Document:-
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Summary record of the 1614th meeting

Topic:
State responsibility

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

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.

recognition of a rule of law giving a measure of protection to the essential interests of a State.

3. In that connexion, it should not be forgotten that, in modern international law, the recognition of some very essential interests of States, particularly economic interests, was in the process of elaboration in new rules imposing obligations on other States. In that respect, "new" international law differed fundamentally from "old" international law, which regarded States as "Powers". The only vital interest of a Power was to expand, or at least not to contract. It was small wonder, therefore, that a right of self-preservation had been regarded with great suspicion by international lawyers.

4. The interpretation in question had the further advantage of implying that there must be a common yardstick to measure the allegedly essential interest of one State against the legally protected interest of another State, as well as to judge the previous conduct of the States involved. It also implied that, before any such "measuring" took place, it should be factually established that the conflict was really fortuitous.

5. A third level of comparison concerned the quality of the rule or obligation for the non-performance of which the excuse of "state of necessity" was invoked. On the one hand, there were international rules, such as those prohibiting aggression, non-compliance with which could never be excused on such a ground. On the other hand, there were rules of international law, particularly conventional rules, which explicitly, or more often implicitly, had already taken into account a possible conflict with the essential interests of a State and were adapted to the cases where such situations arose. In such cases, the inherent conflict was already resolved by the rule itself. Only if neither an absolute rule of international law, nor a rule already adapted to the possible conflict of interests was at stake, could the general plea of state of necessity come into play. It was only then that there was a fortuitous conflict and the two other levels of comparison could be applied.

6. However, although fortuitous from the point of view of the rules of law involved, the situation of conflict might still not be fortuitous in fact, in that it might be the outcome of the previous conduct of the State or States involved. Often, a situation in which a State's essential interest was threatened by a grave and imminent peril could have been foreseen and avoided. In such cases, the international yardstick must first of all be applied. Inevitably, that implied assessing the internal policy measures that a State had taken, or failed to take, and that had brought about, or contributed to, the situation of peril. A State wishing to invoke a state of necessity as an excuse for not fulfilling its international obligations could not at the same time invoke its domestic jurisdiction as a ground for refusing to allow its previous policy measures to be subjected to the international test of what might reasonably have been expected of it, in order to avoid the situation of grave and imminent peril. If that test led to the conclusion that the State could not be blamed for the situation, then the next level of comparison, whereby its interests were measured against those of the other State, could and must be applied.

7. Draft article 33, as proposed by Mr. Ago, though possibly based on a slightly different interpretation, nevertheless seemed to lead to the same result. The third level of comparison was reflected in paragraph 3 of the draft article, in that subparagraph (*a*) referred to norms of international law that were immune from the plea of necessity by virtue of their special peremptory character, and subparagraph (*b*) referred to cases in which the inherent conflict was already resolved by the conventional rule of international law itself. He attached particular importance to the words "or implicitly" in that subparagraph.

8. The second level of comparison, namely that relating to the fortuitous character of the conflict, seen from the factual point of view, was reflected in paragraph 2. However, the wording of that paragraph was perhaps both too strong and too weak. One could hardly expect to be confronted in practice with a case in which a State deliberately created a grave and imminent peril to its own essential interests. On the other hand, the very element of "fortuitousness" inherent in the plea of necessity implied that the State's conduct was not the only cause of the situation. It might be better, therefore, to replace the words "was caused" by "could have reasonably been avoided".

9. The first level of comparison—between the interests of the States involved—was reflected in the second sentence of paragraph 1.

10. Referring to paragraph 18 of Mr. Ago's report, he said that, whatever plea of necessity might be accepted in law, the act of the State itself obviously remained an internationally wrongful act entailing new legal relationships very similar, though not identical, to those that would ensue from any other wrongful act of a State. In such cases, any treatment of the act according to other rules, such as those relating to liability for injurious acts not prohibited by international law, was *a priori* precluded.

11. A situation of grave and imminent peril threatening an essential interest of a State might also have been caused, provoked, or contributed to by the conduct of the other State, whose legally protected interest was sacrificed by the act of necessity not in conformity with the obligation owed to that State or else the conduct in question might have contributed to the supervening of that situation. The question whether such a circumstance affected the operation of the third level of comparison was, to some extent, addressed in paragraphs 55 to 66 of the report. However, the observations contained in those paragraphs centred only on a particular type of international obligation, namely that sector of the over-all international obligations of States that concerned respect by every State

for the territorial sovereignty of others. The question was whether all the rules pertaining to that sector had the same force of *jus cogens* as must be accorded to the prohibition of aggression. However, in principle, the excuse of state of necessity could be invoked in the case of breaches of other types of international obligation towards another State. Indeed, such other types of international obligation were mentioned at various points in the report.

