela*" was sometimes used when the correct term would have been "*autoconservación*", for the two terms also had a different legal meaning; lastly, in the second quotation in paragraph 48 of the report, the word "*terceros*" had been used when the sense clearly called for the word "*otros*". He requested that his protest be reflected in the summary records and that the Spanish version of documents submitted to the Commission be carefully revised before being reproduced in the *Yearbook of the International Law Commission*.

2. He had been somewhat concerned to learn from Mr. Ago at the 1613th meeting that an essential interest, which was one of the fundamental elements of a state of necessity, could include an economic interest. His concern was explained more particularly by the fact that the Latin American countries had had some unfortunate experiences of attempts to justify intervention in their affairs on financial grounds. The concept of essential interest therefore seemed to be a two-edged sword. For example, the economic interests of the nationals of State A could be treated as an essential interest and, on that basis, State A could invoke a state of necessity on the ground that it had to defend an essential interest that was allegedly being threatened in State B.

3. The example given in paragraph 57 of Mr. Ago's report, concerning attacks made by Mexican Indians in United States territory between 1836 and 1896, was a little strange. In his view, the case was more one of self-defence on the part of the Indians than an example of state of necessity. Moreover it was the Indians who had had an essential interest in the matter, it was they who had been threatened with extermination and it was their lands which had been confiscated by the invaders. The example would have been more appropriately dealt with under the heading of human rights.

4. Lastly, he stressed the need to draft the article in such a way that it would not lead to any misinterpretation of what constituted a state of necessity. That was particularly important in the case of small countries, whose only shield lay in correct interpretation of the few international legal instruments that were of benefit to them.

5. Mr. ŠAHOVIĆ said that draft article 33 had to be examined not only from the point of view of the draft articles as a whole, and particularly chapter V thereof, but also from the point of view of general international law. From that angle, the article seemed to be justified, although it might be necessary to specify more clearly the limits within which state of necessity could be taken into consideration.

6. An article on state of necessity, when viewed in terms of the draft articles as a whole, and particularly chapter V, did have its raison d'être. Since draft article 3, para. (*a*)[2] defined the subjective element of an internationally wrongful act of a State, and state of necessity included just such an element, the Commission could not disregard the concept. Again, having enumerated in chapter V a number of circumstances that could preclude wrongfulness, the Commission could not remain silent on the question of state of necessity. Furthermore, article 33 followed on logically from article 32, which was concerned with distress and presented an objective aspect in relation to article 2. Articles 32 and 33 also shared a common feature in that they both involved a deliberate act. It had therefore been proposed in the Sixth Committee that a distinction should be drawn between the articles of chapter V which involved an element of inten-

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

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

tionality and those which did not. In view of the affinity between a situation of distress and a state of necessity, it might be said that they could be dealt with in a single article, in the way that the Commission had dealt with *force majeure* and fortuitous event in a single provision, but he was of the opinion that state of necessity, which was more complex than distress, should form the subject of a separate article.

7. When viewed in terms of general international law, state of necessity also had a place in the draft. The many cases cited by Mr. Ago showed that, although state of necessity had not become fully accepted, it did have some status in international law. Many of the misunderstandings to which state of necessity had given rise were the result not of the use of one term rather than another but of determining the facts, and of the difficulties experienced by some courts in deciding what intrinsic value the concept had in international law.

8. In modern international law, there was some hostility towards the concept of state of necessity. For extra-legal reasons, some people feared the potentially adverse consequences of recognizing the concept. It was, moreover, a difficult concept to define precisely. In order to do so, it was necessary to determine the conditions in which the plea of necessity could be invoked in the framework of State responsibility. Yet international law was constantly evolving; thus, after long controversy, a rule had emerged in international law to the effect that "military necessity" could not be considered as a plea in international law because it negated the principle of the settlement of armed conflicts by humanitarian law. The law of war no longer existed, but a single system of international law, which prohibited the use of force, had taken over. In that connexion, Mr. Ago had been right to emphasize *jus cogens* in general and the prohibition of the threat or use of force in particular. For his own part, he considered that state of necessity could constitute a plea in existing positive international law solely on the basis of those two elements, but it remained to be seen how and to what extent they should be taken into account.

9. Referring to the wording of draft article 33, he said that paragraph 1, which was in some ways a definition of state of necessity, should specify the conditions in which it applied. In that regard, account might be taken of the views expressed in paragraphs 12 to 15 of the report. For example, emphasis should be placed on the exceptional nature of measures taken by reason of necessity and on the innocence of the injured State. The meaning of the terms "essential State interest" and "grave and imminent peril" should also be clearly explained, either in the draft article itself or in the commentary thereto. However, the task of improving the wording of draft article 33 lay with the Drafting Committee.

