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Summary record of the 1537th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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in connexion with article 28, greater use would be made of the possibility of commenting on any text that would be produced by the Drafting Committee. Clearly, a number of difficult issues were involved and it was now necessary, in view of the statement by Mr. Jagota, to place on record exactly what the Commission had said on the question of responsibility for superior orders.

39. Principle IV of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal [8] stated that the fact that a person acted "pursuant to order of his Government or of a superior" did "not relieve him from responsibility under international law, provided a moral choice was in fact possible to him". The presumption was that the individual was not relieved of responsibility for what he had actually done, and the reference to "a moral choice" simply qualified a general principle. With regard to sovereign States, the tendency of judicial and arbitral decisions had been to presume that a State was responsible for its own acts, and a very strong case was needed if a State was to be relieved of that responsibility. In his opinion, the point to which the Commission's attention had now been drawn strengthened the case for preserving the responsibility of the State that actually committed the international wrongful act.

40. The clarification by Mr. Jagota gave cause for fresh anxiety, since Mr. Jagota's interpretation very considerably narrowed the scope of the circumstances in which a State other than the State committing the wrongful act might be responsible for the act perpetrated. Moreover, it would still leave in the draft a lacuna that would not be covered by the other articles, particularly articles 5 to 15. He was extremely grateful to Mr. Jagota for drawing attention to the Nürnberg principles, but his conclusions in that regard were frankly different from those reached by Mr. Jagota.

41. Mr. SCHWEBEL said that a further reason for adopting a prudent approach to the interesting distinction suggested by Mr. Jagota in respect of criminal acts was that, in view of the discussion of article 19 which had taken place in the Sixth Committee, the Commission would doubtless wish to be cautious about the treatment of article 19, lest that article should make an impact on other articles of the draft. On second reading of article 19, the Commission would have to consider very carefully the debate in the Sixth Committee and any additional comments by States in order to judge whether the approach taken in article 19 was a viable one. Again, for the fundamental reasons given by Sir Francis Vallat, it was essential to avoid the danger of a lacuna in the set of draft articles.

42. Mr. USHAKOV considered, unlike Mr. Ago, that Morocco should be regarded as a newly independent State within the meaning of article 2, paragraph 1 (*f*), of the 1978 Vienna Convention,[9] namely, as a State "the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible".

43. Mr. REUTER could not agree that the responsibility of the State was comparable to that of the individual. As the Statute of the Nürnberg Tribunal and the Judgment of that Tribunal made clear, leniency must be shown to the individual who had no choice other than suicide. But the position was not the same for a State; the option of suicide was always open to it, which was what made it great. That was why a State which had committed an international crime could not be exonerated, no matter how great the pressure exerted on it.

44. He might concede that, during the Second World War, the Italian police who had resisted when the Italian State had ceased to exist could be said to have acted as an organ of the German State, or that the Vichy French police force had found itself in a position where it ought to have been considered as an organ of Germany. But that was a question of attribution, which should be dealt with in another article. It was conceivable that the officers of the Vichy French police, whose acts of an international character would be attributed to the German State, should be tried according to the principles of the Nürnberg Tribunal for having obeyed orders which they should not have obeyed.

45. As far as shared responsibility was concerned, he found it difficult to agree that one State should be exonerated in the case of an international crime in which two States were implicated. Bringing pressure to bear on a State to commit a certain act was an international crime, but it was another international crime not to resist that pressure, since there was no moral consideration to prevent a State from committing suicide.

The meeting rose at 12.55 p.m.

1537th MEETING

Wednesday, 23 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, 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.

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[8] *Yearbook... 1950*, vol. II, p. 375, document A/1316, part III.

[9] See 1535th meeting, foot-note 4.

