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Summary record of the 1532nd meeting

Topic:
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20. Mr. TABIBI nominated Mr. Pinto.

21. Mr. TSURUOKA and Mr. JAGOTA seconded the nomination.

Mr. Pinto was unanimously elected first Vice-Chairman.

22. Mr. PINTO thanked the members of the Commission.

23. The CHAIRMAN invited nominations for the office of second Vice-Chairman.

24. Mr. FRANCIS nominated Mr. Díaz González.

25. Mr. REUTER and Mr. TSURUOKA seconded the nomination.

Mr. Díaz González was unanimously elected second Vice-Chairman.

26. Mr. DÍAZ GONZÁLEZ thanked the members of the Commission.

27. The CHAIRMAN invited nominations for the office of Chairman of the Drafting Committee.

28. Sir Francis VALLAT nominated Mr. Riphagen.

29. Mr. REUTER seconded the nomination.

Mr. Riphagen was unanimously elected Chairman of the Drafting Committee.

30. Mr. RIPHAGEN thanked the members of the Commission.

31. The CHAIRMAN invited nominations for the office of Rapporteur.

32. Mr. THIAM nominated Mr. Dadzie.

33. Mr. SCHWEBEL, Mr. JAGOTA and Mr. USHAKOV seconded the nomination.

Mr. Dadzie was unanimously elected Rapporteur.

Adoption of the agenda (A/CN.4/316)

The provisional agenda (A/CN.4/316) was adopted unanimously.

The meeting rose at 5 p.m.

1531st MEETING

Tuesday, 15 May 1979, at 11.30 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Organization of work

1. The CHAIRMAN said that, in the absence of sufficient information about all the items on the agenda, the Enlarged Bureau was not yet in a position to recommend a general programme of work for the current session. The Bureau's only recommendation so far was that the Commission should first consider the topic "State responsibility". Since the election of Mr. Ago, Special Rapporteur on that topic, to the International Court of Justice at the thirty-third session of the General Assembly, a communication had been addressed to the President of the Court to inquire whether Mr. Ago would be able to introduce his eighth report, relating to the final articles of part I of the draft on State responsibility, and comment thereon in the Commission. By letter dated 12 March 1979, the contents of which had been brought to the attention of the Commission's members, the President of the Court had signified his consent, subject to certain conditions, in particular the condition that Mr. Ago would participate in the Commission's deliberations in his individual and personal capacity.

2. The Enlarged Bureau further recommended that the first three weeks of the session should be used for considering the relevant documents submitted by the Special Rapporteur and already circulated (A/CN.4/318 and Add.1–3) and that another addendum, to be circulated later, should be considered during one week early in July.

3. In the absence of objections, he would take it that the Commission agreed to accept those recommendations and to invite Mr. Ago to attend as from the next meeting to introduce and comment on his report.

It was so decided.

The meeting rose at 11.45 a.m.

1532nd MEETING

Wednesday, 16 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

Status of members of the Commission

1. Mr. SUY (Under-Secretary-General for Legal Affairs) recalled that at its previous session the Commission had expressed the wish that the Secretary-General

should approach the Swiss authorities for the purpose of obtaining an improvement in the status of the members of the Commission.

2. Early in the autumn of 1978, he had had a conversation with the Permanent Observer of Switzerland to the United Nations, who had promised to put the question to the Swiss authorities. A few weeks later, he had received the visit of two officials of the Federal Political Department, to whom he had voiced the concern of the Commission's members and who had left him with the impression of being favourably inclined to the idea of improving the members' status. In February 1979, the Permanent Observer of Switzerland to the United Nations Office at Geneva had informed him that the Federal Political Department had proposed to the Federal Council that the members of the Commission should be eligible for the same privileges and immunities as heads of diplomatic mission accredited in Geneva; but that proposal had still to be considered by other departments.

