Document:-
A/CN.4/SR.1618

Summary record of the 1618th meeting

Topic:
State responsibility

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

obligations had long been ruled out as grounds for armed intervention by creditor States. As a result of coercion used against Venezuela by creditor States, in 1902 Luis María Drago, the Argentine Foreign Minister, had expounded the doctrine that the debts of a sovereign State could not be collected by armed force, a view which he had again expressed at the Second International Peace Conference (The Hague, 1907) and which had led, at the initiative of the United States, to the conclusion of a new convention stipulating that armed force could not be used for the collection of contractual debts, unless the debtor State rejected arbitration or failed to comply with the arbitral award.

29. Lastly, the assertion that urgency was a requisite for establishing the existence of a state of necessity had no basis in the learned opinion on the topic. In that respect, it was important to remember that situations might arise in which a State could not perform its obligation for many reasons other than mere lack of time.

30. As to the text of article 33, the first and second sentences of paragraph 1 should form separate paragraphs, since the first sentence set forth the general principle of state of necessity, whereas the second sentence placed qualifications on the principle. It was one thing to enunciate a principle and another to speak of the cases in which the principle did not apply. In addition, it might be desirable to express the principle in a negative form, in order to meet the concerns of those who wished to put a restrictive interpretation on the concept of state of necessity. Furthermore, paragraph 2 referred to "the occurrence of the situation", but it might well be better to follow the wording of articles 31 and 32, which spoke of the State which "has contributed" to the occurrence of the situation. Such a formulation would cover cases in which States failed to take steps to prevent the particular situation from arising.

31. Mr. TSURUOKA paid a tribute to Mr. Ago's devotion to the cause of codification and the progressive development of international law.

32. Like most of the members of the Commission who had spoken, he approved the main lines of draft article 33. He was in favour of retaining the article on state of necessity, for in the light of the practice of States and of the general structure of the draft, such an article, which would supplement preceding provisions, had to be included. However, he shared the concern of those members who had said that the concept of state of necessity was somewhat vague and open to abuse. Accordingly the areas where it was admissible should be carefully distinguished from those where it was not admissible.

33. As other speakers had said, Mr. Ago had made it clear that the concept of state of necessity operated only exceptionally in international law. If possible, it should become even more of an exception.

34. Some members of the Commission had taken the view that the subjective element should be entirely removed from the definition of cases in which the concept might be applied—which he felt was in itself evidence of a certain subjectivity. Accordingly, if it was not possible to eliminate that element of subjectivity altogether, the Commission should include in its commentary a detailed analysis of the concept, together with a wealth of examples from practice of cases of the application and of the exclusion of the concept, so that States would in that way have criteria enabling them to avoid abuse. There should also be a procedure for recourse to the judgement of a third party in order to avoid or correct any misapplication of the concept.

35. So far as the form of draft article 33 was concerned, he hoped that the language would be brought into line with that of articles 31 and 32 and, in particular, that the wording of article 33, paragraph 2, would be brought into line with that of article 31, paragraph 2, and article 32, paragraph 2, both in English and in French.

36. Lastly, he noted that the question of compensation caused some concern to several members of the Commission. He believed it indispensable that the innocent State should be indemnified, and the best solution would be to add to draft article 33 a paragraph 4 on the following lines:

> "The preclusion of wrongfulness by virtue of paragraph 1 does not imply the preclusion of the obligation to make good the damage occasioned by the act of necessity".

The meeting rose at 5.55 p.m.

1618th MEETING

Tuesday, 24 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. 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*)

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

1. The CHAIRMAN, speaking as a member of the Commission, said that, throughout the history of international law, and of law in general, reference had been made to the existence of a defence of necessity. The concept had been known in Roman law as a defence in an action for damages: in such cases, if no more had been done than a reasonable man would have done, fault had been precluded and no compensation had been required for the harm thus lawfully caused. Grotius had accepted the concept, while prescribing precautions and restrictions which bore a striking resemblance to those so carefully distilled from the wealth of material in Mr. Ago's report. In that connexion, he drew attention to article 142, paragraph 3, of the draft convention on the law of the sea,[2] which referred to the rights of coastal States to take such measures as might be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastlines or related interests.