State responsibility (*continued*) (A/CN.4/318 and Add.1–3, A/CN.4/L.289/Rev.1, A/CN.4/L.290)

[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] (*concluded*)

1. Mr. JAGOTA, referring to Sir Francis Vallat's statement at the previous meeting, said that he would be grateful if Sir Francis Vallat would explain where a lacuna would occur in the draft if indirect responsibility was defined restrictively in article 28 in such a way that responsibility for an internationally wrongful act was transferred to another State in certain specific instances, namely, when that other State, as a result of its directions, control or coercion, had compelled the State in question to commit the wrongful act. Acts of grave concern to the world community as a whole, like those enumerated in article 19 of the draft,[2] might be mentioned as exceptions to article 28. Consequently, a State committing an act of aggression, even under pressure from another State, could still be held responsible for failing to resist the pressure of that other State. Obviously, all members of the Commission wished a rule to be drafted in terms that would apply in all cases, not creating a lacuna or offering an escape clause for any wrongdoer.

2. Sir Francis VALLAT said that, at the previous meeting, Mr. Jagota had seemed to affirm that the responsibility of the controlling State would be limited to cases in which the State under control had no moral choice in the matter. In his own opinion, limitation of the scope of international responsibility to cases of that kind would create a lacuna. In fact, a lacuna was bound to occur if the responsibility was identified reciprocally, for there was a grey area in which there would be responsibility on the part of the State having the right of control but there would still be room for responsibility on the part of the State committing the internationally wrongful act. Perhaps he had misunderstood both Mr. Jagota and the intention of the article submitted by Mr. Ago, but if that was not the case a lacuna did exist.

3. Mr. JAGOTA wished to make his position perfectly clear, although he still had an open mind on the matter under discussion and would certainly consider any fair and reasonable solution that was suggested.

4. In the light of doctrine and State practice, Mr. Ago had proposed the general rule that an internationally wrongful act of a State entailed that State's international responsibility. Article 27 modified that rule by establishing additional responsibility in the case of aid or assistance rendered by a State to another State for the purposes of committing an internationally wrongful act. Article 28 further modified the rule and shifted responsibility from the State committing the internationally wrongful act to another State which had compelled it to perpetrate the act as a result of directions or control or the use of force or coercion. In those circumstances, the State committing the act did not enjoy independence in its decision-making and, for that reason, the responsibility was transferred to the other State.

5. In his own proposal (1535th meeting, para. 16), he had narrowed the scope of article 28. The general rule, as enunciated in article 1, would normally still apply; he had interpreted exoneration from responsibility narrowly, limiting it to situations in which the State had no option but to commit the internationally wrongful act, and had also construed compulsion restrictively, by excluding situations in which the State had actually had a choice open to it or had committed wrongful acts because its authorities had exceeded the instructions received. In the latter set of circumstances, the State committing the wrongful act could not evade responsibility; in that connexion, he had referred (1535th meeting) to the *Romano-Americana Company* case cited by Mr. Ago in his report.

6. He fully agreed with Mr. Schwebel's statement, at the previous meeting, that a State should not escape responsibility on the grounds that it had acted under coercion, and considered that such cases, in which both the State committing the act and the State exerting coercion should be held responsible, might form an exception to article 28, an exception that would be established in keeping with the general terms of article 19. He had been present in the Sixth Committee during the discussion of article 19, and at that time many States had viewed it as a substantive contribution by the Commission to the progressive development and codification of international law. Naturally, article 19 would be reviewed on second reading and, if the Commission should then decide to change its position in that regard, it would still be possible to describe the exception to article 28 as an "international crime" or a "crime in international law", or to use a form of words that would reflect the essential idea that a State should not be allowed to escape its responsibility for a very grave act under the pretext that it had been acting under coercion.

7. Mr. VEROSTA drew attention to a case that had not yet been mentioned, that of military alliances, whose operation led to results similar to the operation of consular jurisdictions, which had now disappeared from international practice. Instead of a consular jurisdiction, it was a military jurisdiction that was exercised in the territory of the host State. In the territory of that State, foreign allied military units enjoyed immunity from criminal jurisdiction, being subject to the jurisdiction of the military authorities of the State to which they belonged or to the general commanding them. If a traffic accident occurred in the host State involving trucks of foreign allied military units, the criminal aspect of the case came within the competence of the general commanding those units or of an *ad hoc* military tribunal. Such situations obviously gave rise to delicate problems, with which Austria had

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

[2] See 1532nd meeting, foot-note 2.

more than once been confronted when the four great Powers had maintained garrisons in its territory. It would be wrong to think that treaties of alliance and related orders furnished answers to such problems. They had to be dealt with in the course of practice, and there was no doubt that the concept of shared responsibility came into play. The question might be further complicated if the alliance had common bodies whose members included a representative of the State in which the accident occurred. In that case, a co-responsibility of the joint authorities might be added to the shared responsibility of the host State and the sending State. The need for article 28 was all the more evident.