3. He had just been informed by the Permanent Observer of Switzerland to the United Nations office at Geneva of the decision taken by the Federal Council on 9 May 1979, the text of which was contained in a communiqué addressed to the Secretary-General and which read:

On the proposal of the Federal Political Department the Federal Council decided on 9 May 1979 to accord, by analogy, to the members of the International Law Commission, for the duration of the Commission's sessions at Geneva, the privileges and immunities to which the Judges of the International Court of Justice are entitled while present in Switzerland. These are the privileges and immunities enjoyed by the heads of mission accredited to the international organizations at Geneva. The members of the International Law Commission will be entitled to a special red identity card.

4. The CHAIRMAN thanked Mr. Suy for the efficiency with which he had acted since the previous session. The status of the members of the Commission was of special importance owing to the duration of the Commission's sessions. The way in which the problem had been settled would certainly give the members of the Commission full satisfaction. The decision of the Federal Council, to which he expressed the Commission's sincere thanks, was further evidence of the constructive co-operation between Switzerland and the United Nations, which, in the particular case, served the cause of the codification and progressive development of international law.

State responsibility (A/CN.4/318 and Add.1–3)
[Item 2 of the agenda]

Draft articles submitted by Mr. Ago

Article 28 (Indirect responsibility of a State for an internationally wrongful act of another State)

5. The CHAIRMAN congratulated Mr. Ago on his election to the International Court of Justice and expressed his thanks to the Court for having authorized Mr. Ago to participate in the Commission's deliberations on State responsibility—evidence of the Court's wish to continue to co-operate with the Commission in the codification and progressive development of international law.

6. He invited Mr. Ago to introduce the part of his eighth report on State responsibility (A/CN.4/318 and Add.1–3) dealing with the indirect responsibility of a State for an internationally wrongful act of another State (A/CN.4/318), and more specifically article 28 (*ibid.*, para. 47), which was drafted in the following terms:

Article 28. Indirect responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is not in possession of complete freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not entail the international responsibility of the State committing the wrongful act but entails the indirect international responsibility of the State which is in a position to give directions or exercise control.

2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not entail the international responsibility of the State which acted under coercion but entails the indirect international responsibility of the State which exerted it.

7. Mr. AGO said that in introducing his eighth report on State responsibility his intention had been to comply with the Commission's request, made at its thirtieth session, that he should supplement part I of the draft articles on State responsibility.

8. He recalled that chapter IV, which dealt with the implication of a State in the internationally wrongful act of another State, covered two possible situations. The first, described in section 1,[1] which the Commission had considered at its thirtieth session and which was the subject of article 27, was usually called "complicity" of a State in the commission by another State of an internationally wrongful act—in other words, the case where a State, without necessarily itself committing an internationally wrongful act, was a party to an internationally wrongful act committed by another State by giving aid or assistance to that other State for the commission of the act. The second situation, described in section 2 (A/CN.4/318 and Add.1–3, paras. 1 *et seq.*), which the Commission was about to consider and which was the subject of article 28, was that of the indirect responsibility incurred by a State for the internationally wrongful act of another State—in other words, the case where a State without being a party to the internationally wrongful act of another State in the form of providing aid or assistance for the commission of the act, found itself, in relation to that other State, placed in a situation in which the responsibility arising out of the internationally wrongful act committed by that other State was laid at its door.

[1] See *Yearbook... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, paras. 55 *et seq.*

9. In that connexion, referring to the principle laid down in article 1 of the draft,[2] namely, that "every internationally wrongful act of a State entails the international responsibility of that State", he recalled that the Commission had explained in its commentary that that was a general rule applicable to the "normal situation", but that there might be "special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed", and had added that those exceptional cases would be covered later in the draft.[3] The time had come to deal with those cases in the framework of the chapter on the implication of a State in the internationally wrongful act of another State.

10. It had taken a long time for the concept of indirect responsibility to crystallize in legal literature, for the expression "indirect responsibility" had often been misused in the past to describe various situations which in fact involved direct responsibility, for example the responsibility incurred by a State in connexion with acts of private persons or acts committed by agencies that were not competent.

