Document:-
**A/CN.4/SR.1538**

**Summary record of the 1538th meeting**

Topic:
**State responsibility**

Extract from the Yearbook of the International Law Commission:-
**1979, vol. I**

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.

tion no longer existed—there was no longer a wrongful act. For example, where a State relieved another State of an obligation towards it, the obligation ceased to exist and there was no longer an unlawful act. If, for instance, a State agreed to the stationing of another State's troops in its territory, it cancelled, in that specific case, the obligation on the part of the other State not to send troops into the territory of a foreign State. As the obligation no longer existed, the presence of foreign troops in the territory of the first State was not an unlawful act. If the State had authorized the presence of foreign troops in its territory only for a specific period, the obligation was simply in abeyance; on the expiry of that period, the obligation revived, and the stationing of foreign troops in the territory of that State became an unlawful act.

4. In the case of a multilateral treaty, which had been mentioned by Mr. Reuter at the previous meeting, could a State party to the treaty relieve another State party of its obligations under the treaty? He did not think so. Article 20, paragraph 2, of the Vienna Convention [2] stated, in respect of reservations,

> When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

Consequently, in the case of a limited multilateral treaty, a State party could not unilaterally relieve another State party of its obligations under the treaty; it could do so only with the consent of all the parties to the treaty.

5. In addition to multilateral treaties, there were other cases in which a State could not relieve another State of its international obligations, namely where they were obligations of *jus cogens*.

6. The question raised in article 29 was therefore in fact that of the existence of the obligation, rather than that of responsibility.

7. Mr. AGO wished to clear up immediately any misunderstanding as to his position. He entirely agreed with Mr. Ushakov that the object of article 29 was not to preclude the responsibility arising out of an unlawful act, but to preclude the wrongfulness of that act, on the grounds that consent rendered the obligation permanently or temporarily inoperative in the particular case.

8. It was obvious that in certain cases the State could not give its consent to the non-observance of the obligation towards it, since the obligation was an obligation *erga omnes* from which no derogation was possible. That was so in the case of obligations established by rules of *jus cogens*. It could also be so in the case of obligations provided for by certain restricted multilateral treaties.

9. For example, in the case of the invasion of Austria by German troops in March 1938, Austria had itself been bound, under the treaties of Versailles and Saint-Germain-en-Laye, by an obligation towards the Allied Powers of the First World War. Had it consented to the entry of German troops into its territory, the occupation of Austria by Germany might not have constituted an unlawful act with respect to Austria, but Austria's consent would itself have been an unlawful act, since it would have constituted a violation of Austria's obligations towards the Allies. Consequently Germany would have committed an unlawful act not against Austria, but against the signatory Powers of the treaties of Versailles and Saint-Germain-en-Laye.

10. The reason why prior consent must be given in order to preclude wrongfulness was precisely that, if it was given subsequently, the act remained wrongful, since the obligation had still been operative at the time the act had been committed. The State could not efface the wrongfulness of the act *ex post facto*; it could then only refrain from making a claim based on responsibility arising out of that act.

11. Mr. RIPHAGEN said that the provisions of chapter V of the draft might tend to break the logical link between breach of an obligation, responsibility and the content of responsibility, for in his view it was possible to provide that a breach of an obligation did not constitute an internationally wrongful act only in cases where another primary rule prevailed over the rule at the source of the international obligation that had been breached. In other words, there was always an interrelationship between the different primary rules of international law, and hence a possibility of conflict between the abstract rules applicable to a given concrete situation. Such a conflict might arise as a result of a fortuitous set of circumstances, the classical but somewhat hypothetical example being that of the conflict between the duty not to trespass on another's property and the duty to render assistance to a person in need. A conflict might also arise because different primary rules had different objects, which then had to be harmonized. Again, some abstract rules pre-empted, as it were, all other rules. For instance, under Article 103 of the United Nations Charter, an obligation arising under the Charter prevailed over all other obligations. A conflict might even arise in regard to an extremely abstract right, such as the right of a State to a continued factual existence.

12. He further considered that the choice between conflicting rules must always be made by reference to the legal consequences of the breach of the rule. It was possible, for instance, to envisage a situation where the consent of the victim of the breach of an international obligation, which was also an obligation *erga omnes*, did not preclude the wrongfulness of the act in question, but none the less discharged the State committing it from its obligation to compensate the victim. That situation did not, however, appear to be covered by the second sentence of draft article 29. In any event, he was uncertain whether it was correct to provide that consent in such cases had no effect whatsoever. It might have an effect between the consenting State and the State committing the breach, yet have no legal effect as between the other States bound by

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

the *erga omnes* obligation. In that connexion, it would be useful for the Commission to consider the questions raised by Mr. Reuter, which were particularly relevant to the relationship between the primary rules of international law.