2. However, despite the wealth of supporting material and the persuasiveness of the conclusions contained in the report, he still had doubts as to the advisability of including a provision on necessity in the draft articles. In the first place, it seemed that most of the authorities quoted in the report, while speaking of a defence of necessity as being part of the law, had not actually felt obliged to make it the basis of a decision. Secondly, draft article 33 contemplated the safeguarding, not of rights, but of an essential State interest, and called for an assessment of whether the interest of the other State was comparable or superior to the interest that the act had been intended to safeguard. The term "interest" could be given many meanings, and was likely to compound the difficulties of applying the provision in a manner that would ensure that justice was secured in a particular case. The need to compare interests, which would appear to call for value judgements, in the absence of a universally accepted scale of values, could pose problems which would seriously impair the utility of the concept of necessity, and therefore of the draft articles.

3. Even more troubling was the fact that the concept of necessity, by its very nature, imported a subjective element so pervasive as to make a rule based upon it incapable of proper application by a tribunal. For all the references to a "state of necessity" cited in the report, and for all the rules with which lawyers had tried to confer objectivity and precision on the concept, it might well be that necessity was not a state or condition of things, but rather an interpretation or evaluation of a situation, and therefore a state of mind. Moreover, the content of the notion might be so subjective as to be unhelpful in the ordering of relations between States. Alternatively, its application might be so circumscribed as to deprive it of usefulness altogether. It was true that the examples of financial cases in which judges or counsel had theorized that severe financial or economic constraints might relieve debtor States of their duty to repay, or to repay according to a certain schedule, could evoke considerable sympathy at a time when most developing countries were waging a constant battle to support their economies through foreign loans, and repayment schedules threatened to overwhelm them. However, a debtor State availing itself of the defence of necessity in order to avoid or reschedule repayment could be faced with a very serious situation in that no State might be willing to offer it financial assistance in the future. To provide a legal basis for action in situations of economic necessity could undermine the force of treaties in that field and have the effect of strengthening trends towards protectionism in the industrialized world.

4. Despite those doubts regarding the recognition of a legal norm concerning necessity in international law, he was willing to agree that draft article 33 should be referred to the Drafting Committee. Nevertheless, in order to mitigate an apparently high level of subjectivity in the application of the provision and to assist tribunals which might have to interpret it, it might be worthwhile considering introducing into the text a standard of "reasonableness" which would ensure that States exercised at least a minimum of objectivity before concluding that a situation of grave and imminent peril existed.

5. It would seem logical that the concept of necessity should preclude wrongfulness altogether, and should not be simply a mitigating circumstance, but it was clear that the duty to compensate remained. The position of third States suffering damage as the result of an act done in a situation of necessity needed further thought.

6. With regard to the wording of the draft article itself, he supported the introduction of the criterion of "reasonableness" in paragraph one. There was also a need to make clear the exceptional nature of the plea of necessity by drafting the article along the lines of article 62 of the Vienna Convention,[3] as suggested by Sir Francis Vallat (1615th meeting). The provisions of paragraph 1 required the State invoking the plea of necessity to prove that it had had no other means of safeguarding an essential State interest. That would place such a burden on the State concerned as to raise again the question of the utility of the draft article.

7. In paragraph 2, the term "situation of 'necessity'" was used without warning and, although the meaning

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

[2] "Informal Composite Negotiating Text/Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2–5).

[3] See 1615th meeting, foot-note 3.

was clear, some introduction was needed, if only for the sake of presentation. In addition, it should be provided that paragraph 1 would apply, not if the situation had been "caused by the State" but if the State had "contributed to" the situation.

8. In sub-paragraph 3 (*b*), the term "implicitly" should be expanded to introduce the idea of a necessary implication having regard to all circumstances.

9. Mr. AGO, commenting on the various points raised by the members of the Commission in discussing draft article 33, said that Mr. Riphagen's account of the interesting theory of state of necessity as a conflict of rules (1614th meeting) had troubled him at first, for he had tried to show in his report that, in cases where a State pleaded necessity, it could not be claimed that there was a conflict of two rights or that one right ultimately prevailed over the other. However, he had been relieved to find afterwards that Mr. Riphagen had not been thinking of a conflict of two rights but rather of a conflict of two rules, one of which was that from which derived the subjective right of another that was not being respected, and the other that was that being drafted by the Commission. From that point of view, Mr. Riphagen's statement therefore could not fail to promote a better understanding of the theory underlying the concept of state of necessity.