10. The wording of paragraph 2 might, in so far as possible, be brought into line with the corresponding provisions of the preceding articles, more particularly article 31, paragraph 2, and article 32, paragraph 2.

11. Sub-paragraph 3 (*a*) contained a reservation relating, in particular, to the case of non-compliance with the prohibition of aggression. Compliance with the peremptory norms of general international law, and especially the prohibition of aggression, was in his opinion a prerequisite for a plea of necessity, and sub-paragraph 3 (*a*) was therefore an essential provision. However, it was not wholly satisfactory. First, its contents should be included in paragraph 1. Secondly, the wording was not entirely in line with that of article 29, paragraph 2, in which the Commission had reproduced the definition contained in the Vienna Convention on the Law of Treaties[3] for the purposes of referring to peremptory norms of general international law. The concise formulation used in the draft article under consideration might give rise to misunderstanding. The prohibition of the threat or use of force established in Article 2, paragraph 4, of the Charter of the United Nations and in article 52 of the Vienna Convention was of such importance in so delicate a matter as state of necessity that it was essential to be as explicit as possible on that point.

12. Since state of necessity continued to give rise to confusion, it might be claimed that the question was one which did not yet lend itself to the codification and progressive development of international law, but Mr. Ago's report had convinced him that, if the Commission agreed with such a claim, it would be disregarding positive international law.

13. Lastly, he noted that the problem of compensation could arise when the wrongfulness of an act of the State was precluded. The Commission had already stated that it was aware of that problem and that it would deal with it in part 2 of the draft articles. Once it had considered all of the draft articles in chapter V, it might nevertheless try to decide whether the problem should be mentioned in that chapter.

14. Mr. QUENTIN-BAXTER said that he had been very interested in the example given by Mr. Ushakov at the previous meeting, of a State which, in order to protect a nuclear power station on its territory in the event of a forest fire, crossed the frontier where the forest extended; in the absence of consent by the other State, such action would clearly amount to a physical invasion of that other State's sovereignty. However, it seemed preferable to deal with that kind of ground for precluding wrongfulness under the heading of self-defence, with the very rigid limitations that had attached to that particular ground since the "*Caroline*" case. In fact, if a State was faced with a situation of danger on a relatively deserted part of its neighbour's

[3] For the text of the convention (hereinafter called "Vienna 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.

territory and the situation was out of control and represented a much greater threat to that State than to its neighbour, the sense of urgency would be similar to that which arose in a case of an imminent peril in which wrongfulness could be excluded on the ground of self-defence.

15. How then should the question be resolved? And was it, in fact, necessary to include state of necessity among the circumstances that precluded wrongfulness? In principle, the purpose of any system of law was to provide the rules that reasonable people required. That, however, was not a complete answer if one bore in mind the adage that "hard cases make bad law". Nevertheless, it would sometimes prove necessary, in order to uphold a rule of major importance, to allow situations that would be very hard, from the moral standpoint, on the party in breach of the rule. That was particularly true in the penal law of States, where issues such as the right to life were involved—but the same kind of issue could arise under international law. For all that, he did not think that those considerations would resolve the matter with which the Commission was concerned.

16. Another possibility was to disallow any preclusion of wrongfulness in such cases but to maintain the obligation to make compensation, not in the narrow sense of payment of money, but in the sense of doing what was necessary to put matters right. Such an obligation might fall either under the regime of international liability for injurious consequences arising out of acts not prohibited by international law or under the regime governing part 2 of the topic of State responsibility (content, forms and degrees of State responsibility). If the danger to the State that violated the frontier was great and if the other State had taken no measures to abate that danger, no court or tribunal and no judgement of States would deal harshly with the State that had infringed its obligation, irrespective of whether or not the wrongfulness of its act had been precluded. There were a number of factors that would be taken into consideration, in which connexion Mr. Riphagen had rightly suggested (1614th meeting) that the situation could be viewed from the angle of shared resources. For example, if the State committing the act had endeavoured, by negotiation in good faith, to reach agreement on a regime for the protection of a joint interest or a shared resource and the other State had not manifested any interest in such an agreement, that would affect the measure of liability, irrespective of the topic under which the case fell. However, that approach would not solve the problem either, although it did indicate certain possibilities.