13. In the light of those preliminary considerations concerning draft article 29, he thought the Commission would encounter a number of difficulties in endeavouring to reflect the relationship between the various primary rules regarding obligations and rights within the context of responsibility and its consequences, which was the framework within which, in his view, the matters dealt with in chapter V were to be considered.

14. Mr. PINTO said that draft article 29 had logic on its side and was firmly rooted in concepts of private law. He agreed entirely that consent, in the sense not merely of knowledge but of acceptance of the risk involved, was required for the preclusion of wrongfulness. He also agreed that consent must be validly expressed, that it could be tacit although it must be unequivocal, that it must be given by a person or authority competent to express the will of the State and that it could be vitiated by error, fraud, corruption or duress. At the same time, he had certain doubts regarding the practical application of article 29, which related to article 28.[3] Article 28 dealt with the case of a State that was responsible for another State's act. If, when exercising the rights thus devolving upon it, the dominant State caused damage to the subservient State, could it be said that the latter had consented to such damage? He thought not; nor, in his view, could it be said that the colonized nations had consented to the devastation that had ensued, although some might argue that their consent had been vitiated by such elements as duress and corruption. In his view, however, it was not enough for draft article 29 to provide that, in the presence of those and other like elements, there was in effect no consent, for the fact remained that consent had indeed been given.

15. He therefore considered that some qualifying words such as "voluntarily and freely" should be inserted in the draft article, between the words "consent" and "given", *ex abundanti cautela,* to set at rest any doubts that might arise on that score.

16. Mr. REUTER said that draft article 29 raised three types of question. First of all, it raised two questions of drafting. The first concerned the title of the article: "Consent of the injured State". In reality, the State was not injured, since it had given its consent. The second concerned the exceptions to the rule set forth in the first sentence of article 29. Although the obligations arising from a rule of *jus cogens,* referred to in the second sentence of the article, unquestionably constituted an important exception, there were nevertheless others. If the term "lawful" consent were used all exceptions would be covered and the second sentence of the draft article could be omitted.

17. The other question was whether draft article 29 was desirable. He recalled that Mr. Ago agreed with Mr. Ushakov that it was not the existence of the responsibility but the existence, or rather the effectiveness, of the obligation that was at issue in article 29. It was debatable, therefore, whether that article, together with the other articles in chapter V, which would deal with questions such as *force majeure* and self-defence, really belonged among draft articles on State responsibility; however, he would not wish to take too rigid a position on that point. The Commission had refrained from dealing with questions such as *force majeure* in the draft articles on the law of treaties because it had preferred to consider that type of question in the context of draft articles on State responsibility. It would be regrettable, therefore, if the Commission decided once again to postpone consideration of those questions.

18. In addition, draft article 29 raised questions of substance. Mr. Ago had repeatedly used the term "agreement" to describe the form taken by the consent. However, consent or waiver was not always in the form of an agreement. It might be a unilateral act, as in the *Nuclear Tests* case brought before the International Court of Justice, or even simply a mode of conduct. It was not possible, therefore, to shelter behind the Vienna Convention, which applied only to international agreements concluded in written form, although article 3 of that Convention recognized the legal force of international agreements not concluded in written form. Allowance had to be made for cases of unilateral acts, and, quite apart from agreements and unilateral acts, there might be modes of conduct capable of producing legal effects.

19. For his part, he believed that a State could give its lawful consent in a number of ways—and, occasionally, in ways not contemplated in the Vienna Convention. He considered article 29 to be necessary, although its wording could be simplified by use of the expression "lawful consent".

20. Mr. NJENGA observed that Mr. Ago had referred in his report to certain instances, including those involving *force majeure,* where wrongfulness would undoubtedly be precluded. With regard to the *volenti non fit injuria* principle, however, care should be taken not to draw too close an analogy between the position of an individual under domestic law and that of a State under international law; whereas an individual could consent to injury only to himself, in the case of a State the government, president or regional authority consented to injury on behalf of others.

21. In his view, the Commission would be ill-advised, in terms of the progressive development of international law, to provide that consent by one State could entirely exonerate the other State from responsibility. That applied in particular to the dispatch of troops to the territory of another State, and the various examples cited in Mr. Ago's report only heightened his doubts on that score. In the case of the German occupation of Austria in 1938, the dispatch of United Kingdom troops to Muscat and Oman, of United States troops to Lebanon and of Belgian troops to the

[3] See 1532nd meeting, para. 6.