10. With regard to the criterion to be applied in assessing the relative weight of the interests involved, Mr. Riphagen, although starting from different premises, had reached conclusions very close to his own. He had, moreover, pointed out that different imperative rules could co-exist. On an earlier occasion, when discussing article 19,[4] the Commission had noted that some international crimes could be more criminal than others and that some imperative rules could be more imperative than others. His own view was, nevertheless, that the entire field of imperative norms should be kept apart from the plea of state of necessity.

11. Another point effectively stressed by Mr. Riphagen was that the drafting should be as clear as possible so as to avoid misunderstanding. With regard to the possibility of compensation for damages, he (Mr. Ago) considered that, if the right to compensation was recognized, it would not preclude the act in question from being regarded as wrongful. While the act was certainly not in conformity with an international obligation, it could not be described as wrongful if the precluding of wrongfulness was the result of a state of necessity. On the other hand, he agreed with Mr. Riphagen that the object of chapter V of the draft articles was to avert the injustice that might occasionally result from the strict application of certain rules of law.

12. Mr. Reuter had rightly recognized (1614th meeting) that, even if not wrongful, the action in respect of which the defence of necessity was raised might yet give rise to a claim for compensation. His main argument was that the Commission had very properly decided to formulate in precise terms the concepts in the other draft articles in chapter V and to circumscribe clearly their respective limits. The comment was entirely correct, and he (Mr. Ago) had himself suggested, during the discussion on *force majeure*, that a distinction should be drawn between two concepts of impossibility of performance: "material" and "absolute" impossibility, and "relative" impossibility,[5] the latter being typical of situations in which the strict application of the rule would involve such grave consequences for the party submitting to it as to make it doubtful whether performance was really possible—from the "human" point of view, if not from the "material" point of view. On that occasion, Mr. Ushakov had proposed that the Commission should restrict the application of the concept of *force majeure* to cases of material and absolute impossibility. The Commission had followed that proposal—probably rightly—leaving, however, a lacuna to be filled, and it was within the compass of state of necessity that that should be done.

13. Commenting further on Mr. Reuter's statement, he wished to dispel any possible misunderstanding about his attitude to natural law. He had spoken in his report of some jusnaturalist theories because certain eighteenth- and nineteenth-century authorities had caused confusion by describing as principles of natural law a body of rules whose virtue was rather that they coincided with their own views. For his part, he was convinced that there was a law which he preferred to describe not as natural but as spontaneous, a law that arose in the conscience of subjects of law and preceded positive law, and in some respects was superior to it.

14. In his statement at the 1614th meeting, Mr. Ushakov had urged the Commission to venture into the subject of state of necessity only with the utmost caution. He (Mr. Ago) agreed with this, but would point out that it would perhaps be incautious to leave so vital a concept as state of necessity undefined. Mr. Ushakov had taken the view that state of necessity could not apply to financial obligations; on the other hand, he had also cited examples in which that concept would apply, such as a fire which broke out in inhabited territory on the frontier between two States and which would necessitate crossing the frontier to fight it. But principally he had emphasized the highly subjective nature of comparisons between State interests, and had suggested that the Commission might perhaps agree to treat the defence of necessity as an extenuating circumstance rather than as one precluding wrongfulness. He had also envisaged (1615th meeting) the complications that would arise in a situation in which a State B, which was the victim of an act of necessity of State A, reacted by taking

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

[5] See *Yearbook ... 1979*, vol. I, p. 185, 1569th meeting, paras. 5 and 6.

countermeasures, which in their turn were followed by a reaction on the part of State A, and so on. He (Mr. Ago) wished to point out, in the first place, that in his view it would be wrong in such a case to speak of real countermeasures if, in regard to the first act, the excuse of necessity had been justified, since in that event the action taken by the State in question could not be described as wrongful. Such complications were inherent in international relations and could arise in situations of *force majeure* or distress, and not only where state of necessity was invoked.

15. He sympathized with Mr. Díaz González's complaint (*ibid.*) about the Spanish translation of the report and thought that even the English version was open to criticism. On the other hand, he knew from experience how difficult it could be to convey an author's ideas precisely in a foreign language when the subject-matter was as delicate as that dealt with by the Commission.

