Document:-

A/CN.4/SR.1540

Summary record of the 1540th meeting

Topic:

State responsibility

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1. State responsibility (item 2)	16 May – 5 June 13–19 July	(4 weeks)
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 27 June – 10 July	(3 weeks)
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 watercourses (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 I, 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

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* Resumed from the 1538th meeting.

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

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

responsibility of the State that committed it, the act must be performed at the time when the obligation was in force for that State. Thus, if draft article 29 were read in conjunction with articles 1, 16 and 18, it seemed clear that, once a State had given its consent to the commission of an act that would otherwise have been unlawful, any previous international obligation incumbent on the performing State would cease to remain in force as far as the consenting State was concerned. That being so, it was not possible to invoke article 16, which was fundamental to the doctrine of international responsibility.

7. He had next asked himself whether it was more logical to take the approach adopted by Mr. Ago. For the answer to that question he had found it necessary to revert to the concept of consent, but in a different perspective, namely, consent as a fundamental element of State sovereignty. If the act in question involved an aspect of international relations that was of concern solely to the consenting State and the performing State, the consent could be given either before or after the commission of the act. The legal effect would remain the same in substance, since if the consent were given after the act had been committed, the international responsibility of the performing State would be waived. Not all cases were so simple, however. Implicit in the terms of Article 2, paragraph 1, of the United Nations Charter was the obligation on all Member States to respect the sovereignty of all other States. If, therefore, a State consented to the entry of troops into its territory after the act had been committed, no wrong would be done as far as that State was concerned. The other Members of the United Nations, however, might well adopt a resolution condemning the act, since the principle of State sovereignty was involved. In other words, the consent of the State directly involved would not necessarily suffice to legitimize the situation within the terms of the Charter. Viewed from that standpoint, he saw considerable justification in Mr. Ago's approach.

8. The exception provided for under the terms of article 29 in the case of a breach of a *jus cogens* rule was basically sound, in his view. Indeed, analogies were to be found in domestic law, one example being that the consent of an injured person did not avail the accused.

9. In the part of the report in which the basic elements of consent were outlined (A/CN.4/318 and Add.1-3, paras. 56-76), reference was made to a number of cases. He was not altogether sure that the *Savarkar* case was entirely relevant, since the main issue before the Commission was whether or not the consent of a State had been validly given. It was doubtful whether that had been so in the case of the French Government, and the *Hague Court Reports* did not answer the question. Nevertheless, there had been some irregularity in Savarkar's arrest and in handing him over to the British authorities.

10. Lastly, he considered that, to avoid any misunderstanding regarding the nature of consent, draft article 29 should be more narrowly drafted. In that connexion, Mr. Tsuruoka's amendment, with its express reference to the valid and explicit nature of consent, would undoubtedly do much to make the article more generally acceptable.

11. Mr. TABIBI said that chapter V differed from the earlier chapters of the draft both as to its nature and as to its purpose. Whereas the first four chapters concentrated on the questions dealt with in articles 1 and 3, namely, State responsibility for an internationally wrongful act and the constituent elements of such an act, chapter V dealt with certain special circumstances, in particular the consent of the injured State, in consequence of which an intrinsically wrongful act was to be considered as lawful. The question of consent had been studied at great length in the course of the Commission's work on the law of treaties. The essence of consent was validity. If the consent were obtained through error or fraud or from an organ of the State that was not competent to express its will, or if it were contrary to the *jus cogens* rule, the act remained wrongful.

12. He shared the concern voiced by Mr. Njenga (1538th meeting), which was rooted in the fear that history would repeat itself. A dominant Power could always obtain the consent of a weaker one, whether by threat of force, by economic or political pressure, by fraud or error or by any of the other means at the disposal of powerful countries. Nevertheless, he considered article 29 useful in the draft to obviate the many problems that could otherwise arise in contemporary international relations.

13. The article and its accompanying commentary should therefore be couched in clear terms to reflect, in particular, the requirement of the validity of the consent. That would do much to dispel the concern expressed by certain members. Accordingly he welcomed the text proposed by Mr. Tsuruoka.