Congo, and indeed of the more recent dispatch of French troops to Shaba Province in Zaire, the issue of consent had been introduced to justify grosss interference in the domestic affairs of another State. All those situations, moreover, had been characterized by the presence of a dominant and a subservient, or client, State, which meant that consent had invariably been a foregone conclusion. There were of course certain situations in which a State could consent to the presence of foreign troops on its soil, since the United Nations Charter itself provided for collective self-defence, as did a number of bilateral and multilateral agreements. But the dispatch of troops to prop up the régime of another country or for the purpose of colonialization—colonialization often based on so-called consent secured from chiefs who did not realize what they were signing—was totally unjustifiable. Nor was the question of State responsibility at issue in certain cases. In Africa, for example, neighbouring States often entered into agreements whereby their respective nationals could cross the border, for instance to catch cattle thieves and bring them to justice. In cases where entry into the territory of another State was permitted, there was no need for any rule; where it was not, such a rule would merely provide the justification for any mischief done.

22. In the circumstances, he felt very strongly that draft article 29 should be omitted, for its inclusion in the draft would in any event certainly make the entire draft unacceptable to the Sixth Committee of the General Assembly and to the international community as a whole. He therefore urged the Commission to proceed to the other articles dealing with circumstances that precluded wrongfulness and could be justified in logic, law and contemporary international relations.

23. Mr. VEROSTA wished to provide a clarification concerning the occupation of Austria by German troops in March 1938. At the Nürnberg proceedings, it had been the defence that had claimed that Austria had given its consent to the entry of German troops. However, the Nürnberg Tribunal had been unable to establish that such consent had been given. Even before the entry of the German troops. Austria had been subjected to threats, which had prompted the Chancellor to resign, leaving the President of the Republic practically alone and prevented, by lack of time, from convening Parliament, not then in session. Under pressure by the Germans, an Austrian Nazi, Seyss-Inquart, had succeeded the outgoing Chancellor; Seyss-Inquart had later become one of the leaders of the SS, and had been sentenced to death by the Nürnberg Tribunal and executed. It was he who should have given his consent to the entry of German troops into Austria, but because of the confusion of telephone calls from Berlin to Vienna and vice versa on that day, he had not given it.

24. Mr JAGOTA agreed that consent could be viewed as a relevant circumstance precluding wrongfulness. As Mr. Ago explained in his report (A/CN.4/318 and Add.1–3, para. 50), he was concerned in chapter V with circumstances precluding wrongfulness, not with circumstances precluding responsibility; that explained the difference between chapters IV and V, and that was why the substance of articles 27 and 28 could not be dealt with in exceptions precluding the wrongfulness of the act, since responsibility would then no longer be entailed.

25. Mr. Ago's extremely interesting presentation had raised a number of matters that called for clarification before a final position could be adopted with regard to the text of article 29. Indeed, a circumspect approach was required in dealing with the present subject-matter because, as Mr. Ago himself had realized, it was always possible to misuse or abuse consent and justify it for other purposes, such as those indicated by Mr. Njenga. Consent doubtless formed a sound basis for making an exception in what might be termed minor cases, but it was important to bear in mind the possible application of the concept of consent in more difficult political cases, such as those involving the use of force or involving sovereign acts committed by one State in the territory of another State. Mr. Ago had referred not only to consent but also to waiver, two concepts that were altogether different. In the present context, did the concept of consent imply the concept of waiver? It could be correctly argued that consent was one of the principal circumstances precluding the wrongfulness of an act, but a waiver was a straightforward decision, open to any sovereign State, to relinquish the exercise of certain rights.

26. As Mr. Ago had said, consent was like an agreement, and the effect of the agreement might be either to eliminate or to suspend the wrongfulness of the act. In that regard, it was important to establish the difference between elimination and suspension. Presumably, the wrongfulness of an act could be suspended if the consent were conditional or subject to withdrawal, for example if consent were given for a period of one year to the stationing of foreign troops in the territory of the State. In that case, the continued presence of those troops after that period had elapsed or after withdrawal of the consent would become wrongful. Consequently article 29 should reflect the fact that consent could be either conditional or unconditional. Consent might be given unconditionally under great provocation and, in such cases, the danger was that an act that was not wrongful would never become wrongful at any later date.