16. He had noted Mr. Díaz González's remark about cases in which it should be decided whether the vital interest to be protected was that of the State which invoked state of necessity on its behalf or that of the victim State. He strongly supported the call for maximum clarity, to avoid any misinterpretation of the future draft articles.

17. Mr. Šahović (*ibid.*) had set the problem of the state of necessity in its proper perspective within both the system of international law and systems of domestic law. His view, with which he (Mr. Ago) concurred, was that the field of application of the notion of state of necessity must be precisely delimited. However, Mr. Šahović also held that it was essential that the draft articles should contain a provision relating to state of necessity. He (Mr. Ago) wished to point out that state of necessity did not deserve all of the reproaches sometimes made about it, since it met a basic requirement of justice, the concern that the application of rules of law should not be made too rigid. Misuse was admittedly open to criticism, but the notion itself was an indispensable component of any system of law if excessive friction in the application of rules was to be avoided. Mr. Šahović had gone so far as to regard it as a necessary complement to the other provisions of the draft articles, and had drawn attention to the fundamental importance of an exception regarding the prohibition of the use of force, even otherwise than in cases of aggression.

18. Mr. Šahović had suggested that the terms of the draft articles should be strengthened, and that perhaps an express clause should be added relating to compensation for possible damage. The Commission might possibly accede to that suggestion, although it should remember that during the discussion of an earlier draft article raising the same problem, Mr. Riphagen had taken the view that it would be preferable to include a separate general provision—a solution that seemed preferable to him.

19. Mr. Quentin-Baxter (*ibid.*) had likewise cited some interesting examples, for instance the crossing of frontiers in emergencies. He had rightly emphasized that the principle under consideration was common to all systems of law and, in fact, could not be eliminated. He had also pointed out that the obligation to compensate for damages might very well persist even where wrongfulness was precluded. He (Mr. Ago) agreed with that remark and added that the rule to be adopted by the Commission on that point must be very flexible.

20. Mr. Quentin-Baxter had stressed the constituent elements of the state of necessity. He had taken the view that it was just to make provision for some exceptions, but that he would strongly oppose the dropping of draft article 33, on the grounds that the Commission was bound at least to draw the attention of Governments to the immense problem of state of necessity so as to elicit their views on the matter.

21. Sir Francis Vallat (*ibid.*) had adopted a practical—and particularly welcome—approach. Referring to the practice of States rather than to jurisprudence, which was more rare, Sir Francis had noted that in many cases the parties had agreed in recognizing the validity of the principle of state of necessity, irrespective of whether they accepted or rejected its application to the particular dispute between them. He had inferred from those precedents that the principle was one that was generally accepted in international law.

22. He had visualized situations (the "*Torrey Canyon*" case, for example—see A/CN.4/318/Add.5–7, para. 35) in which two distinct grounds for precluding wrongfulness might be simultaneously invoked and had suggested that the article should be drafted in negative rather than positive terms, by the use of such language as: "It is not permissible to invoke state of necessity, except ...". The proposal deserved careful consideration and he (Mr. Ago) intended to return to it later.

23. Sir Francis had also rightly emphasized that the object of draft article 33 was to settle a problem of circumstances precluding wrongfulness, and not of circumstances precluding some portion of responsibility or of the obligation to compensate, for a wrongful act produced two kinds of possible consequences, as the Commission had already noted in connexion with countermeasures: namely, sanctions and compensatory measures. Sir Francis had stated that, even if wrongfulness was precluded the obligation to compensate for damages might subsist, although the aggrieved State would not be justified in applying countermeasures precisely because where there was damage there was no wrongful act. He had also stressed the concept of balance of interests; in conclusion, he had requested the Commission to consider the problems raised by the use of armed force.

24. Mr. Francis (1616th meeting) had said that the oral introduction of article 33 had convinced him of

the need for such a provision. In his view, article 33 was justified by considerations related to the practice of States, to doctrine and to the nature of the international legal order. However, he had considered that the Commission should specify in the text of the article what were the circumstances under which state of necessity could be invoked. He (Mr. Ago) fully agreed with him on that point.