8. Mr. PINTO said he still had some doubts about article 28. The question in his mind was which State's responsibility the Commission should endeavour to deal with in that article, which appeared to be concerned not only with the responsibility of the dominant State but also, to some extent, with the responsibility of the so-called subordinate State. He feared that in the final analysis such an approach introduced the defence of necessity, too rare and complicated a matter to be handled in the way in which the Commission was now proceeding. If the aim was to establish rules for two separate responsibilities, namely, the responsibility of the dominant State and the responsibility of the subordinate State, paragraph 1 as drafted was far too condensed. Similarly, it was far too condensed if the Commission was thinking in terms of some kind of defence of necessity, a conclusion which seemed inescapable since the responsibility of the subordinate State, if such responsibility ever existed, was extinguished. So many different concepts could not be treated simultaneously in such a short paragraph. He fully realized that it was not perhaps the intention to deal with the defence of necessity or any other kind of defence, but that was certainly the impression one gained from reading paragraph 1.

9. Again, it was somewhat difficult to accept the concept of a transfer of responsibility. If paragraph 1 did in fact relate to transfer of responsibility, he wished to know what connexion between the dominant and subordinate States would allow the responsibility to be transferred. An examination of chapters II and III of the draft did not reveal the existence of any such connexion. Consequently the responsibility could not be transferred, and responsibility arose simultaneously but independently for each State and must be shared by them in varying degrees—to the point where no responsibility lay with the subordinate State and complete responsibility lay with the dominant State.

10. In his opinion, article 28 was concerned primarily with the responsibility of the dominant State and, as Mr. Njenga (1536th meeting) had pointed out, it was not the intention to create a category of States that could not be held responsible for their actions, comparable to the category of minors in private law. The very idea of a State being regarded as a minor was abhorrent. If the Commission endeavoured to deal fully with the question of the responsibility of a subordinate State, it would encounter the difficult problems of elaborating a kind of defence for the subordinate State, something which, in the circumstances, it was not possible to do.

11. Lastly, with regard to the exception formed by international crimes, as enumarated in article 19, he fully shared the views expressed by Mr. Jagota.

12. Mr. AGO, replying to the further comments to which draft article 28 had given rise since the 1536th meeting, noted first that, with the exception of Mr. Ushakov, all members of the Commission who had spoken on the article had stressed the need for such an article. As Mr. Schwebel had observed, without the article under consideration there would be a lacuna in the draft. However, it would be a lacuna with respect to the attribution of responsibility, as Mr. Reuter had pointed out, not with respect to the attribution of the internationally wrongful act. It was inconceivable that an organ of a State acting under the control of another State should be transformed into an organ of the latter State; it remained the organ of the State to which it belonged.

13. The place of article 28 no longer seemed to be a source of difficulty, since Mr. Riphagen had pointed out that the rightful place for the article was in part I of the draft, even if provision had to be made, in part II, for the various degrees and forms of direct and indirect responsibility.

14. As to the scope of article 28, Mr. Njenga had spoken of obsolete forms of dependence that were of historical interest only. He had mentioned certain kinds of protectorate which should not be confused with direct colonial rule. For instance, the relations at one time established between France and Morocco, in the form of a protectorate, had remained relations between two States. Algeria's accession to independence had given rise to a new State, whereas Morocco, on becoming independent, had been a State regaining its independence. At the time of the French protectorate over Morocco, the indirect responsibility of the protecting Power for acts of the Sherifian authorities had been affirmed in a famous case.

15. The most important case appeared to be that of military occupation. In that connexion, he explained that he had never considered that a value judgement should not be made on the various cases of occupation. Of course, there were odious occupations, like those of aggressor States, whereas the purpose of others was precisely to liberate a territory occupied by the armed forces of an aggressor State. It might also happen that a State militarily occupied by an aggressor State reacted, in exercise of its right of self-defence, and occupied the territory of the aggressor State. It was none the less true that the term "occupation" had generally been applied to all those forms of occupation, even to liberating occupation.