27. It had been rightly pointed out that consent must be freely given, as noted by Mr. Ago himself in his report, but that condition was not reflected in the formulation of draft article 29. Moreover, consent should be validly expressed, which implied that the person expressing the consent must be competent to do so for the purposes of international law. But the question arose who was competent to express consent for the purposes of international law. Fortunately, that aspect of the matter had already been dealt with in the Vienna Convention, and a form of words could be chosen to indicate the capacity of the organ or individual authorized to express the State's consent. Another question concerning the validity of the consent was

whether the State was competent to give consent if by so doing, it entered into conflict with a higher obligation or with higher rules that did not allow a State to abandon an obligation and thus affect the rights and obligations of other parties.

28. He entirely agreed that presumed consent was unacceptable, and that express consent and implied consent should be treated separately. Nevertheless, greater discussion was needed of whether implied consent should always be allowed as an exception that precluded the wrongfulness of an act. In grave cases where there was a possibility of abuse, as in the examples offered by Mr. Njenga, implied consent should not be admissible, and it was therefore necessary to stipulate that the consent must be express. Of cource express consent did not necessarily mean consent in writing. The time for expressing consent should plainly be before the act was committed; otherwise the consent would in effect constitute a waiver. Naturally, he fully agreed with the last part of the article, concerning an obligation arising out of a peremptory rule of general international law.

29. The matters he had raised should be clarified and reflected in the text of article 29, so that it would be acceptable to the Sixth Committee. The article had therefore to be so drafted that its limits were perfectly clear, since an exception, by definition, must be restrictively interpreted and applied.

30. Mr. THIAM said it would be difficult to quarrel with the principle in draft article 29, whereby consent erased wrongfulness, particularly since an exception was provided for with regard to rules of *jus cogens*. As far as the wording was concerned, he thought that the term "injured State" should if possible be replaced by a more appropriate term.

31. Two arguments had been put forward with regard to the appropriateness of inserting an article such as article 29 in the draft. First, it had been said that the provision in question was related as much to the topic of treaties as to the topic of responsibility. Although that discussion could be prolonged indefinitely, the fact that the article under consideration was concerned with the reparation of an injury meant, in his view, that it was more closely related to the topic of responsibility. Secondly, Mr. Njenga had said that consent might be given under conditions such as to rule out the possibility of its having been given freely, and that, given the difficulties with which the question was fraught, it would be better not to take it up for fear of interfering, for example, in the affairs of a State which, for strictly internal reasons, wished to obtain the support of another State. For his own part, he thought that was not a sufficient reason for dropping article 29; it should be possible to draft it in terms ruling out such forms of interference. In that connexion, he noted that, whereas the interventions of Belgium in the Congo had provoked sharp reactions in Africa, the African countries had raised no objection to the sending of Moroccan troops into Shaba at the side of French troops—an action that had been regarded as intended to counter subversion from without.

32. In his view, the principle set forth in draft article 29 should therefore stand, but should be qualified by safeguards taken from the theory of defects of consent.

33. Mr. SCHWEBEL said that the article appeared to be essentially sound, correct in law and necessary to the set of draft articles. It might pose some drafting difficulties, but some valuable suggestions had already been made, such as those by Mr. Jagota, who had raised one question which nevertheless called for some discussion, namely, the question whether the article was speaking of consent or waiver. That point was convincingly dealt with in paragraph 72 of the report, which discussed the time at which the consent was given. The article could not be subsumed under the idea of waiver, for that would suggest that there had been an initial wrong for which the State wronged had chosen not to claim damages. In many cases, if the State had validly expressed its consent to the act in question, then no wrong had occurred. As Mr. Ago had pointed out in his report, if a wrong had taken place and the victim thereof then chose not to press for its rights, the case could be regarded as one of waiver. In that connexion, Mr. Ago had given the example of the landing of United States marines in Cuba in 1912, an occasion when the Cuban Government's consent had apparently been given after the event. Yet another example was that of the invasion of Czechoslovakia in 1968, when consent thereto, if expressed at all, had been given only after the event, as had been made plain in the proceedings in the Czechoslovak Parliament and in the Security Council. Indeed, it did not appear that valid consent had ever been given.

34. As had been so ably demonstrated by Mr. Njenga, the validity of the consent was obviously fundamental, although the issue was by no means peculiar to colonial situations. He did not reject the possibility of speaking of "genuine consent", or "consent validly expressed", or employing some other form of words, but he was somewhat sceptical as to their legal efficacy. The Commission would probably return to the fundamental concept that consent should mean solely genuine and authorized consent and not consent that was extorted or given by puppet spokesmen.