11. The concept of "indirect" responsibility, or of responsibility for the "act of another", raised a twofold problem. It was necessary to define that concept in the light of an examination of cases where there was attribution of responsibility to a party other than that to which there was attribution of the internationally wrongful act, and to produce a justification for that exceptional occurrence.

12. The first writer to undertake to justify the existence of responsibility for the act of another in international law had been Anzilotti, who had referred in particular to the relations of dependence of one State on another. He had thought that such justification was to be found in the existence, in those relations, of a relationship of international representation.[4] According to Anzilotti, the State which undertook to represent another State internationally was answerable for the internationally wrongful acts committed by that other State, for, inasmuch as the represented State entertained no direct international relations, a third State which had suffered some injury could not apply directly to that State for the purpose of obtaining reparation. Logically, therefore, the international responsibility for wrongful acts committed by the represented State was attributable indirectly to the representing State.

13. That theory had been accepted for a number of years, but had then been criticized by some authors, who had argued that, while according to the system of international representation a State injured by the internationally wrongful act committed by the represented State could apply to that State solely through the representing State, that was no reason why the representing State should be held answerable for the wrongful act in place of the represented State. The injured State could very well lay before the representing State the direct responsibility of the represented State, and not the indirect responsibility of the representing State, for the represented State's wrongful act. The attribution to one State of responsibility for an act committed by another State therefore had to be justified on grounds other than international representation.

14. Verdross had sought to justify Anzilotti's theory by reference to State practice and, in particular, by reference to the ruling of Judge Huber in the *British Claims in the Spanish Zone of Morocco* case, from which he had singled out the sentence which said that "the responsibility of the protecting State arises from the fact that it alone represents the protected territory in its international relations", and that the protector was answerable "in place of the protected State".[5] In reality, however, Judge Huber had not intended in his ruling to justify the protector's responsibility for the act of the protected on the grounds that the former had representation of the latter, but on the grounds of what actually occurred in the protectorate relationship. He had observed that in most cases that relationship entailed so great an interference by the protecting State in the internal affairs of the protected State that the protecting State appeared to be almost sovereign in the territory of the protected State. It was therefore logical to attribute to the protecting State responsibility for acts committed in that territory, the organs of the protected State being no more than decentralized organs of the protecting State. Verdross's attempt to find a basis for Anzilotti's theory in international jurisprudence and practice had thus been unsuccessful.

15. During the subsequent evolution of doctrine, the theory of representation had thus been abandoned, and the basis for indirect responsibility had instead been sought in the very nature of certain relations existing between two States. The point of departure taken had been the observation that indirect responsibility arose in cases where there was a relationship of dependence of one State on another (vassalage, protectorate, mandate, etc.). The question had then arisen whether a relationship of dependence between States always, as such, entailed the responsibility of the dominant State for the internationally wrongful acts committed by the dependent State, or whether such an effect must be limited to the existence, in the framework of that relationship, of certain specific conditions. And it had been asked what could be the justification for the responsibility in question.

16. Initially, it had been thought that responsibility for the act committed by another State could be founded on practical considerations. According to the "Schutztheorie", the dominant State should be held answerable for the internationally wrongful acts of the

[2] For the text of all the draft articles adopted so far by the Commission, see *Yearbook... 1978*, vol. II (Part Two), pp. 78 *et seq.*, document A/33/10, chapter III, section B, 1.

[3] *Yearbook... 1973*, vol. II, p. 178, document A/9010/Rev.1, chapter II, section B, article 1, para. (11) of the commentary.

[4] See A/CN.4/318 and Add.1–3, para. 5.