12. Under paragraph 2 of draft article 33, the state of necessity could not be invoked if the situation must be blamed on the State invoking the excuse. However, what if the situation must be blamed on the other State? If the question of state of necessity was considered as reflecting a conflict between a rule of international law giving a measure of protection to the essential interest of a State and another rule protecting an interest of another State, it was impossible to avoid taking into account the conduct of the second State, in terms of its conformity or non-conformity with the first-mentioned rule. Could State A reasonably expect State B to act in conformity with its obligation towards State A if State A had brought about a situation in which State B could not do so without sacrificing its essential interests?

13. Obviously, the answer to that question was in the negative, and such an answer was not excluded by the terms of draft article 33. The only point to decide was whether, in such cases, the second sentence of paragraph 1 of the draft article would apply. In other words, was it not possible that "comparable" or "superior" interests of the other State could be sacrificed as a result of an act which arose out of a state of necessity? The principle that sentence set forth could be likened to the rule of proportionality, and it was difficult to apply the international yardstick that words such as "comparable" and "superior" necessarily implied to cases where the interests involved were of different dimensions. To take the example cited in paragraph 56 of Mr. Ago's report, how was the interest of a State that had crossed the frontier in pursuit of an armed band or gang of criminals to be compared with the interest of another State that was protected by the rule of international law prohibiting acts performed *jure imperii* by one State within another's territory? A similar question could be raised regarding the interest that a State had in protecting its nationals, even when abroad, particularly if such nationals were being held in foreign territory against their will.

14. In such cases, there seemed to be an inherent conflict between the functional, personal and territorial aspects of the sovereignty of States. In that connexion he noted from the report that, in the case of the "*Caroline*", that conflict had been solved by providing for an exception on the ground of "a strong overpowering necessity" (*ibid.*, foot-note 115), whereas, in a dispute between the United States and Mexico, it had been solved by an agreement concluded between the parties that determined the personal dimension—"hostile Indians"—and the territorial dimension—"in desert areas and up to a specified depth" (*ibid.*, foot-note 116). In neither case, however, was one of the two common features of the other cases discussed in the report present since there was no danger involved "which the foreign State in question has a duty to avert by its own action but which its unwillingness or inability to act allows to continue" (*ibid.*, para. 56). In other words, the question whether the other State was to be blamed for the existence of a situation in which an essential State interest was threatened "by a grave and imminent peril" had been left open.

15. Accordingly, it was necessary to examine the connecting factors in the situation as a whole with a view to determining which types of relationship—functional, personal or territorial—should prevail in a given context. In so doing, it should be borne in mind that there could be cases where a state of necessity merged with a situation of self-defence, since the former involved a measuring of comparable interests in the event of a fortuitous conflict between different rules, and the latter involved the suspension of the rule whereby the use of force against the territorial integrity of another State was prohibited when the same rule was violated by that other State. In such cases, the blame for the existence of the situation in which an essential interest of State A was threatened by a grave and imminent peril rested on State B. That did not, however, necessarily mean that State B had previously committed an internationally wrongful act with respect to State A. The Commission, when it had agreed that consent should constitute a circumstance precluding wrongfulness, had not been thinking in terms of consent given by the organ of the State and in the forms prescribed for consent to be bound by a treaty. Similarly, in the case in point, it was not necessary that the blame resting on State B should arise out of the breach of an international obligation towards State A. That, in fact, was where the difference lay between circumstances precluding wrongfulness and the new legal relationships arising out of the breach of an international obligation, which latter subject was dealt with under part 2 of the topic.

16. In paragraph 80 of his report, Mr. Ago had rightly stressed the need to ensure that "the fundamental requirement of respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*". Justice, unlike the rule of law, was universal, permanent and, above all, definite. Indeed, that was the consideration which lay at the root of all the circumstances precluding wrongfulness, ranging from fortuitous event and *force majeure* through distress and consent to state of necessity and self-defence. All those circumstances, however, had a common dimension in that they merged into the topic of the content, forms and degrees of State responsibility at the point where a relationship had to be established between a given rule

and a sanction—the latter word being understood in the sense attributed to it by Mr. Ushakov.[2] The topic of the content, forms and degrees of State responsibility likewise merged into the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which, in turn—viewing the matter from the preventive rather than the repressive point of view—merged into the question of the management of shared natural resources, which constituted the essence of the law of the non-navigational uses of international watercourses.