35. Mr. PINTO said that Mr. Ago, in his presentation of the draft articles, had drawn a clear distinction between international wrongfulness and international responsibility. Under the terms of article 1 of the draft, every international wrongful act of a State entailed the international responsibility of that State, but it was apparent from reading chapter V that Mr. Ago contemplated circumstances in which international responsibility could arise from acts other than acts that were internationally wrongful. In view of the title of chapter V, namely "Circumstances precluding wrongfulness", and of the fact that the Commission was working on a draft on State responsibility, he inquired whether it was Mr. Ago's intention at a later stage to tie in the two aspects and say in what instances circumstances precluding international wrongfulness would also preclude international responsibility.

36. Sir Francis VALLAT said that he experienced some doubts with regard to draft article 29, but, as in the case of article 28, he would probably gain a clearer picture of the matter as the discussion proceeded further. In his reading of the report under discussion (A/CN.4/318 and Add.1–3, paras. 56–77), the very title of chapter V had given him the impression that the Commission was now moving into a different area. Hitherto, it had been discussing responsibility for an internationally wrongful act and had operated on the assumption that a particular act was internationally wrongful. Suddenly, the Commission was considering something that was juridically altogether different. Again, the subject-matter now related to exceptions, namely circumstances precluding wrongfulness, yet the Commission had not considered the circumstances giving rise to wrongfulness and had not examined the issue of right and wrong in terms of law. Fortunately, he had found that paragraph 56 of the report referred to the principle *volenti non fit injuria,* the counterpart of which in common law systems was *damnum sine injuria.* However, it had then proved disconcerting to find that the report dealt not with the result of the act but with the nature of the act—with its wrongfulness. The Commission had in a sense taken a position on the question whether consent would preclude wrongfulness, but he still had lingering doubts whether it should proceed on the basis of that kind of fundamental classification.

37. In common law systems, the principle *damnum sine injuria* was expressed without reference to the wrongfulness of the act. For example, a person who suffered damage as a result of an act by another person had no right to compensation for that damage if he had consented to the commission of the act. For his own part, he wondered whether it was not possible to adopt a similar approach in international law. So far, the Commission had studied the matter on the basis of what might be called a civil law analysis and of the wrongfulness of the act; something that he feared would create great difficulties at a later stage for common law countries. If it were possible to find a less theoretical approach to the problem, from the point of view of drafting, it would be much easier for such countries to accept the set of articles.

38. The difficulty might be illustrated by the exception concerning *jus cogens.* He entirely agreed with the principle that a State was not entitled to commit a breach of a peremptory norm of international law. However, it was also necessary to consider the content of the norm. One of the obvious examples of a breach of *jus cogens* was the unlawful use of force, a concept that was embodied in Article 2, paragraph 4, of the Charter of the United Nations. If armed forces entered the territory of another State, characterization of that act as a breach of a peremptory norm must inevitably depend on the circumstances, which would include the question of consent by the State concerned. But the exception enunciated in article 29 specified that the act would remain wrongful if the obligation in question arose out of a peremptory rule of general international law. He very much doubted that the effect of the consent of the State could, in those circumstances, be regarded as irrelevant. Admittedly, there might be cases in which the consent of the State was indeed irrelevant. It was only common sense that a State could not consent to the torture of its nationals by another State and thereby make such torture lawful. Nevertheless, in many instances, consent—or the absence of consent—was an integral part of the nature of the act and of the obligation itself. Naturally, a State could not normally claim compensation for damage when it had given consent to commission of the act, but it was important to consider the exception in article 29 very carefully and to examine the way in which the concept of consent was expressed.

39. Mr. AGO, replying to the comments made by Sir Francis Vallat, said that all the preceding draft articles had been intended precisely to determine the conditions under which there was an internationally wrongful act. Under article 3, there must exist conduct attributable to a State under international law and that conduct must constitute a breach of an international obligation of that State. Chapters II and III of the draft specified respectively when there was an international act of a State and when there was a breach of an international obligation. What remained to be determined was whether, in cases where all the conditions for the occurrence of an internationally wrongful act were fulfilled, the act was possibly not wrongful on account of the following special circumstance: where there was an international obligation and a State was entitled to expect observance of that obligation, but where that State gave its agreement, with the result that a special rule came into being for that specific case and the obligation in question did not apply in that case. Such an approach seemed much more general than the view that, in the event of consent, there was no right to reparation for the injury suffered, and hence no wrongful act.

*The meeting rose at 12.55 p.m.*

---

## 1539th MEETING

*Friday, 25 May 1979, at 11.40 a.m.*

*Chairman:* Mr. Milan ŠAHOVIĆ

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

---

### Organization of work (*continued*) *

1. The CHAIRMAN said that the Enlarged Bureau had suggested the following approximate dates for consideration of the items of the agenda:

* Resumed from the 1531st meeting.