17. The preclusion of wrongfulness on the ground of necessity was closely circumscribed by the terms of draft article 33, something that the Commission should welcome. Thus, if the obligation breached arose out of a peremptory norm of international law, wrongfulness was not precluded. The will of the parties as expressed in treaty instruments was paramount. Lastly, a strict rule of proportionality had to be observed. For those reasons, and because there could be no contributory cause on the part of the State which committed the act, the concept of necessity was much more restricted than had formerly been the case. As Mr. Reuter had pointed out (*ibid.*), article 33, if read together with the draft article on *force majeure* and fortuitous event, would be far narrower in ambit than the traditional understanding of *force majeure* alone. But that still did not dispose of the Commission's problem, since preclusion of wrongfulness on the ground of a state of necessity differed from the other grounds of preclusion. A State which invoked necessity had to consider, for instance, whether its intended action was in keeping with the rule of proportionality, whether peremptory norms were involved, whether it could be said, by reversing the chain of causation, that the State itself had contributed to the situation, and whether there were any treaty instruments that had a bearing on the matter. In the case of the other grounds of preclusion, however, States did not engage in that kind of exercise, and in the face of an imminent peril they acted without a moment to think. His concern on that score was somewhat heightened by the fact that much of the relevant State practice related to economic circumstances, and situations could be characterized differently depending on the view taken by the State concerned at a particular moment in time. For example, if a general election was pending, the Government might consider that the matter could wait until the elections had been held.

18. For all those reasons, he felt somewhat hesitant. The Commission had perhaps been right in considering that its position might depend to some extent on the view that it would take of the regime governing international liability for injurious consequences arising out of acts not prohibited by international law. In that connexion, he would remind members that the Working Group appointed to consider that topic had suggested that it should be limited to issues arising out of the physical use of the environment,[4] a suggestion to which Mr. Riphagen had voiced some reservation. For his own part, he was not even tempted to question that limitation. Nor did he think that the views on that point would be divided when the time came for the Commission to consider the topic. Therefore, he had no intention of seeking to take over from the regime of State responsibility cases having an economic content, which obviously did not fall within the physical use of territory. At the same time, inasmuch as the regime of international liability for injurious consequences arising out of acts not prohibited by international law would be developed by reference to the physical use of territory, it would, in addition, undoubtedly define to some degree the areas that did not fall within that topic.

[4] See *Yearbook ... 1978*, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex, para. 13.

19. He therefore considered that the preclusion of wrongfulness on the ground of a state of necessity should be maintained, and enunciated in a provision that was worded as carefully and restrictively as possible. His position could largely be explained by the fact that the kind of consideration to be taken into account bore a relation to the regime of international liability for injurious consequences arising out of acts not prohibited by international law, and those same considerations to some extent eluded the categories of lawfulness and unlawfulness. The Third United Nations Conference on the Law of the Sea, for example, clearly demonstrated how States could, by negotiation and agreement, make the necessary accommodations to combine the maximum amount of freedom with the maximum degree of security against unlicensed freedom on the part of other States. In the same way, the consequences of a state of emergency in a particular State, such as non-payment by that State of its external debts, could be covered more appropriately within the flexible framework of the topics to which he had referred than in the context of the questions of lawfulness and unlawfulness. In that connexion, the kinds of exceptions that were required in terms of the developing countries and of UNCTAD immediately came to mind, as did perhaps Principle 23 of the Declaration of the United Nations Conference on the Human Environment.[5] That was not to say, however, that only the developing countries stood to benefit from them. There were other cases in which limitations of liability were required in respect of a given regime, such as those in which the economics of the industry concerned dictated such a limitation. He had in mind, for example, the carriage of oil by sea.

20. In the light of those considerations, an article based on draft article 33 should, together with recommendations by the Commission, be submitted to the General Assembly. He trusted, however, that the set of draft articles would incorporate a general reservation to the effect that the draft articles in no way affected the obligations which might be incurred in connexion with injurious consequences arising out of acts not prohibited by international law.

21. Sir Francis VALLAT said that, in the past, there had been much theoretical controversy regarding the preclusion of international wrongfulness on the ground of necessity. It was significant that, although the cases in which a plea of necessity had been upheld were very few in number, on many occasions both sides had in principle accepted that the establishment of the existence of a state of necessity would preclude wrongfulness. On the basis of the information available to it, the Commission would therefore be justified in concluding that the concept of necessity was generally accepted by States.

22. Admittedly, many of the cases referred to in the report related to financial obligations and the doctrine of necessity could be more readily accepted in that field than in others, but the Commission should be careful not to limit to financial obligations the situations in which the plea of necessity could be invoked.

23. As to the question of the effect of a plea of necessity, an examination of the doctrine expressed in the statements of Governments revealed that, in general, States considered that the establishment of a state of necessity precluded wrongfulness, and did not simply modify the consequences of an act. Accordingly, it seemed that the best course would be to include draft article 33 in part 1 of the draft and also to provide for the preclusion of wrongfulness if an excuse of necessity was established. However, regardless of whether the draft article was included in part 1, the question would have to be taken up again in part 2. Furthermore, in almost all circumstances, reliance on a plea of necessity would be completely frustrated if the other State concerned was allowed to take countermeasures. Consequently, once a state of necessity was established, it would normally be quite justifiable to rule out the possibility of adopting such measures.