16. In all those cases, the question was whether a State exercised control over the activities of another State. Three cases could be distinguished.

17. A State might be subject to the control of another State only in certain spheres of activity, in which case any internationally wrongful act it might commit in wholly free spheres of activity, would entail its responsibility in accordance with the draft articles so far prepared. That had been the viewpoint adopted by the Franco-Italian Conciliation Commission in its decision of 15 September 1951 in the *Heirs to the Duc de Guise* case. [3]

18. Conversely, there were cases in which the State controlling another State considered that the situation in that State was such that its own organs should take the place of those of that State. That had happened in Germany where, after the Second World War, the four great Powers had taken over the entire administration. In Italy and Austria, on the other hand, certain sectors had been delimited. In central Italy, for instance, a strip of territory near the front line had been placed directly under Allied administration, which meant that the great Powers would have been directly responsible for any internationally wrongful act that might have been committed by the authorities of that sector. As for the case just mentioned by Mr. Verosta, it seemed to relate to acts falling within areas of activity that were within the exclusive competence of the occupying State. If one of the military jurisdictions in question committed, for example, a denial of justice, the responsibility of the State on which that jurisdiction depended would be entailed, and the local State would be in no way responsible. The question nevertheless deserved to be studied further, because the situation might vary from case to case.

19. Lastly, there might be cases in which the State machinery subsisted but was subject to control. The Agreement on the machinery of control in Austria of 28 June 1946 [4] mentioned eight areas of activity in which the Allied administration had taken over entirely from the Austrian administration. As far as other areas of activity were concerned, however, the Agreement had provided that the Austrian Government and all subordinate Austrian authorities would carry out whatever orders the Allied Commission might give them. In yet other areas, it had provided that the Austrian administration was not to await orders but was nevertheless subject to some supervision.

20. Distinctions could also be drawn in the matter of coercion. Very strong coercion extinguished in a specific case all freedom of action and decision-making power of the State suffering the coercion. By contrast, a State might be subject to simple pressure which, although scarcely stronger than incitement, nevertheless constituted a form of coercion. It was obvious that at the time when the authority of a State subject to such pressure determined its action, it must take account of that pressure even though, once its decision had been made, the maxim *coactus voluit, tamen voluit* could be applied to it.

21. The question of exclusivity arose in the following terms: did the indirect responsibility imputable, in certain circumstances, to a State controlling or coercing another State preclude all direct responsibility of the State that had committed an internationally wrongful act while under such control or coercion, or was it, on the contrary, possible to conceive of concurrent responsibilities? The Commission would inevitably have to answer that question. Some of its members considered that, in particularly serious cases, both States concerned incurred responsibility. In his opinion, the distinguishing test should be, rather, the extent of the control or coercion. Where the State subject to control or coercion no longer had any freedom of choice, it would seem absurd to hold it responsible for its actions. In other cases, however, the responsibility of the State subject to control or coercion must subsist. In that connexion, he agreed with those members who held that States should not be encouraged—by being assured that their responsibility would not be involved—to act in breach of their international obligations. It was probably along those lines that the problem should be resolved.

22. In its existing negative formulation, article 28 precluded, in each case, the responsibility of the State committing the internationally wrongful act. The Commission would therefore have to draft a text in positive terms, but without going beyond its intentions. The article should do no more than specify in what cases a State incurred international responsibility by reason of the internationally wrongful act of another State and, possibly, indicate whether that other State might also incur a parallel responsibility. Responsibility for the act of another was as it were the counterpart of the power enjoyed by the State which, in certain circumstances, could give orders to another State, or exert control over the latter's activities.

23. Lastly, the Commission would have to settle the question whether the case of coercion could be entirely equated with that of a stable and durable relationship between two States, in which case a single provision might cover both cases. Personally, he continued to believe that they could not be treated on the same footing and that it would be preferable to deal with each in a separate paragraph.

24. The CHAIRMAN said that if there was no objection he would take it that the Commission decided to refer draft article 28 to the Drafting Committee for examination in the light of the debate, and taking into account the proposals submitted by Mr. Tsuruoka (A/CN.4/L.289/Rev.1) and Mr. Jagota (A/CN.4/L.290).