14. Mr. VEROSTA considered that the title "Consent of the injured State" did not correspond to the content of draft article 29; indeed, the expression "injured State" did not appear in the body of the article. It appeared only in the report, where the word "injured" appeared in quotation marks as from paragraph 71, which showed that Mr. Ago had had some doubts as to the advisability of using the expression in article 29. As was very pertinently stated in paragraph 68 of Mr. Ago's report, the circumstance precluding wrongfulness in the situation covered by article 29 was the "consent of the State in which is vested the subjective right that would, in the absence of such consent, be wrongfully injured by the conduct of another State". It followed that where there was consent there was no injured State, because there was no wrongful act. Accordingly, he proposed that the expression "injured State" should be omitted from article 29 and from the commentary.

15. He stressed that, in its relations with another State, a State could derogate from rules of customary international law provided that they were not rules of *jus cogens* and that the rights of third States were not impaired. For example, it was not permissible for a

State to agree to the passage of foreign troops through its territory unless that twofold condition was respected. There were numerous examples in support of that proposition in State practice. Between 1815 and 1878 the Ottoman Empire, which had possessed two enclaves in Dalmatia (at that time an Austrian province), had several times asked Austria for the right of passage for the purpose of moving troops from Albania to Herzegovina, but had never asked for Austria's consent when at war with other States lest it should risk a refusal, for Austria, then bound to those States by the law of neutrality, would have been committing a wrongful act with respect to them had it permitted the passage of Ottoman troops. Similarly, by authorizing British troops during the Boer War to pass through Mozambique (at that time regarded as an integral part of Portuguese territory), for the purpose of relieving a city besieged by the Boers, Portugal had breached the rule of neutrality which it had pledged to respect and had thus committed a wrongful act against the Boer Republics. It was to make amends for that wrongful act that, when the Boers, after their defeat by the English, had lost access to the sea, the Portuguese Government had authorized President Kruger to cross the territory of Mozambique and to take ship from there to Europe, where he had hoped to enlist the support of certain States for the Boer cause. By that conduct the Portuguese Government had committed a second violation of the rule of neutrality and another wrongful act — that time vis-à-vis England.

16. For a State's consent to be a circumstance precluding wrongfulness, it must not derogate from a rule of *jus cogens* or injure the rights of third States, and it must also have been given before the action taken by the other State. In that connexion, the question arose whether prior consent—normally a response to the other State's request—did not constitute an agreement between the two States. The question also arose whether in State practice there was such a thing as unilateral consent. In his opinion, in State practice unilateral consent could be given only after the commission of the wrongful act. In that case, however, consent could not erase the wrongfulness of the act that had already occurred, as Mr. Ago stated in paragraph 72 of his report. Where a State gave its consent *ex post facto*, that consent was in effect no more than a waiver by that State of any claim arising out of the wrongful act, in other words, of its right to claim reparation. Mr. Verosta gave another example to illustrate that view. In 1849, Emperor Franz-Joseph had asked for and obtained military aid from Russia to put down a republican rising in Hungary (at that time part of the Habsburg Empire); the entry of Russian troops into Hungarian territory had therefore been lawful. If, on the other hand, Nicholas I had sent troops on his own initiative to crush the Hungarian revolution, the case would have been entirely different, and the Viennese government, even if it had benefited from that intervention, could not have erased the unlawful character of the intervention *ex post facto*, even by subsequently concluding an agreement with the Tsar governing the withdrawal of troops and various material and financial questions. The inference to be drawn was that the prior consent envisaged in article 29 was only part of a bilateral agreement that derogated from certain rights and prerogatives of the consenting State.

17. In that connexion he drew attention to the question of the diplomatic protection of aliens. Towards the end of the nineteenth century, the Latin American States, which had been much troubled by that question, had decided to abolish the reciprocal obligation to guarantee the protection of aliens by concluding *inter se* and with certain European countries (France, Spain, Italy and Germany) treaties containing a so-called "irresponsibility" clause.

18. The Institut de droit international had dealt with that question at several sessions, dating back to 1900, and had expressed the "voeu" that States should pledge themselves in advance by international convention (when such conventions did not already exist) to submit any dispute concerning the international responsibility of the State arising out of damage caused in their territory to the person or property of aliens first to an international commission of inquiry and then to a conciliation procedure. In a further "voeu", it had urged States to refrain from inserting reciprocal irresponsibility clauses in treaties, on the grounds that such clauses had the disadvantage of dispensing States from the performance of their duty to protect their nationals abroad and of their duty to protect aliens in their territory. The Institut had added that States which, owing to exceptional circumstances, considered themselves unable to provide sufficient and effective protection for aliens in their territory, could not avoid the consequences of that state of affairs except by temporarily denying aliens access to the territory.[3] By its statement that States could not, even by reciprocal agreements, evade their duty to protect their nationals abroad and to protect aliens in their territory, the Institut de droit international had as early as 1898 applied the elements of the concept of *jus cogens*.

