Document:-
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Summary record of the 1616th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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.

completely disrupted the finances of many countries, particularly the developing countries. It was of interest to note Mr. Reuter's remark (1614th meeting), that in relation to some international conventions on narcotics, these latter countries had assumed obligations which they could not reasonably be expected to discharge. To the extent that Mr. Ago had based his justification for the concept of necessity on examples of financial obligations, he (Mr. Francis) was of the opinion that draft article 33 had direct, but not exclusive, relevance to the situation of developing States.

8. Lastly, he agreed with other members of the Commission that, in a case involving the use of force, necessity could not be deemed a circumstance that precluded wrongfulness.

9. Mr. SCHWEBEL said that Mr. Ago's report was a model of scholarship, discernment, analysis and, indeed, courage, for it took moral courage to advocate that a state of necessity precluded the wrongfulness of an act of a State. He had shared the uneasiness of other members of the Commission at having to deal with a draft article relating to the concept of state of necessity, which was in bad odour for good reasons, but he had reluctantly come to accept the draft article submitted by Mr. Ago.

10. However, there was merit in the suggestion made by Sir Francis Vallat at the previous meeting that draft article 33 should be cast negatively in the style in which article 62 of the Vienna Convention dealt with *rebus sic stantibus*. There was even greater merit in subjecting judgements relating to a state of necessity to third party adjudication. If, under the Vienna Convention, a plea of *jus cogens* was seen to demand subjection to third party adjudication, the same should certainly be true of so delicate a plea in avoidance as state of necessity, for as Mr. Ushakov had pointed out (1615th meeting), the dangers of self-judgement by the State pleading necessity were too great. He therefore hoped that the commentary to draft article 33 would be enriched by the observations made in that connexion by members of the Commission during the current discussion.

11. While he could accept the substance of draft article 33 and most of the commentary, he still had doubts about the way in which the article treated the question of who bore the burden of an internationally wrongful act. It was clear to him that the burden of compensation should fall not on the innocent State whose rights had been violated but on the State which pleaded necessity. Other members of the Commission seemed to agree with that view. Again, Mr. Ago had not opposed it and had said that, instead of qualifying an act committed out of necessity as unlawful but allowing mitigated damages, it would be better to treat the act committed out of necessity as lawful but contemplate full compensation. If that was in fact the Commission's view, draft article 33 and the commentary should clearly say so. Perhaps Mr. Ago would consider adding a new paragraph 4 worded along the following lines:

> "The applicability of paragraph 1 does not affect equitable considerations of distribution of loss; as between an innocent beneficiary of an international obligation and a State which fails to perform that obligation for reasons of necessity, the latter shall bear the resultant burdens and pay any compensation necessary to make whole the former."

12. Admittedly, it could be argued that a provision of that kind belonged in part 2 of the draft articles, but if one bore in mind that the damage suffered was not the result of a wrongful act because wrongfulness was precluded by reason of necessity, it could be argued that the matter came under the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He was, however, not sure that any of those approaches was satisfactory and therefore requested Mr. Ago to consider the possibility of including in draft article 33 a provision along the lines of the one he (Mr. Schwebel) had just suggested. It would then be clear that an act committed out of necessity was not wrongful, that the obligation whose evasion or avoidance was thus justified did not have to be performed, but that the burden of non-performance was not to be borne by the innocent party.

13. Lastly, further consideration should be given to the suggestion made by Mr. Riphagen (1614th meeting, para. 8) that draft article 33, paragraph 2, should be amended to read:

> "Paragraph 1 does not apply if the occurrence of the situation of 'necessity' could have reasonably been avoided by the State claiming to invoke it as a ground for its conduct."

14. Mr. CALLE Y CALLE said that Mr. Ago's report was largely concerned with the question posed in its paragraph 10, namely, whether the obligation of one State towards another State could be sacrificed because it was impossible for the first State to respect that obligation or because it was compelled to act as it did out of necessity. In seeking to answer that question, Mr. Ago had not referred to any abstract notions of law but had instead drawn widely on State practice and doctrine. In other words, he had looked to the realities of international life in order to determine whether the wrongful element in the conduct of a State should be precluded in cases where compliance with its obligation would gravely, and perhaps irrevocably, imperil an essential State interest. Thus, an otherwise unlawful act would become lawful not by virtue of any primary rule but because the wrongfulness of that act was extinguished. The question was not one of a right inherent in all obligations—of a kind of *rebus sic stantibus* clause—but of a state of necessity that should be covered by international law.