17. Sub-paragraph 3 (*b*) of draft article 33 dealt with the explicit or implicit effect of conventional provisions on situations of necessity (see A/CN.4/318/Add.5 and 6, paras. 67–69). It was clear that, in so far as a conventional provision covered the situation, it was that provision, rather than the general rule governing a state of necessity, which would apply. The difficulty was that the general rule consisted of both permissive and restrictive elements and, while the conventional provision could obviously expand or contract either element, the residual effect of the general rule was far from clear. The problem was very similar to that which had arisen in regard to negotiated reservations to multilateral treaties and the relationship of those reservations to the general rule concerning the admissibility of reservations. It seemed to him, therefore, that the public emergency clauses in human rights conventions, which were referred to in foot-note 145 of the report, dealt not with the general rule on necessity but rather with an exclusion of that rule in favour of a rule of *jus cogens*. Moreover, the provisions referred to in foot-note 146, and in particular article XX of the General Agreement on Tariffs and Trade (GATT), provided for derogations from the obligations laid down with a view to protecting, *inter alia*, public morals, public health or items of artistic and cultural heritage. In other words, those provisions dealt not with necessity but with matters that could not obey the laws of supply and demand that lay at the very heart of freedom of trade. It was significant that the GATT provisions did not imply that the interest in protecting, for example, public morals should be measured against the interest in promoting freedom of trade, whereas the Treaty establishing the European Economic Community did do so.[3] As was rightly stated in paragraph 69 of Mr. Ago's report, however, "only through an interpretation of the convention in question" would it be possible to give a definitive answer in each case. The only question to be decided, therefore, was whether sub-paragraph 3 (*b*) of draft article 33 reflected a sufficient degree of flexibility. That, however, was a matter which could be settled by the Drafting Committee.

18. Mr. SCHWEBEL said that the Commission was concerned at the moment with the case where State A, in failing to perform an obligation owed to State B, acted out of necessity because, for example, the performance of the obligation would prejudice an essential interest of State A. In so doing, however, State A was none the less in breach of its obligation, and in many cases would presumably inflict damage on State B, which was entirely innocent in the matter. In such circumstances, which of the two States should bear the burden of the damage? His own view was that it should be State A.

19. The position of a State that acted out of necessity was not the same as that of a State that took certain countermeasures or acted in self-defence. In the latter case, the otherwise wrongful act of a State was not qualified as wrongful because there had been a prior wrongful act by another State. A State that acted out of necessity, on the other hand, did so voluntarily, since it had a choice in the matter. Nor, again, was the position the same as that of a State which acted as it did because of *force majeure* or impossibility of acting otherwise.

20. In that connexion, he noted that paragraph 18 of Mr. Ago's report stated that the preclusion of wrongfulness for reasons of necessity would not in itself preclude the consequences that would follow if the act were deemed unlawful, and would not, therefore, extend to consequences to which the same act might give rise, such as the obligation to compensate for the damage caused, which would be incumbent on the State on a basis other than that of *ex delicto* responsibility. Did that mean that the state of necessity would mitigate, but not exclude, damages? And, if so, would it be perhaps preferable to treat the act arising out of a state of necessity as wrongful and to take the circumstances of necessity in mitigation of damages, rather than to treat such an act as not wrongful but to hold that damages were none the less payable?

21. Mr. REUTER said that, although a provision such as draft article 33 was essential and its wording could not have been better than that proposed by Mr. Ago, he (Mr. Reuter) was not fully satisfied, because some quite serious doubts remained to be dispelled.

22. According to the opening passage of the draft article, it would be the Commission's view that a state of necessity precluded the wrongfulness of an act of a State not in conformity with what was required of it by an international obligation. He wondered whether *force majeure* and state of necessity should not also be provided for in the law of treaties, from which such concepts had been partially excluded. He noted that a state of necessity usually did not affect the obligation itself, which might, for example, merely be suspended. That was, however, not a question to be dealt with by the Commission, because it was not one of responsibility. The issue before the Commission was whether the wrongfulness of the act disappeared, and whether it disappeared entirely or partially. That was a very sensitive question, and he was not really sure that the

[2] See for example *Yearbook ... 1979*, vol. I, p. 57, 1544th meeting, para. 28.