19. In conclusion, he wished to make three comments. First, the expression "injured State" did not correspond to the cases covered by article 29. Secondly, a State's consent to another State's conduct that was intrinsically wrongful made that conduct lawful and, if given in advance, formed part of a bilateral agreement. Thirdly, such a derogation from customary rules should not prejudice the rights of third States founded on other rules of customary international law, notably rules of *jus cogens*, or having their source in multilateral conventions.

20. Mr. TSURUOKA wished to explain the considerations that he had drawn from a reading of paragraph 72 of Mr. Ago's report, which dealt with the question of the time at which consent was given. The view could be taken either that the effect of consent *ex post facto* was neither to legitimize the wrongful act nor even to imply a waiver of a claim in respect of the

[3] Institut de droit international, *Tableau général des résolutions (1873–1956)* (H. Wehberg, ed., Basel, Editions juridiques et sociologiques, 1957), pp. 140 and 142.

consequences of the act, or that such consent, in so far as it did not operate to legitimize the wrongful act, implied a waiver of the right to make a claim in respect of the consequences of the act. Another question was whether the effect of subsequent consent was limited in time. In Mr. Ago's opinion, the consent given at a particular time by a State continuously occupied by another State affected that situation only as from the time at which the consent was given. It would not legitimize the wrongful act except as to the future. But why then should the consent be held to imply the waiver of a claim in respect of the consequences of the wrongful act? Would the waiver be implied, or presumed? Those questions called for answers that it should be possible to give in the commentary to the article under discussion, without any need for amending the formulation of the article.

21. Mr. QUENTIN-BAXTER said that the first difficulty to be encountered in considering article 29 was that the subject-matter encompassed something far more fundamental than an exception. It was a general proposition that, unless they were of a peremptory nature, international obligations could be changed by the will of the parties. Again, primary obligations were often thought of in contexts in which the factor of consent entered into the primary obligation.

22. The famous judgement by Chief Justice Marshall in the United States Supreme Court in 1812 in the schooner *Exchange* case [4] reflected the unquestioned right of a sovereign State to total control over its territory and entry into that territory. Only by way of an exception, in other words, by consent, whether express or implied, could a public ship of another State enter that territory. The Supreme Court had concluded that, in the case of an army, there could be no inference of consent unless it was express, but the practice of States was such that a visit by a ship belonging to a friendly State might well be supposed to have the implied consent of the State visited. Consequently, the Court had found that consent could be implied. However, once it was established that the ship was visiting the port with the consent of the State concerned, the right of the ship or the flag State to sovereign immunity was itself established. Only the absence of consent could remove that sovereign immunity, in other words, in the case in question, if it could have been supposed that the schooner had been allowed to enter United States waters on condition that it did not enjoy sovereign immunity. The Court had also found that there was nothing in State practice that allowed such consent to be presumed. Consent was therefore to be regarded as lying at the very root of the existence of international obligations, and it was very difficult, from a strictly theoretical point of view, to fit the concept of consent into the pattern of a mere exception.

23. It should be remembered that the Commission's ultimate aim was to establish a comparatively simple rule that would be of practical value, in particular to countries that had few trained international lawyers. The object of the texts and commentaries prepared by the Commission was to provide readily accessible material for practitioners in law, especially practitioners in the service of a State or of an international organization. Hence there would be a lacuna in the present set of draft articles if it failed to include, approximately in the position that article 29 now occupied in the structure of the draft, a provision dealing with consent. Indeed, the draft provided a good deal of practical guidance for legal advisers faced with the problem of examining the issue of attribution, establishing the nature of the act, determining whether the obligation was one of result or of conduct — in short, all the steps that the competent lawyer must go through in deciding on his initial approach to a legal problem. From a purely practical standpoint, the draft therefore required a provision relating to consent, even if it involved some slight divergence from strict logic.

