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A/CN.4/L.290

**Draft articles on State responsibility: text of article 28 proposed by Mr. Jagota - reproduced in
A/CN.4/SR.1535, para. 16**

Topic:
State responsibility

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cited by Mr. Ago (A/CN.4/318 and Add.1-3, para. 41), the British Government had declined to accept any responsibility for compensation arising out of destruction of the company's properties in Romania and the United States Government had finally agreed to address its claim to the Romanian Government, which in turn had agreed to assume responsibility for the acts committed by its own organs. The case showed that the victim was not necessarily left with no recourse if responsibility were confined solely to situations involving the use of force or control by another State. Again, it was possible to envisage cases in which one State received instructions from another but exceeded those instructions. Obviously, in such instances the State in receipt of the instructions could not be entirely absolved from responsibility.

16. In the light of all those considerations he proposed two variants for article 28 (A/CN.4/L.290), which did not, however, affect the substance of the text proposed by Mr. Ago:

“Variant A

“An internationally wrongful act committed by a State which must submit, in law or in fact, to the directions, control or coercion of another State, does not, but only to the extent of the limitation on its freedom of decision, entail the international responsibility of the State committing the wrongful act; instead it entails the international responsibility of the State under whose directions, control or coercion such wrongful act was committed.

“Variant B

“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, but only to the extent of this limitation, entail the international responsibility of the State committing the wrongful act; instead it entails the international responsibility of the State under whose direction or control such wrongful act was committed.

“2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not, but only to the extent of this limitation, entail the international responsibility of the State which acted under coercion; instead it entails the international responsibility of the State under whose coercion such wrongful act was committed.”

17. With regard to the placing of articles 27 and 28, he pointed out that those articles did not extinguish the internationally wrongful act; they simply established additional responsibility or provided for the transfer of responsibility. Consequently, their rightful context was clearly part I of the draft, for the internationally wrongful act was still the point of reference in determining State responsibility. They should not be shifted to chapter V, which would deal with exemptions, i.e.

circumstances which precluded wrongfulness. The choice therefore would be either to leave articles 27 and 28 to constitute chapter IV or to ally them in some way with articles 9 and 12, which dealt with situations of a similar nature and were placed in chapter II of part I. Of course, if it was decided later to alter the underlying concept of exemptions, which were to form the subject of chapter V, it might well be found appropriate to place the two articles in that chapter. Nevertheless, the matter did not require attention immediately and could well be decided later by the Drafting Committee.

18. The CHAIRMAN, speaking as a member of the Commission, said that article 28 would have to be drafted in more explicit terms, so as to answer the questions raised in the course of the debate, in particular with regard to the nature and degree of the responsibility referred to in that provision.

19. With regard to the justification for the presence of article 28 in the draft, he considered that the Commission had the duty to draft a provision that would be applicable in the various situations envisaged, for such situations did occur in international affairs. Both relationships of dependence and coercion existed and would probably continue to exist for a long time to come. Moreover, although sovereign and equal, States were living in a world of interdependence.

20. It was also important to take account of positive international law, as Mr. Riphagen had shown by emphasizing the relationship between fact and law. The Commission should therefore base its deliberations on the United Nations Charter, since the terms of the Charter offered the decisive test for saying that a given situation was lawful or unlawful. It would be necessary to formulate precise rules relying on the Charter and on positive international law, as a basis for determining the lawfulness of the situation envisaged. In that connexion, the text of article 28 proposed by Mr. Tsuruoka (A/CN.4/L.289) provided a sound basis for the drafting of language that would fit into the draft as a whole.

21. In one passage in his written presentation of article 28 (A/CN.4/318 and Add.1-3, para. 3), Mr. Ago said that the provision in question was limited to cases in which international responsibility was attributed to a State for an internationally wrongful act committed by another State, and added that

Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future.

In his own view, that reasoning was not very convincing. Since other draft articles spoke of international organizations and insurrectional movements, he doubted that that argument was tenable. Personally, he would prefer the Commission to try to work out solutions for such situations, although he realized that its work would thereby be complicated considerably.