

Document:-
A/CN.4/L.291

**Draft articles on State responsibility: text of article 29 proposed by Mr. Tsuruoka - reproduced in
A/CN.4/SR.1540, para.4**

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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1. State responsibility (item 2)	16 May – 5 June (4 weeks) 13–19 July	
2. Filling of casual vacancies in the Commission (article 11 of the Statute) (item 1)	29 May	
3. Question of treaties concluded between States and international organizations or between two or more international organizations (item 4)	6–12 June (3 weeks) 27 June – 10 July	
4. Succession of States in respect of matters other than treaties (item 3)	13–26 June (2 weeks)	
5. Review of the multilateral treaty-making process (General Assembly resolution 32/48, para. 2) (item 6)	11–12 July	
6. The law of the non-navigational uses of international water-courses (item 5)	20–26 July (1 week)	
7. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (General Assembly resolution 33/139, part 1, para. 5; General Assembly resolution 33/140, para. 5) (item 7)	27 July	
8. Report of the Commission and related matters	30 July – 3 August (1 week)	

2. If there were no objections, he would take it that the Commission agreed to adopt the above programme of work.

It was so decided.

The meeting rose at 11.45 a.m.

1540th MEETING

Monday, 28 May 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

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

Also present: Mr. Ago.

State responsibility (continued) *
(A/CN.4/318 and Add.1–3, A/CN.4/L.291)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

ARTICLE 29 (Consent of the injured State)¹ (continued)

1. Mr. TSURUOKA considered that article 29 truly dealt with the case of the preclusion of the wrongfulness of the act and not with the case of the injured State's waiver of its right to invoke the responsibility of the State committing the wrongful act. For that reason he considered that chapter V of the draft articles was the right context for article 29.

2. As Mr. Ago had said in his report, what was at issue in practice was not the principle that consent was a bar to the charge of wrongfulness; what was at issue was the actual existence of the consent and the validity of the way in which it was expressed. Accordingly, he considered that it would be advisable if the article itself stipulated that the consent must be given validly and expressly.

3. On the other hand, he considered it preferable that the article should not specify that the consent must precede or accompany the conduct, as Mr. Ago had said in paragraph 72 of his report (A/CN.4/318 and Add.1-3), for a provision on those lines might well be inconsistent with the rule laid down in article 25, paragraph 1.² It would be preferable to look to interpretation to settle that question in practice.

4. For those reasons, he proposed a redraft of article 29 (A/CN.4/L.291):

“If it is established that the valid and explicit consent has been given by a State to an act of another State which would otherwise be a breach of an international obligation of the latter State towards the former State, such consent precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory norm of general international law.”

5. Mr. FRANCIS said that under draft article 29 an act that would have been wrongful without a State's consent, could be transformed into a lawful act by virtue of that consent. The question of consent, particularly as it related to the presence of the troops of one State on the territory of another, continued to be a source of misunderstanding; most of the difficulties related to the need for consent to be genuine and validly expressed. However, there had never been any dispute about the general principle that, within certain limitations, a State could sanction a wrong done to it, a principle which, moreover, also had its application in other areas of international relations. It was therefore right and proper that the draft should reflect contemporary practice in the matter.

6. He noted that Mr. Ago, drawing widely on State practice and doctrine, had laid emphasis on the transformation of a wrongful act into a lawful act rather than on the waiver of a claim based on international responsibility. His own approach, initially, had been to test the validity of the terms of draft article 29 by reference to articles 1, 16 and 18. Article 18 provided that, for the act in question to entail the international

* Resumed from the 1538th meeting.

¹ For text, see 1537th meeting, para. 25.

² See 1532nd meeting, foot-note 2.