15. It had been said that a state of necessity must by definition be absolute and imperative, but he did not

think that the Commission was required to consider extreme cases in which the very survival of a State was at stake. Nor was it required in that context to consider obligations that arose under *jus cogens* and humanitarian law, or related to the fundamental sovereignty and integrity of the State. Rather, the Commission should deal with situations in which a State was unable, for some very pressing reason, to fulfil a given obligation, normally an obligation that was set forth in a convention and, consequently, was of somewhat lesser importance. It was in such situations that the State had to decide whether, in certain circumstances, it should disregard its obligation in order to protect an essential interest.

16. Mr. Francis had raised an important point regarding the interaction between political, social and economic factors. In a world order that left much to be desired, States sometimes had urgent social needs that prevented them from complying with, for instance, obligations of a financial kind or obligations which arose under contracts with private persons; in such cases, the treaty or contractual obligations of the State had to yield before its overriding interests. In his view, however, a State could not derogate from all norms. It could derogate from only a certain category of norms, for a certain time, and in cases in which an essential State interest was imperilled.

17. The preclusion of the wrongfulness of an act of the State did not, of course, remove the obligation to compensate for the damage caused by an act that would otherwise have been unlawful. In that regard, he agreed entirely with Mr. Quentin-Baxter (1615th meeting) that compensation should be viewed not only in monetary terms but also as a means of restoring, in so far as possible, the *status quo ante.*

18. In the light of those considerations, he considered that a carefully and restrictively worded draft article would certainly command wide support in the Sixth Committee of the General Assembly. However, a provision should be expressly incorporated in paragraph 1 of the draft article to the effect that the existence of a state of necessity must be proved. In other words, it must be established that the State had acted as it had because there had been no other way of protecting an essential interest threatened by a grave and imminent peril.

19. Also, in the Spanish version of sub-paragraph 3 (*b*), the word "*texto*" should be amended to read "*instrumento*", in line with the original French text. In that connexion, he endorsed the remarks made by Mr. Díaz González at the previous meeting: it was regrettable that the reports presented by special rapporteurs should lose some of their clarity in translation.

20. Mr. VEROSTA said that the wording of paragraph 1 of draft article 33 should be more restrictive, in order to emphasize the exceptional nature of a state of necessity. In his opinion, it was not really certain that the example of financial difficulties given by Mr. Ago came within the framework of state of necessity.

21. The use of the words "invoke it as a ground" in paragraph 2 showed that Mr. Ago had some doubts about the absolute nature of the principle laid down in paragraph 1. If the wording of paragraph 1 was to be retained as it stood, it would be more accurate to refer, in paragraph 2, to an "exception". Mr. Ago had, moreover, agreed that the Drafting Committee might consider the text from that point of view. The same paragraph should also contain a provision on the burden to be borne by the injured State, the purpose being, once again, to attenuate the absolute nature of the rule.

22. He supported the text sub-paragraph 3 (*a*), but wondered whether it was desirable to retain in sub-paragraph 3 (*b*) such absolute wording as that proposed by Mr. Ago, who had not cited among the examples included in the report any of the dramatic situations in which some States had actually found themselves. He had in mind, in particular, the case of the Danubian Empire, which had been bound to Germany by a convention dating from before the First World War and, despite strong domestic pressure as from 1916 onwards, had refused to plead necessity in order to free itself of its obligations; the fact that it had kept its word had led to its downfall. Another example was the case of the Kingdom of Italy, which had been linked to Germany and Japan during the Second World War by a convention which had not provided for state of necessity; yet, in 1943, the Fascist Grand Council had decided to depose Mussolini and to change sides. In his opinion, those examples militated in favour of the inclusion of less absolute wording in sub-paragraph 3 (*b*).

The meeting rose at 12.35 p.m.

1617th MEETING

Monday, 23 June 1980, at 3.15 p.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. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, 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*)