[3] United Nations, *Treaty Series*, vol. 298, p. 11.

solution adopted was the right one. In dealing with the case in which, to use the more specific English words, there was "compensation" but not "damages" or, in other words, in which there was financial responsibility, but no wrongful act had been committed, the Commission would be entering a domain that was not really its concern at the moment—for it was considering, at that point, only the wrongful act of the State—and that would come more within the scope of Mr. Quentin-Baxter's topic.

23. In general, the concept of state of necessity was admitted only reluctantly. In the past, attempts had been made to restrict the exercise of the right of necessity to matters affecting the existence of the State. In his report, Mr. Ago had invited the Commission to take a different point of view and, without ruling out the right of necessity in situations where the existence of the State was at stake, not to place too much emphasis on that aspect. He proposed instead that emphasis should be placed on a more general characteristic of the right of necessity and that the Commission should realize that there was now general agreement on the concept of such a right. From that point of view, the inclusion of a draft article on state of necessity was essential. It was, however, essential only as a result of the position which the Commission had taken earlier on the concept of *force majeure* in the sense of a material or, in other words, absolute impossibility of performance. Yet that was not the way in which *force majeure* was commonly defined in modern legal terminology, in which, with regard to economic and financial obligations, for example, the term *force majeure* was used to describe a situation of relative, not absolute, impossibility of performance. Draft article 33 could thus be regarded as a provision counterbalancing an excessively strict position taken on another point.

24. In that connexion, he said that the case-law of the Court of Justice of the European Communities offered many interesting examples. The parties to the disputes adjudicated by that Court had, at various times, invoked *force majeure*, state of necessity and self-defence to justify non-compliance with their obligations. Hence the Court had had to define those concepts and apparently took the view that the definition of *force majeure* varied according to the field to which it applied. Those examples seemed to militate in favour of very specific wording, even if the Commission appeared to be going against the trend.

25. He also pointed out that situations could be visualized in which a state of necessity was combined with self-defence or, in other words, in which there was both a measure of self-defence and a measure of necessity.

26. He was not sure about the real nature of draft article 33, which could be seen as a technical rule, a general principle or even as a whole legislative programme. He thought, however, that in fact it laid down a general principle, for it was very hard to know what exactly was meant by such expressions as "essential interest" or "grave and imminent peril". The wisest course would be to say that what was needed was a set of specific legal rules under broad headings. Draft article 33 did, in fact, seem to be a source of special rules relating to broad topics, as was clearly shown by the examples of cases of economic and financial problems. He could see why an attempt had been made to formulate a general article, but thought that it embodied a principle that was very difficult to apply and that it called for the largest possible number of agreements in the various fields in which it could apply. It could even be said that draft article 33 foreshadowed the whole problem of the new international economic order. The developing countries had, for example, signed many conventions—relating, *inter alia*, to drug control—which they considered to be in keeping with the interests of the international community. They were, however, incapable of performing the obligations they had undertaken in those conventions, and it had been necessary to invent the doctrine that, so long as a country had shown good will, under-development was an admissible cause of impossibility of performance.

27. Lastly, he noted that, although Mr. Ago had intended to exclude natural law from his draft articles, he had nevertheless been forced to reintroduce it in the form of a progressive natural law which was nothing more than the conscience of the international community.

28. Mr. VEROSTA noted that, because the word "*excuse*" was used in the French text of draft article 33, paragraphs 2 and 3 (*b*), it might be inferred that those provisions were meant to indicate an "exception" to the rule in the first sentence of paragraph 1, namely, that wrongfulness was precluded if the State had acted in order to safeguard an essential State interest threatened by a grave and imminent peril. An act committed by reason of necessity was, however, ultimately contrary to international law, and the word "*excuse*" could mean that compensation might be owed. In the English text of draft article 33, the word "*excuse*" had been translated in one passage by the word "ground" and in another by the word "plea".

29. By way of example, he referred to a case which had, regrettably, not been mentioned in the report, namely, that of the invasion of Belgium by Germany in 1914. Since Belgium, a permanently neutral State, had objected to German troops crossing its territory, the German Government had, in a statement made to the Reichstag by the Chancellor, admitted that it was wrong to disregard that objection, but had stated that it would compensate Belgium accordingly. The German Government had been in a state of necessity, and its only object in also invoking self-defence had been to be able to describe the invasion of Belgium as a defensive war—the only kind of war considered permissible by the Social Democratic Party.