[5] *Ibid.*, para. 8.

dependent State, on the grounds that third States that had suffered injury might, in resorting to coercive measures against the dependent State in order to obtain reparation, encroach on the rights and interests of the dominant State and even oblige it to intervene to protect the dependent State. Making the dominant State answerable for acts of the dependent State would be, as it were, a necessary measure to safeguard the interests of the dominant State. A variant of the "Schutztheorie" appeared in the argument of Verdross, who had justified the concept of indirect responsibility on the grounds that recourse by the injured State to enforcement measures against the dependent State would constitute inadmissible interference in the legal sphere of the dominant State.[6]

17. In 1928, Eagleton had drawn attention to the connexion between the responsibility and the freedom of decision and of action of the State that committed an internationally wrongful act. In Eagleton's opinion, "responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control or, conversely, the actual amount of control left to the respondent State".[7] Consequently, the existence of responsibility on the part of one State for another State's internationally wrongful act was bound up, in Eagleton's opinion, with the existence of some control exercised by the former over the activities of the latter. Thus, in relations like those existing in the case of a protectorate, the protecting State could not be held answerable for the breach of an international obligation on the part of the protected State except in so far as it had control of that State. As early as 1883, F. de Martens had expressed the same idea when he had written that logic and equity would require that States that were in a situation of dependence should be "responsible for their actions towards foreign Governments only in proportion to their freedom of action".[8] The modern theory of indirect State responsibility had evolved on those lines.

18. In cases where there was a relationship of dependence between two States, a distinction should in fact be drawn between two possible situations. The first situation was that where the interference of one State in the affairs of the other implied a substitution of the former for the latter in certain areas; in such a situation the dominant State's agencies were operating in the territory of the dependent State. If, therefore, a breach of an international obligation of the dependent State were committed in the framework of such a sphere of activity (for example, denial of justice in the territory of the protectorate by the judicial authorities directly subordinate to the protecting State), not only was the dominant State responsible, but it was directly responsible, for its responsibility flowed directly from the activities of its own agencies.

19. The second situation was that where a dependent State continued to act in certain areas through its own agencies, but where those agencies were not free in that they were subject to the control of the dominant State. Only in that situation was it truly possible to speak of responsibility attributable to the act of another, or indirect responsibility, since the internationally wrongful acts committed by the organs of the dependent State in the exercise of an activity of the dependent State were committed by that State, and not by the dominant State which assumed responsibility for them. It was logical, however, that responsibility for those acts should be borne by the dominant State if the sphere of activity in which the said acts had been committed was under the direction or control of the dominant State.

20. On the other hand, indirect responsibility could occur not only in relations of dependence that were becoming obsolete, such as protectorates, but also in other situations, in particular military occupation. A State under military occupation retained its international sovereignty, but the interference of the occupying State in the internal affairs of the occupied State limited the latter's freedom of action. The occupying State must therefore be regarded as indirectly responsible for an internationally wrongful act committed by the occupied State in a sector of activity in which the latter State was subject to the direction or control of the occupant. Similarly, in the case of temporary dependence of one State on another resulting not from the existence of a stable and permanent relationship but, for example, from a specific act of coercion, the State that forced another State to commit an internationally wrongful act could be regarded as indirectly responsible for that act.

21. It was less certain whether a federal State should be held internationally responsible for the act of one of its constituent States, for only very rarely was a constituent State of a federal State a separate subject of international law. If it was not, then the federal State was directly answerable for the act of the constituent State, as for the acts of any other public collectivity in its territory. Only if the constituent State possessed its own international capacity could the question arise.

22. The last question was whether indirect responsibility was an exclusive responsibility or whether the responsibility of the controlled State coexisted with that of the controlling State.

23. The analysis of international practice confirmed the conclusions reached by most authors in their most modern pronouncements. In its answer to the request for information made by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930), Denmark had very pertinently remarked that the reply to the question depended "upon the nature of the relations between the two States, the extent and character of the control exercised by one State over the administration of the other State, and the degree of autonomy left to the subordinate or protected State".[9]

[6] *Ibid.*, para. 15.

[7] *Ibid.*, para. 17.