24. As to the text of the draft article, greater stress should be placed on the exceptional character of the plea of necessity. One way of doing so would be to place the draft article after draft article 34 (Self-defence), so that its effects would be recognized as being different from those of the other circumstances precluding wrongfulness, and to redraft it in a negative form along the lines of article 62 of the Vienna Convention on the Law of Treaties.

25. In the main, he agreed with the limits that draft article 33 placed on the excuse of necessity. However, it should be emphasized that the use of armed force by a State outside its own jurisdiction or within the jurisdiction of another State would rule out any plea of necessity.

26. Lastly, there was inevitably a substantial element of subjectivity in assessing a state of necessity, something which rendered the application of article 33 more difficult than that of most of the articles relating to other circumstances precluding wrongfulness. In the context of draft article 33, it would be important to ensure an adequate system for the settlement of disputes.

27. Mr. USHAKOV pictured a case in which draft article 33 was in force and State A, which had breached an obligation towards State B, justified its conduct by pleading necessity. State B, finding that the obligation had been breached, did not, however, accept the plea of necessity and took legitimate countermeasures against State A in keeping with draft article 30. He would like Mr. Ago to indicate, in that instance, which State was acting within its rights and which State incurred international responsibility.

[5] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

28. Similarly, if State A considered that the countermeasures taken by State B were not legitimate because the grounds that it (State A) had invoked precluded the wrongfulness of its initial act and it, in turn, took countermeasures, the question of responsibility would arise again. The possibilities for further complications in a case of that kind were endless.

29. In his opinion, it was advisable to identify all the relationships to which article 33 could give rise and, in particular, the links between that article and article 30.

30. Mr. ROMANOV (Secretary to the Commission), referring to the comments made by Mr. Díaz González at the beginning of the meeting, apologized to the Commission for the errors of translation in the Spanish version of document A/CN.4/318/Add.5. The comments made by Mr. Díaz González would be brought to the attention of the Spanish Translation Service in New York, and the necessary steps would be taken to correct the errors.

The meeting rose at 12.50 p.m.

1616th MEETING

Friday, 20 June 1980, at 11.35 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. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

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

1. Mr. FRANCIS said that, at the Commission's previous session and also at the beginning of the current session, he had had serious doubts about the advisability of tackling the question of necessity as a circumstance precluding wrongfulness and of including a provision to that effect in the draft articles. His doubts had arisen mainly because the concept of necessity had been open to great abuse in the past.

2. However, his misgivings had been dispelled after engaging in a careful study of the excellent Secretariat study entitled "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine",[2] and section 5 of the addenda to the eighth report by Mr. Ago (A/CN.4/318/Add.5–7). Mr. Ago had surveyed a welter of information on State practice, international judicial and arbitral decisions and doctrine, found the golden thread which ran through all the doctrinal polemics, placed before the Commission in his eighth report the indisputable essentials of the question of necessity and established beyond any doubt that article 33 should be included in the set of draft articles under consideration.

3. As a result of Mr. Ago's successful completion of his task, it was now clear that possible abuses of the concept of necessity should not have been a matter of such great concern to him (Mr. Francis) because safeguards against such abuses, and thus a justification for draft article 33, were provided in the broad legal framework that was formed by the Charter of the United Nations, more particularly Article 2, paragraph 4 thereof, and by the jurisprudence of the Organization, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[3] the Definition of Aggression[4] and articles 53 and 73 of the Vienna Convention.[5]

4. A practical justification for draft article 33 was also to be found in the technological developments which had taken place in recent years, in the structure of the modern State system and in the social, economic and political forces at work in today's world, a world that was quite different from what it had been only five or ten years previously.

5. With regard to technology, he did not think it far-fetched to assume that when, for example, a State engaged in the exploration and exploitation of the resources of the sea-bed or the continental shelf, it might encounter difficulties that would require it to plead necessity to justify the conduct it adopted in dealing with such difficulties.

6. As to the structure of the modern State system, when the United Nations had been established in 1945 it had had 51 Members, but it now had more than three times that number. If the 51 original Members of the United Nations had considered it necessary to provide for the concept of necessity, it was all the more likely that the present Members would consider it important to be able to invoke that concept.

7. It was a well-known fact that the social, economic and political forces at work in the world of today had

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

[2] *Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315.

[3] General Assembly resolution 2625 (XXV), annex.

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

[5] See 1615th meeting, foot-note 2.