24. On the other hand, it was one thing to state the proposition that, unless they were of a peremptory nature, international obligations could be changed at the will of the parties. It was quite another to suggest that the question of consent might provide an escape from the normal consequences of responsibility, for such a suggestion ran the risk of producing the result feared by Mr. Njenga, in other words, the tendency to justify anything that might be said as amounting to consent. It had already been pointed out that it was essential to specify that consent should be expressed before the commission of the act in question. That being so, the draft could do little to avoid an attempt by a transgressor State to justify its actions on the grounds of consent by the other State. In the present instance, it was not possible to deal effectively with the question of proof of the existence of an obligation or to lay down a rule specifying who, in particular circumstances, could give consent. In some cases, the relevant circumstances and State practice would tend to establish the likelihood of implied consent, but in many other cases they would not. In the example mentioned by Mr. Njenga, namely, pursuit of a cattle thief across international boundaries, the existence of consent would call for clear evidence from the practice and the understanding of the States concerned, but it would not flow from any general rule of law.

25. In addition, nothing could be done in the present set of draft articles to circumvent the difficulties arising out of the doctrine of recognition. It was usually regarded as the right of a sovereign State to recognize other States or Governments, and many of the difficulties inherent in cases of the kind mentioned by Mr. Njenga (1538th meeting) might occur as a result of the use of that institution of recognition. Nevertheless, it could be made perfectly clear in the commentary that, in speaking of consent, the Commission was referring to something that preceded the act. It was not referring to waiver, condonation or some kind of concession extracted after the event.

[4] W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, 3rd ed. (New York, Banks Law Publishing, 1911), vol. 7, pp. 116 *et seq.*

26. The article should focus not on the injured State but on the obligations of the State committing the act. Obviously, it was not Mr. Ago's intention to shift the focus in any significant manner, but the emphasis on the consent of the injured State rather than on the act of the State created the possibility of departing from the original intention of the article. If indeed the State was injured, then its consent was hardly a satisfactory excuse. Surely, the intention must be to specify that no injury occurred when consent was validly obtained. It was not necessary to use a form of words such as "valid consent", for it was to be taken for granted that the draft dealt with legitimate situations. As Mr. Ago had intended, the draft could be presented not as one that invited an escape from responsibility but as one that, at least to some extent, closed the avenues of escape from responsibility.

27. He would therefore prefer to bring forward the reference to a peremptory rule of international law to the beginning of the text and to start the article with the words "subject to any peremptory norm of international law". In that way, notice would be served from the outset that the purpose was not to encourage an escape from the normal consequences of the breach of an international obligation but to indicate the limitations on any legitimate possibility of escaping from such obligations.

28. It was an outstanding feature of modern international law that many international obligations, especially in questions of major importance to international relations, were more than simply bilateral. It had to be realized that, through membership in the United Nations or regional organizations or other groupings, States agreed to certain standards of conduct. Accordingly, it would be reassuring to those who were worried about the possible impact of consent if the draft stressed that the act would continue to be wrongful unless the necessary consent was obtained from all the parties to which the obligation was owed. Admittedly, the draft was concerned with the responsibility of States alone, and not with the responsibility of other subjects of international law. However, the draft was not confined exclusively to the responsibility of States towards other States. In theory at least, article 29 related to the consent of any subject of international law to which a State owed an obligation. The article might therefore specify that the obligation of a State continued to exist unless it had been removed by the consent of all States and other entities to which the obligation was owed.

29. Finally, it was his understanding that Mr. Ago's purpose in article 29 was to place consent in a limited context and not to allow it as a general exception. Such an article would make a substantial contribution to the general aim of ensuring the integrity of States themselves.

30. Mr. JAGOTA said that the concept of consent was a crucial aspect of the sovereign equality of States. It also constituted a very important concept in international law, for treaties establishing rights and obligations were concluded by mutual consent. Indeed, the International Court of Justice could not have jurisdiction without consent. For the purposes of the draft articles, the essential problem now was to determine whether consent should constitute a basis for transforming a wrongful act into a lawful act. As revealed by the examples cited by Mr. Ago in his report, the matter was a delicate one, since the controversies almost always hinged on the question whether consent had actually been given and, if so, on the way in which it had been given. Consequently, if article 29 was to be viewed as dealing with an exception, it must be drafted in very precise terms to ensure that the exception was interpreted restrictively.