[8] *Ibid.*, foot-note 33.

[9] *Ibid.*, para. 30.

24. In cases of military occupation, the experience of the Second World War had also confirmed the distinction to be drawn between two possible situations: a situation in which the occupying State merely supervised the activities of the occupied State, and a situation in which the occupying State replaced some of the occupied State's organs by its own organs for the purpose of ensuring the safety of its armed forces or for the purpose of maintaining public order, if the occupied State was unable to do so itself. Practice had confirmed that, in a situation of the first type, an internationally wrongful act committed by an organ of the occupied State entailed the indirect responsibility of the occupying State, and that, in a situation of the second type, such an act entailed the latter's direct responsibility. Control was thus the true criterion of responsibility for the act of another in international law.

25. As for the question whether or not the indirect responsibility of the "controlling" State excluded the direct responsibility of the "controlled" State, he thought that the former should normally exclude the latter. Article 28 should therefore, in his view, state that responsibility for the act of another originated in the control exercised by one State over another State, and that such responsibility, normally at least, was exclusive in nature.

26. Mr. USHAKOV wished to ask Mr. Ago three questions. First, did the article under discussion deal with situations that were lawful or that were unlawful under modern international law? Secondly, could the relationship between the constituent members of a federation and the federal State be said to be a relationship of dependence and, if so, by what rule of international law? Thirdly, what was the connexion between the article under discussion and article 2 of the draft, under which "every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility"?

27. Mr. AGO, answering the first question, said that the situations contemplated might be either lawful or unlawful. Military occupation might be lawful in some cases but unlawful in others. Unlawful situations of dependence were fortunately tending to disappear, but the possibility that some of them might reappear could not be excluded. A case where coercion was used normally implied an unlawful situation. However, the fact that such a situation was unlawful was certainly not a reason for denying that the State resorting to coercion should be held internationally responsible for the act of the State subjected to coercion. In such a case, the unlawfulness of the coercion was an element that tended rather to corroborate, from the standpoint of simple justice, the responsibility of the coercing State. In the final analysis, there was little point in inquiring whether a particular situation was or was not lawful: what mattered was the consequence of the situation.

28. With regard to Mr. Ushakov's second question, he wished to dispel any possible misunderstanding: if, in a federal State, a constituent State had retained a certain international personality and committed an internationally wrongful act, the situation might exceptionally be one of responsibility for the act of another, but it was certainly not a situation of dependence.

29. Mr. Ushakov's third question concerned the connexion of the article under discussion not only with article 2 but also with article 1. The first two draft articles laid down the fundamental rules. In drafting article 1, under the terms of which "every internationally wrongful act of a State entails the international responsibility of that State", the Commission had considered whether it might not be preferable to state that such an act entailed *a* responsibility, inasmuch as it was conceivable, in exceptional cases, that some other State's responsibility might be entailed. But it had preferred to lay down the general rule and to refer to possible exceptions in its commentary to the article. The same problem had arisen in connexion with article 2, according to which "every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility". In exceptional circumstances it might happen that a dependent State's decion-making power was limited in certain areas, and that an internationally wrongful act committed by it in one of those areas entailed the indirect responsibility of the dominant State.

30. He wished to make some further remarks to supplement his presentation of article 28. As he had said, and although he had argued otherwise in some of his writings, he was now inclined to defer to the prevailing opinion of learned writers that a State had exclusive indirect responsibility for the internationally wrongful act of another State if it had influenced the latter's decision-making power. In fact, learned writers had not expressed a very clear-cut opinion on that point, nor did the practice of States offer any enlightenment in support of a definitive position; accordingly, were the Commission to take the view that there could be coexistence of the two responsibilities, he would accept that view. It should be pointed out that the Commission was bound neither by the opinion of learned writers nor by State practice, and that it was free to promote the progressive development of international law.