25. Mr. Schwebel had initially taken the view (1614th meeting) that state of necessity should preclude responsibility rather than wrongfulness, but had subsequently dropped the idea. At the 1616th meeting, he had expressed a preference for the article to be drafted in the negative, and had stressed the advisability of providing for the possibility of compensation for damages. In regard to that point, he (Mr. Ago) pointed out that in some cases, compensation should be made, even in full, whereas in others it might not be required at all. Each case had to be considered on its merits, and the Commission should not go into too much detail, in case it were to draft a provision on the question. Besides, the problem of compensation normally arose after wrongfulness had been precluded, and the amount of damages to be paid could be settled by an arbitral tribunal or a conciliation commission. Mr. Schwebel had in another connexion rightly proposed that the plea of necessity should clearly be precluded in all cases where the State in question could have avoided the danger by other means.

26. As regards the use of the words "contributed" or "caused by", it should be left to the Drafting Committee to choose the most appropriate wording. The verb "contribute" had the advantage of having been used in other draft articles, even if to use it in article 33 might make the provision somewhat strict. It was a moot point whether a State was in a "state of necessity" if it found itself in a situation which was not really "caused by" it but to which it had contributed, for instance by pursuing too lax a financial policy. If that situation was nevertheless fraught with extreme danger for it, was it fair to not allow it any excuse?

27. In the opinion of Mr. Calle y Calle (1616th meeting), article 33 was justified by the realities of international life, although he considered that the plea of necessity should be subordinated to stringent conditions. In that connexion, he (Mr. Ago) pointed out that, since it had been agreed that state of necessity could in no event justify recourse to armed force, there was no point in attempting to limit the application of that notion to the cases where the interest to be safeguarded was the very existence of the State. The interest should be an essential one, but in most cases it had nothing to do with the existence of the State which invoked it.

28. Mr. Calle y Calle had also called attention to the possibility that necessity might be pleaded to justify the non-observance of humanitarian rules. In that context, unlike that of *jus cogens*, it was in fact conceivable that it might not be entirely inadmissible to be allowed to invoke the plea of necessity. In fact, the various conventions in which humanitarian rules were laid down dealt differently with the state of necessity. In some, the preamble or the final clauses stipulated that the obligations laid down in the instrument should be construed as being valid only within the limits imposed on a State in circumstances of grave necessity. In such a case, the applicability of state of necessity was therefore automatically admitted, but the conditions had to be established in the light of the terms of the convention rather than according to the rules of general international law. Other conventions, on the contrary, laid down a general rule debarring any plea of necessity, which meant that the plea could in no circumstances be invoked. But not uncommonly, an individual article of a convention contained a provision specifically concerning state of necessity. If that provision stated that necessity could not be pleaded in some particular case, the inference to be drawn was that it could be pleaded in all other cases covered by the convention. If, however, the provision stated that it was open to the parties to waive the observance of a certain obligation in case of necessity, it could be inferred that the plea of necessity was inadmissible to justify the non-observance of the other obligations defined in the convention. Hence, where the provisions of conventions were involved, everything depended on their interpretation, and the most complicated situation might arise.

29. Finally, Mr. Calle y Calle had taken the view that the existence of a state of necessity should be well established. The use of the term "established" could in fact assist the Commission in providing the necessary guarantees of objectivity. Moreover, the term had been used several times in the draft in order to emphasize the objective character that a situation must present, particularly a situation likely to lead to the wrongfulness of a particular behaviour being precluded.

30. The exceptional nature of the plea of necessity, and the limitations on its application, had been emphasized by Mr. Verosta (*ibid.*). He had also expressed the hope that the burden placed on the innocent State could be reduced, and had raised the question of the relationship between customary law and treaty law.

31. Mr. Yankov (1617th meeting) had, on the one hand, clearly recognized the merits of the rule and, on the other, had expressed the fear that the subjective aspect inherent in the rule was a serious drawback. In the end, he had expressed readiness to accept the notion of state of necessity, which indeed had the backing of State practice, although he emphasized that there still remained the problem of what criterion should be adopted to measure the seriousness of the threat and to assess the interests involved, and notably to determine which should prevail. Mr. Yankov shared his (Mr. Ago's) view that the plea of necessity was inadmissible in the case of important obligations,

though it would be a mistake to try to define what those obligations, taken separately, were.