30. He was not sure whether the general rule of the preclusion of wrongfulness in the case of state of necessity should be retained and whether the French word "*excuse*" was appropriate.

31. Mr. AGO, speaking in reply, said that the word "*excuse*" was not perhaps the most appropriate one, but it was used commonly by learned authors and even in State practice to describe the grounds for the preclusion of wrongfulness and, in particular, in cases of *force majeure*. Nevertheless, to avoid any misunderstanding, another term might be found to replace it.

32. He had not cited cases like that of the invasion of Belgium by Germany and others often associated with it because in his opinion the application of the excuse of necessity in such cases was today excluded, since what was concerned were acts that were contrary to a peremptory norm. Moreover, Governments had frequently invoked a state of necessity in such cases only so as to give their conduct the semblance of moral justification in the eyes of public opinion.

33. In reply to Mr. Schwebel's comments, he said that in his opinion it would be wrong to attribute to "state of necessity" the value of a cause attenuating, rather than precluding, the wrongfulness of the act of a State. The essential value of a plea of necessity was that it would take the blame of wrongfulness away from the act of the State, not that it would attenuate the consequences of the action, which remained wrongful. As for the obligation to compensate for any ensuing damages, it might prevail on other grounds, but remained an obligation to pay in full; it depended more on the wrongful consequences of an internationally lawful act than on the "attenuated" responsibility of an internationally wrongful act.

34. Mr. USHAKOV said that his reading of the report under consideration had convinced him that draft article 33 was unnecessary. The report showed that, in certain extremely rare circumstances, a State might have to adopt conduct not in conformity with that required by an international obligation in order to safeguard one of its essential interests. The State must, in such a case, be in a situation of dire necessity, an exceptional emergency situation. It would not be in such a situation if mere financial obligations were involved, for it was always possible to cope with the situation by means other than emergency measures. A situation of dire necessity would, however, exist in the case where a forest fire broke out beyond the border of a State and came dangerously close to a nuclear power station located inside the border; but even in such a case, the Government claiming to be acting out of necessity could first try to obtain the neighbouring country's consent to the emergency action it was planning to take. Only if the neighbouring country refused could emergency action be taken; even then, it should be temporary, and might give rise to an obligation to make good any damage caused.

35. In his opinion, cases of that kind were ones which were not covered by international law and in which a court should recognize that the existing rules of law did not apply. Such cases should be settled by the parties concerned in the light of the prevailing circumstances, which could mitigate the effects of the emergency action taken; there would, however, be no reason to preclude the wrongfulness of such action. If a developing country was unable to repay a loan, an arrangement could be made to facilitate the servicing of the debt or to reschedule the debt.

36. The effect of all the circumstances taken into consideration in the articles constituting chapter V of the draft articles was, in the final analysis, to preclude responsibility. In the cases covered by the other articles in that chapter, the situation could be evaluated objectively. In the case referred to in draft article 29,[4] it was always possible to determine whether or not consent had been given. In that of draft article 30, it was possible to determine whether an internationally wrongful act had been committed before countermeasures were taken. In the cases of *force majeure* and fortuitous event referred to in draft article 31, the existence of an irresistible natural force and material impossibility could always be established. Similarly, in the case of distress referred to in draft article 32, it was possible to make an objective evaluation of the situation in which the organ of the State found itself. In the case of dire necessity, however, it was not always possible to assess the situation objectively. Nor could that case be equated with those of *force majeure* or fortuitous event, for it did not involve any irresistible force.

37. It was not logical to remove all traces of natural law and to claim that a fundamental right of one State could not be more important than the fundamental right of another State, and to present an article requiring a comparison between the essential interests of two States. It was no more possible to compare the essential interests of States than to compare their fundamental rights. Besides, it was impossible to make an objective evaluation of two interests, each one of which was considered by the State invoking it to be more important than the other. In specific cases, such interests could be evaluated, but it was not possible to lay down in advance a general rule sacrificing an interest protected by an international obligation to a social interest.

38. He was thus of the opinion that, although cases of dire necessity could, of course, arise, they should be treated as cases not covered by international law, just as it could happen in internal law that a court did not pass judgement because there was no applicable statutory provision. In his view, none of the examples

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

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.