31. Mr. REUTER said that Mr. Ago had cleared the ground and had discussed a number of legal mechanisms that did not have to be considered by the Commission and that would not have to be taken into account in the article under discussion. Very constructively, Mr. Ago had also offered certain options and even voiced some doubts for consideration by the members of the Commission.

32. The expression "indirect responsibility", which Mr. Ago, like many authors, had used, was not very satisfactory; but the expression "responsibility for the act of another" was hardly more appropriate in international law. Perhaps that was the difficulty that had given rise to Mr. Ushakov's second question; was the

concept of responsibility for the act of another really acceptable at the international level?

33. The subject-matter dealt with by Mr. Ago touched on a large number of possible situations, in each of which there was one victim and at least two States were implicated in an internationally wrongful act. One of the theories not to be accepted, as Mr. Ago had shown, was the "representation theory"—a theory which was still vague but which, in any case, was out of place in the draft. Another case that should be disregarded was that where two States had lawfully apportioned competence among themselves. It was immaterial that in the case of such an apportionment within a federal State there was also a case of representation. The Commission had already laid down the rule that the conduct of an agency of the State, whatever its position in that State's internal organization, was deemed to be the act of that State.

34. Among the other situations to be disregarded were those which, in his opinion, were reminiscent more of a real union than of the protectorate. An example was the case of the relationship between Switzerland and Liechtenstein, but there were also other economic unions of two States. In such cases the rule was simple: each State was answerable for its own acts. Theoretically the same ought to have been true of the case of a protectorate if it had operated in its genuine legal form—which had not very often been the case.

35. In theory at least, there should be no problem in the case of a *de jure* situation, even if a military occupation was involved, in which case the occupying authorities and the authorities of the occupied State could act within the limits of their competence as recognized by international law. But there were also *de facto* situations. For example, in consequence of the conclusion of the Treaty of Fez (1912) concerning the French protectorate in Morocco, France had performed certain actions in that country which had given rise to a *de facto* situation. He thought that the existing draft articles should probably be supplemented by provisions dealing with the consequences flowing from *de facto* situations.

36. *De facto* situations could be of various kinds. For example, a State might exert coercion against another State, but it could happen that there were not even two States involved. For instance, if in a territory under its control a State set up a puppet State having the mere semblance of a State, it was for the other State to determine whether that puppet State had or had not a real existence. It had such an existence in the eyes of any State that recognized it, whereas in the eyes of the other States the original State was answerable for the newly created State's actions at the international level. It was not necessary for the Commission to deal with such a case, because it was governed by the international rules concerning the recognition of States.

37. As far as military occupation was concerned, he recalled that a large part of France had been occupied by German troops in 1940, but that the French State had continued to exist, with a government which for a number of years had been the only one to be recognized by some other States. In the northern zone, French and German authorities had coexisted and it was perfectly conceivable that the French authorities, under the pressure of the German authorities, had committed some internationally wrongful acts for the purpose of safeguarding legitimate interests. By reason of the continuing existence of the French State—and despite what successor governments had said—it was arguable that the existing French State had a share of responsibility in the commission of those acts. Situations of that kind were not beyond the scope of the general principles laid down in the draft articles already adopted. For the time being, the Commission was not concerned with determining whether two States could be regarded as joint parties to a wrong or as jointly answerable for a wrong, but it would have to consider a serious question of attribution.

38. His personal view was the following. Article 9 of the draft dealt with the reverse *de jure* situation, where a State had placed one of its organs at the disposal of another State. In the case where a State in fact took over the control of an agency of another State, the rule proposed by Mr. Ago was acceptable. However, provision should also be made for the case where all that happened was that a degree of influence, supervision or dominance was exerted on another State. In his opinion the general principles should be respected. Articles of general scope would suffice, although the special case of total *de facto* control would certainly have to be mentioned. In most cases, moreover, there was an intermediate situation, and that situation, therefore, should either be dealt with in a separate article or some reference to it should be made so that it could be considered at the time when the Commission dealt with such matters as complicity and compensation.