It was so decided. [5]

ARTICLE 29 (Consent of the injured State)

25. The CHAIRMAN invited Mr. Ago to introduce chapter V of the draft articles on State responsibility, [6]

[3] See A/CN.4/318 and Add.1–3, para. 35.

[4] United Nations, *Treaty Series*, vol. 138, p. 85.

[5] For consideration of the text proposed by the Drafting Committee, see 1567th meeting, paras. 1–5 and 10–39.

[6] See A/CN.4/318 and Add. 1–3, paras. 48 *et seq.*

entitled "Circumstances precluding wrongfulness", and, more particularly, article 29,[7] drafted in the following terms:

Article 29. Consent of the injured State

The consent given by a State to the commission by another State of an act not in conformity with what the first State would have the right, pursuant to an international obligation, to require of the second State precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory rule of general international law.

26. Mr. AGO said that after stating, in an introduction, that part I of the draft articles would be entirely concerned with defining the rules for establishing the existence of an internationally wrongful act constituting the source of international responsibility, the Commission had laid down, in article 1, the basic principle that

Every internationally wrongful act of a State entails the international responsibility of that State,

and had indicated, in article 3, the two main conditions for the existence of an internationally wrongful act, namely, the existence of an act attributable to the State, and the existence, through that act of the State, of a breach of an international obligation of the State. In chapter II, the Commission had dealt with the various cases in which an act could be considered as an act of the State, and in chapter III with the cases in which an act of the State constituted a breach of an international obligation. Chapter IV dealt with two distinct cases, which had one point in common: the implication of a State in the internationally wrongful act of another State. In the first case, the implication of the State took the form of aid or assistance given by a State to another State for the commission of an internationally wrongful act (article 27); in the second, the implication of the State took the form of control over the sector of activity of another State in which the internationally wrongful act had been committed (article 28).

27. Chapter V, which the Commission was about to discuss, dealt with the case where an act that would normally be an internationally wrongful act lost its wrongfulness. The effect of the circumstances of the case was to preclude the wrongfulness of the act, and not merely to preclude the resposibility resulting from an act that was still wrongful, although at certain periods mention had been made of "circumstances precluding responsibility". If one proceeded from the premise of the principle laid down in article 1 of the draft that "Every internationally wrongful act of a State entails the international responsibility of that State", one could hardly admit that there could be circumstances precluding the responsibility resulting from an act while allowing the wrongfulness of that act to subsist.

28. The concept of circumstances precluding wrongfulness was based on international jurisprudence and on State practice. The replies to the request for information submitted to States by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930) concerning "circumstances in which a State is entitled to disclaim international responsibility" were very clear in that respect. The British Government, in particular, had stated, in connexion with self-defence, that considerations of self-defence "may justify action on the part of a State which would otherwise have been improper".[8]

29. The first question that might be asked was whether the consent of the "injured" State was a circumstance precluding wrongfulness. In logic it was arguable that the wrongfulness of conduct by the State not in conformity with an international obligation was precluded by the consent given to such conduct by the State that had the right to demand compliance with the obligation in question, because, in that case, the consent in fact resulted in the formation of an agreement whereby the international obligation became inoperative, for the specific case, between the two subjects. The consent of the injured State to an act directed against it, which would otherwise be an internationally wrongful act, thus precluded the wrongfulness of that act. That fundamental principle had never been placed in doubt in international jurisprudence or in State practice. The divergences noted in international practice never related to the principle itself but turned on the effective existence of the consent or on the question whether the consent had been validly expressed.

30. In the case of the occupation of Austria by German troops in March 1938, for example, the International Military Tribunal at Nürnberg had found it necessary, in order to determine whether that occupation was lawful or wrongful, to establish whether or not Austria had given its consent to the entry of German troops. It had concluded that it had not been possible to establish that consent and that the occupation of Austria had therefore been internationally wrongful.[9]

31. The consent of the State whose sovereignty would otherwise have been violated had nearly always been cited as justification for the sending of troops into the territory of another State to help it to suppress internal disturbances. That justification had been invoked by the United Kingdom in connexion with the dispatch of British troops to Muscat and Oman in 1957 and to Jordan in 1958, by the United States of America with regard to the dispatch of its troops to Lebanon in 1958, by Belgium at the time of its two interventions in the Congo in 1960 and in 1964, and by the Soviet Union on the occasion of the sending of troops to Hungary in 1956 and to Czechoslovakia in 1968.[10]

[7] *Ibid.*, para. 77.