32. When codifying the law of treaties, the Commission had stressed that the concept of imperative rules was constantly evolving. A rule that was imperative at one moment might cease to be imperative later, and vice versa. It was accordingly better to rely on safe examples than to lay down rigid definitions. Mr. Yankov had even questioned whether the rule *pacta sunt servanda* was not an imperative rule of international law which a State should not be able to evade by pleading necessity. That was not his (Mr. Ago's) view, for Mr. Yankov's line of reasoning would lead to the conclusion that in no case where a treaty obligation was involved would it be possible to plead state of necessity—which would be going too far.

33. Mr. Yankov had cited a number of examples of obligations, including the interesting one of a country that was forced to close its frontiers, in violation of an international obligation, in order to prevent the spread of an epidemic. Mr. Yankov had added that the Commission should pay due regard to the stability of the international legal order, should not adopt categorical positions and should proceed with the greatest caution in continuing its work on the draft articles.

34. Mr. Jagota (*ibid.*) had approved the article under consideration after a searching analysis of the subject and after mature reflection. As he saw it, state of necessity could only be invoked as a circumstance precluding wrongfulness if all of the conditions indicated were fulfilled. In commenting on that view he (Mr. Ago) felt constrained to repeat what he had said in connexion with Mr. Yankov's position: he could not share Mr. Jagota's point of view that the conditions were so numerous that they could probably never all occur simultaneously. In reality, the conditions (not so numerous, in the end) were essential; they had to be present, not in order to impede the application of the rule, but in order to avoid abuses. Mr. Jagota had also wondered what conclusion should be drawn regarding a series of facts constituting non-observance of the obligation not to resort to the use of force although they did not constitute an act of aggression or an armed attack.

35. In addition, Mr. Jagota had inquired who would adjudicate possible disputes. The problem was not a new one: it could arise in connexion with the application of all the draft articles. In some cases, a dispute might arise between States bound by a compulsory jurisdiction clause. In other cases, the States in question would simply need to comply with the provisions of the Charter of the United Nations relating to the peaceful settlement of disputes. The problem might arise in an acute form in connexion with some cases where state of necessity was pleaded, but that was no reason for dealing with it in article 33.

36. Mr. Barboza (1617th meeting) had mentioned the abuses to which the concept of state of necessity had given rise and had also stressed the limitations which made the concept acceptable. With regard to the subjective aspect of the rule, he had stressed that in case of disagreement on the assessment of a situation, an objective assessment was always possible. Mr. Barboza had rightly stressed the flexibility given to international law by the application of the concept of state of necessity, and emphasized that the effect of the article under consideration was to preclude responsibility for wrongful acts rather than mitigate it.

37. Although Mr. Tsuruoka (*ibid.*) had approved the main lines of article 33, he had nevertheless drawn attention to a number of subjective aspects which could not be removed. He had counselled caution, weighed the merits of the verbs "contributed to" and "caused by" and referred to the question of compensation, and in that connexion, had proposed the addition of a paragraph 4 to article 33. He (Mr. Ago) believed that the additional provision might be introduced in a separate article stipulating that the various circumstances which precluded wrongfulness did not prejudge the obligation to make good any damage.

38. Finally, the Chairman, speaking as a member of the Commission, had pointed out that Roman law had recognized the concept of state of necessity. He had also mentioned article 142 of the draft convention on the law of the sea. The object of that provision was that application of an excuse of necessity to the obligations set forth in the text should not be precluded; it was drafted along the lines of Article 51 of the Charter of the United Nations. In his (Mr. Ago's) opinion, rather than a purely conventional disposition of acceptation of principle, it was a reminder and a reaffirmation of the existence of the principle of state of necessity in general international law. However, Mr. Pinto had expressed some doubts and some fears. In that connexion, he (Mr. Ago) stressed that the Commission's task was precisely to ensure that necessity could only be invoked to preclude wrongfulness if the necessity was established conclusively.

39. In general, the discussion had shown that the Commission approved of the inclusion of article 33 in the draft, and seemed prepared to request the Drafting Committee to try to work out a generally acceptable text.

40. The dangers which had been mentioned should not be overestimated. If the application of the plea of necessity was subordinated to strict conditions, those dangers would be seen to be less formidable. The Commission had managed perfectly well to avoid the similar dangers of other circumstances which precluded wrongfulness.