39. Mr. SCHWEBEL also wished to congratulate Mr. Ago on a characteristically erudite and perspicacious report.

40. In essence he fully agreed with the views expressed by Mr. Ago. However, in foot-note 99 of Mr. Ago's report, it was suggested that "coercion" should be understood in the sense in which the term was accepted in the United Nations system. It was perfectly understandable that the Commission might not want to consider the term in any depth, but the sense in which it was accepted in the United Nations system was somewhat vague and contradictory. Legal doctrine was not clear on that point and perhaps its least ambiguous expression was to be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[10] Yet the terms of the Declaration itself were not particularly clear and, even if doctrine could be

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

said to be set out in the Declaration, State practice conspicuously failed to conform to doctrine. The question arose what value could be placed on doctrine when practice conflicted with it. Almost every day the newspapers reported cases of the application of coercion to a State that had lately acted in accordance with the most obvious norms of the Charter, but the United Nations none the less failed to respond by way of condemnation.

41. A more important point was whether the responsibility of the dominant State should be exclusive or joint and several. Mr. Reuter had already offered a striking example. Yet another was one in which, for instance, State A was partly occupied and substantially controlled by State B and unlawful assaults on the territory of State C were mounted from the territory of State A. State A was unable to control those assaults and State B was unwilling to control them, although it might have the ability to do so. In that case, was State C obliged to invoke the responsibility of State B alone, and was State A to be exonerated solely because State B was in a position, in the last analysis, to control the ultimate decisions, but not necessarily all the daily decisions, of State A? His own preference would be to favour the development of the law and cast the draft article in terms that would admit joint and several, rather than exclusive, responsibility.

42. Lastly, paragraph 1 of the proposed article seemed to be unnecessary and he wondered whether in fact it endeavoured to say something that was not said in paragraph 2.

The meeting rose at 1 p.m.

1533rd MEETING

Thursday, 17 May 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

Communications from former members of the Commission

1. The CHAIRMAN read out the text of two messages sent to the Commission by Mr. Sette Câmara and Mr. El-Erian, respectively, wishing it all success in the work of the session, and more generally in its work on the codification and progressive development of international law in the cause of international peace and co-operation.

2. He would not fail to reply to those messages and to wish the senders, on behalf of the Commission, every success in their new functions as members of the International Court of Justice.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3)

[Item 2 of the agenda]

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

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)[1] (*continued*)

3. Mr. VEROSTA said that, before studying the eighth report on State responsibility (A/CN.4/318 and Add.1-3), he had taken note of draft article 28, of which paragraph 1 alone called for four comments on his part.

4. First, by envisaging the case of a State which "is not in possession of complete freedom of decision", that provision implied that some States did have such freedom, which was hardly realistic. Even in the case of individuals, the notion of freedom of the will raised many philosophical and moral problems. In the case of a State, decisions were made by State agencies. Of course, in principle, freedom of will and freedom of action did exist, but those freedoms were limited, even for the agencies and political leaders of the great Powers, by considerations of internal policy, the economic order or international relations. Furthermore, the expression "complete freedom" denoted 100 per cent freedom. What would happen if a State which had retained 50 per cent of its free decision-making power did not exercise it in order to forestall the commission of an internationally wrongful act? Would it be exempt from international responsibility altogether?

5. Secondly, it was no doubt difficult to determine, in practice, at what point a State was "subject, in law or in fact, to the directions or the control of another State". The subordination in law of one State to another occurred mainly in the case of protectorates and other similar régimes established by treaty. Generally, subjection to the directions of the dominant State raised the question of the good or bad will shown by the subordinate State in the application of those directions. For example, Nazi Germany had directed the States dominated by it to persecute Jews and Gypsies, but the direction had been very diversely applied. Whereas Slovakia had managed for a long time to protect the Jews and the Gypsies, and Bulgaria had

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[1] For text, see 1532nd meeting, para. 6.