[8] *Ibid.*, para. 53.

[9] *Ibid.*, para. 59.

[10] *Ibid.*, para. 60.

32. He emphasized that, in order to be considered as a circumstance precluding wrongfulness, the consent must be validly expressed. It could be tacit or implicit, provided that it was clearly established. For instance, in the *Russian Indemnity* case, the Permanent Court of Arbitration had taken the view that Russia, by its attitude, had implicitly consented to Turkey's conduct.[11] In no case, however, could the consent be a "presumed" consent, for such a presumption would be an invitation to intolerable abuses.

33. Secondly, the consent must be expressed by a subject of international law, in other words, it must be given by an organ competent to express the will of the State. It was questionable, for example, whether a regional or local authority could commit the State concerning the lawfulness of an action committed with regard to that State. That was the question that had arisen in connexion with the intervention of Belgian troops in the Republic of the Congo in 1960.[12]

34. To be valid, the consent must not be vitiated by defects such as error, fraud, corruption or violence, which were also grounds for the avoidance of a treaty. Thus the principles which, according to the Vienna Convention,[13] applied to the determination of the validity of treaties, also applied with respect to the determination of the validity of consent.

35. A final condition was that the consent must be given prior to or at the time of the conduct in question. Consent given *ex post facto* could be considered as forbearance to pursue the consequences of the wrongful act, but could not take away the wrongfulness of the act.

36. He added that if the offence which the consent was to wipe out was an offence against a rule of *jus cogens*, in other words, against a peremptory rule of international law from which no derogation was allowed by agreement between two States, the injured State's consent could not be treated as a circumstance precluding wrongfulness. That was a new element which the Commission should introduce in the traditional rule relating to circumstances precluding wrongfulness, for it had recognized that there was a category of rules from which no derogation was allowed and whose violation resulted in the avoidance of a treaty, under article 53 of the Vienna Convention. Accordingly, to determine whether the injured State's consent precluded wrongfulness, the first point to be settled was whether the obligation breached was or was not an obligation of *jus cogens*.

37. Mr. REUTER said that, in the case of a bilateral treaty, it was arguable that a State might consider, *ex post facto*, that there had been no violation by the other State of one of the obligations provided for by the treaty, since it was possible, in bilateral relations, to formulate provisions with retrospective effect.

38. Secondly, in the case of a multilateral treaty, had a State the right to consent to a breach of that treaty? If so, did it not, by consenting thereto, itself commit a wrongful act?

The meeting rose at 12.55 p.m.

[11] *Ibid.*, para. 69.

[12] *Ibid.*, para. 70.

[13] See 1533rd meeting, foot-note 2.

1538th MEETING

Thursday, 24 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Francis, Mr. Jagota, Mr. Njenga, 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.

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

[Item 2 of the agenda]

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

ARTICLE 29 (Consent of the injured State)[1] (*continued*)

1. Mr. USHAKOV deeply regretted the choice of examples in paragraphs 60–62 of the report (A/CN.4/318 and Add.1–3); in his opinion, they illustrated political situations which the Commission was not competent to interpret and which it was unnecessary to mention in connexion with article 29.

2. He considered that the question of the circumstances precluding wrongfulness had been misstated in draft article 29. In his view, a wrongful act could not be interpreted by the injured State as a lawful act, for the wrongful act existed objectively, inasmuch as the two conditions of wrongfulness were fulfilled—the existence of an international obligation and the existence of an act of the State in breach of that obligation. It was open to the injured State to forbear making a claim based on responsibility arising out of the unlawful act and to waive the claim to reparations for the damage that it had suffered, but the act itself remained unlawful, since it was not in conformity with the obligation of the State committing the act.

3. On the other hand, if one of the two elements of wrongfulness disappeared—for example, if the obliga-

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