41. Nor should the possible difficulties of the interpretation of the concept of essential interest be exaggerated. In most cases, it was not even a question of waiting to determine whether or not an interest was essential and whether or not it prevailed over another

less essential interest. In the "*Torrey Canyon*" case it had not been necessary to ask if Great Britain's interest in avoiding serious pollution of its coast really took precedence over the flag State's interest in avoiding the destruction of the wreck.

42. As to practice he noted that, taken as a whole, the cases could be divided into two categories. In some cases, the state of necessity had not ultimately been recognized, but the parties or judges had recognized the validity of the principle. In others, the parties or the judge had found that the conditions for the existence of a state of necessity had existed. Thus, in the *Russian indemnity* case (see A/CN.4/318/Add.5–7, para. 22) both parties had admitted that, if the situation of the Ottoman Empire had been such as its Government described, state of necessity could have justified the debtor State's refusal to fulfil its obligation to pay a certain sum at a given moment. In the *Société Commerciale de Belgique* case (*ibid.*, paras. 28 *et seq.*) the existence of conditions of applicability of state of necessity was recognized by the parties.

43. One member of the Commission had inquired whether a rule which apparently favoured the developing countries might not turn to their disadvantage, since they might be inclined to invoke an excuse of necessity in order to avoid paying their debts, which would impair their creditworthiness. He (Mr. Ago) pointed out that unwillingness to pay a debt was not enough to support the plea of state of necessity: the situation had to be one of extreme peril.

44. Referring to other cases mentioned in his report, he said that in the case of fur seal fisheries off the Russian coast (*ibid.*, para. 33), the measures taken by the Russian Government would normally have been unlawful, but in the absence of such measures an ecological disaster would have occurred, which would have prejudiced not only Russia's interests but also those of the other States concerned. The preclusion of wrongfulness was therefore entirely justified. In the case of properties of the Bulgarian minorities in Greece (*ibid.*, para. 32), as in the General Company of the Orinoco case (*ibid.*, para. 39), it had not been necessary to apply any pre-established criterion of comparison for the purpose of determining which interest should take precedence and the applicability of the plea of necessity was accepted. In all those cases, therefore, no subjective aspect had complicated the situation. The importance and frequency of the difficulties which might arise out of some subjective elements should not, therefore, be exaggerated.

45. With regard to the drafting of article 33, he said that a negative formulation might give more force to the rule. However, the positive formulation would have the virtue of conforming to that of the other articles in chapter V of the draft; furthermore, in that drafting, it was a negative formulation which was employed for the exception to the obligations created by peremptory norms. That was a question which the Drafting Committee should examine in the light of specific proposals.

46. So far as *jus cogens* was concerned, he said it would be wrong to think that the only possible example was aggression. No State could invoke a state of necessity to justify its committing genocide, or apply a policy of *apartheid*, etc. All the rules of *jus cogens* acted as a bar to the plea of state of necessity. As regards the use of armed force falling short of aggression, he said that, admittedly, his proposal was perhaps somewhat cautious, but was it really arguable that some of the prohibitions mentioned by members of the Commission formed part of the existing *jus cogens*? There were, of course, forms of behaviour involving the use of force in another State's territory which were clearly covered by *jus cogens*, but in other less clear-cut cases, surely it would be going too far to deny the admissibility of the plea of necessity altogether. To go that far would prevent a State from entering the territory of another State to remove a danger of fire on its own territory. The Commission had the choice between the cautious solution he had proposed and a yet more cautious, but perhaps extreme solution.

47. Some members of the Commission had asked what would happen if the Commission refrained from mentioning the state of necessity. Would its silence mean that the notion of state of necessity was inoperative in international law? Since state of necessity was recognized in all legal systems, the Commission's silence might, on the contrary, have the effect of allowing the concept to play a dangerous role, whereas by recognizing it the Commission could fix strict limits. In any case, by failing to take a clear decision on state of necessity, the Commission would only be rendering a disservice to the cause of international law.

48. The CHAIRMAN suggested that draft article 33 should be referred to the Drafting Committee.

It was so decided.[6]

The meeting rose at 1 p.m.

[6] For consideration of the text proposed by the Drafting Committee, see 1635th meeting, paras. 42–52.

1619th MEETING

Wednesday, 25 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. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.