31. In the short time available to him, he had been unable to find any direct evidence of consent having been accepted as an exception to State responsibility, but the reason for the lack of such evidence might be that the question of State responsibility had not been considered in the perspective adopted by the Commission, in other words, not from the point of view of different aspects of primary rules that generated responsibility, but from that of general rules under which responsibility was entailed as a result of an internationally wrongful act. In volume 8 of the *Digest of International Law,*[5] reference was made to State responsibility for injury to aliens and to the related question of diplomatic protection and international claims. A survey was made of the relevant literature, but no mention was made of consent as an exception. However, in a section dealing with justification in defence, consent was discussed indirectly under the concept of waiver. The effect of waiver was examined in a number of different situations, and it was apparent that waiver after injury had been caused to an alien could be used as a defence by the respondent State in respect of its responsibility. Consequently, in examining the broader canvas of State responsibility as a whole, the Commission must ensure that a general rule on consent was drafted precisely and was not open to abuse.

32. Mr. Verosta had reached the conclusion that consent, if freely and validly expressed, amounted to an agreement between the parties. The point to be considered was whether consent, as understood in the terms of article 29, was to be confined to consent constituting an agreement and *per se* applicable under international law, in which case the question arose whether it was necessary to make provision for an exception. If, however, a wider meaning was to be attached to consent, so that it might even include unilateral consent, the scope of the concept would also be wider and it would therefore have to be defined very carefully. It must also be remembered that, if consent signified agreement, it could imply an invitation to a State to intervene in the affairs of another State and to use armed force. Consequently it was essential to be clear about the precise meaning of the term "consent".

[5] M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967).

33. Again, a distinction had to be drawn between consent and waiver. The commentary should point out that consent given after the commission of the act in effect constituted a waiver. Consent would preclude the wrongfulness of the act, whereas waiver would simply constitute a mitigating circumstance.

34. He supported the proposals made by Mr. Quentin-Baxter earlier in the meeting and by Mr. Tsuruoka (A/CN.4/L.291), but the Drafting Committee might wish to consider the advisability of retaining the phrase "if it is established", employed by Mr. Tsuruoka. Such a form of words, if used in article 29, would have to be used in every article dealing with exceptions and would become an evidentiary rule rather than a substantive norm.

The meeting rose at 6.10 p.m.

1541st MEETING

Tuesday, 29 May 1979, at 11.45 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Bedjaoui, 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, Mr. Verosta, Mr. Yankov.

Filling of casual vacancies of the Commission (article 11 of the Statute) (A/CN.4/317 and Add.1 and Add.1/Corr.1 and Add.2)

[Item 1 of the agenda]

1. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Jens Evensen, of Norway, Mr. Boutros Ghali, of Egypt, and Mr. Julio Barboza, of Argentina, to fill the vacancies caused by the election, on 31 October 1978, of Mr. Roberto Ago, Mr. Abdullah El-Erian and Mr. José Sette Câmara as judges of the International Court of Justice.

2. Telegrams would be sent immediately to the three new members of the Commission inviting them to take part in its work.

The meeting rose at 11.50 a.m.

1542nd MEETING

Wednesday, 30 May 1979, at 10.10 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. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318 and Add.1-3, A/CN.4/L.291, A/CN.4/L.292)

[Item 2 of the agenda]

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

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

1. Mr. PINTO said that the question had been raised of the appropriateness of the term "injured State", which appeared in the title of draft article 29. For his part, he had no difficulty with that term, since, in his view, it was used in its factual, as opposed to its legal, sense to refer to a State that had been injured in fact but might not be held to have been injured in law. So far as the term "consent" was concerned, however, he continued to think that it required some qualification to make it clear that consent must be explicit and freely and lawfully given. He was prepared to accept the addition of the word "valid", provided that it was understood to cover those elements; if not, then some other wording should be found.

2. He agreed that the draft article in its present form should be restrictively interpreted and also that the order of its two provisions should be reversed, so that the exception preceded the general rule.

3. In respect of draft article 29, he had already raised a question (1538th meeting) concerning the relationship between the concepts of wrongfulness and responsibility. In that regard, he would be grateful for clarification on three points, the first of which concerned the connexion between the wrongful act and the consequences, or effects, of the wrongfulness. If consent to a wrongful act was given in accordance with the terms of article 29, should such consent, and therefore responsibility, be deemed to apply to all the consequences that flowed from the act in question, or only to such consequences as could reasonably be foreseen by the State which would otherwise have been injured? Assuming for example that State A installed a nuclear plant on the territory of State B on the specific understanding that there would be no disposal of radioactive waste on the latter's territory, and assuming that an official of State B subsequently authorized such disposal and that damage was caused thereby, it might be held that there was valid consent to the extent that the official concerned was competent in the matter, but the question remained whether, in the circumstances of the case, such consent should

* Resumed from the 1540th meeting.

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