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Summary record of the 1533rd meeting

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said to be set out in the Declaration, State practice conspicuously failed to conform to doctrine. The question arose what value could be placed on doctrine when practice conflicted with it. Almost every day the newspapers reported cases of the application of coercion to a State that had lately acted in accordance with the most obvious norms of the Charter, but the United Nations none the less failed to respond by way of condemnation.

41. A more important point was whether the responsibility of the dominant State should be exclusive or joint and several. Mr. Reuter had already offered a striking example. Yet another was one in which, for instance, State A was partly occupied and substantially controlled by State B and unlawful assaults on the territory of State C were mounted from the territory of State A. State A was unable to control those assaults and State B was unwilling to control them, although it might have the ability to do so. In that case, was State C obliged to invoke the responsibility of State B alone, and was State A to be exonerated solely because State B was in a position, in the last analysis, to control the ultimate decisions, but not necessarily all the daily decisions, of State A? His own preference would be to favour the development of the law and cast the draft article in terms that would admit joint and several, rather than exclusive, responsibility.

42. Lastly, paragraph 1 of the proposed article seemed to be unnecessary and he wondered whether in fact it endeavoured to say something that was not said in paragraph 2.

The meeting rose at 1 p.m.

1533rd MEETING

Thursday, 17 May 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, 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.

Communications from former members of the Commission

1. The CHAIRMAN read out the text of two messages sent to the Commission by Mr. Sette Câmara and Mr. El-Erian, respectively, wishing it all success in the work of the session, and more generally in its work on the codification and progressive development of international law in the cause of international peace and co-operation.

2. He would not fail to reply to those messages and to wish the senders, on behalf of the Commission, every success in their new functions as members of the International Court of Justice.

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

[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] (*continued*)

3. Mr. VEROSTA said that, before studying the eighth report on State responsibility (A/CN.4/318 and Add.1-3), he had taken note of draft article 28, of which paragraph 1 alone called for four comments on his part.

4. First, by envisaging the case of a State which "is not in possession of complete freedom of decision", that provision implied that some States did have such freedom, which was hardly realistic. Even in the case of individuals, the notion of freedom of the will raised many philosophical and moral problems. In the case of a State, decisions were made by State agencies. Of course, in principle, freedom of will and freedom of action did exist, but those freedoms were limited, even for the agencies and political leaders of the great Powers, by considerations of internal policy, the economic order or international relations. Furthermore, the expression "complete freedom" denoted 100 per cent freedom. What would happen if a State which had retained 50 per cent of its free decision-making power did not exercise it in order to forestall the commission of an internationally wrongful act? Would it be exempt from international responsibility altogether?

5. Secondly, it was no doubt difficult to determine, in practice, at what point a State was "subject, in law or in fact, to the directions or the control of another State". The subordination in law of one State to another occurred mainly in the case of protectorates and other similar régimes established by treaty. Generally, subjection to the directions of the dominant State raised the question of the good or bad will shown by the subordinate State in the application of those directions. For example, Nazi Germany had directed the States dominated by it to persecute Jews and Gypsies, but the direction had been very diversely applied. Whereas Slovakia had managed for a long time to protect the Jews and the Gypsies, and Bulgaria had

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

allowed Bulgarian Jews to leave the country with all their possessions, other States had applied those directions with more zeal. If the organs of the dependent State were not favourable to the cause of the dominant State, it was always open to them to try to evade its control. Since they had the opportunity of refraining from committing certain internationally wrongful acts, they assumed a share of the responsibility if they committed such acts.

6. Thirdly, what was meant by "State which is in a position to give directions or exercise control"? Did a State which enjoyed such power exercise it lawfully, or unlawfully? Since paragraph 2 of the article in question concerned coercion, presumably paragraph 1 referred to the case where the dominant State acted within the limits of its legal competence.

7. Fourthly, and lastly, the rule stated in paragraph 1 seemed too radical in that it exempted from all responsibility a State which was subject to the directions or the control of another State and attributed the international responsibility for the wrongful acts of the dominated State exclusively to the dominant State. That rule was liable to cause weak States to apply the directions of the dominant State and accept its control without too many scruples, since full international responsibility would ultimately devolve upon that State.

8. Reading the written presentation of the article had not changed his first impressions. However, he noted that Mr. Ago, in his oral presentation (1532nd meeting), had intimated that he would be willing to accept the idea of a dual or shared responsibility. In his opinion, the solution to the problem should be sought in that direction.

9. Mr. TSURUOKA approved, in principle, draft article 28. It met a need and followed quite naturally an article dealing with aid or assistance given by one State to another for the commission of an internationally wrongful act. Mr. Ago had explained that his reason for using the expression "indirect responsibility" was that it had gained general acceptance in international law terminology and had a fairly precise meaning. But for his own part, without questioning that statement, he saw no need to make a distinction between indirect responsibility and direct responsibility for the purposes of article 28. If State A assumed vis-à-vis State C responsibility for an internationally wrongful act committed by State B, State A alone was responsible vis-à-vis State C. And if it was recognized that States A and B could both be responsible vis-à-vis State C, that responsibility should be the same for both States.

10. The concept of complete freedom of decision raised certain doubts which it would be advisable to dispel. In view of the growing interdependence of States, no country was really free to act in complete freedom.

11. Referring to paragraph 2, he pointed out that the use of coercion did not mean that the State exerting it was exclusively responsible. But the very concept of coercion was not very clear and should be clarified in the light of the provisions of article 52 of the Vienna Convention on the Law of Treaties.[2]

12. For all those reasons, he announced that he would propose a text for draft article 28.[3]

13. Mr. USHAKOV said he did not approve of draft article 28. In the first place, there was no such thing as indirect responsibility, either in international law or in internal law. Of course, authors might have spoken of direct responsibility for acts and of indirect responsibility for omissions, but it was not possible in law to make such a distinction. Legally, a natural or legal person was civilly, penally or administratively responsible for his or its own acts or omissions. The responsibility referred to in article 28 was an international responsibility which should not be described as either direct or indirect. A natural or legal person could not in any case answer for the deeds of others. On the other hand, there were circumstances in which a person's responsibility was not involved. Sometimes there was an apparent responsibility for an act committed by others. In internal law, for example, parents were said to be responsible for the acts of their children. Actually, they were responsible, not for the acts of their children, but for failure to comply with their legal obligations in the matter of their children's conduct; they were responsible for their own omissions.

14. The draft articles under consideration were addressed to States, in other words, to some 150 Members of the United Nations and a few other countries which were not Members. All were sovereign and politically independent; none was subject to the supremacy of another State. Their sovereignty and independence were very real, which explained why the smallest of them could rid themselves of any coercion with the aid of other States, the international community or international organizations. If it were otherwise, the small States would be unable to survive. Admittedly, nothing was absolute, and there was a certain interdependence among States, particularly in the economic sphere. But it was precisely because existing States were sovereign and independent that the Commission had been able to lay down a general rule like that in article 2,[4] whereby every State was subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

15. Draft article 28 envisaged the case of States which were not in possession of complete freedom of decision. Yet, in his view, there was no State which did not possess in law complete freedom of decision or which was subject, in law, to the directions or control of another State. Nor could the case envisaged by the draft article under consideration apply to federal States. It would be a novel conception of federalism to

[2] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereinafter referred to as the "Vienna Convention".

[3] Subsequently distributed as document A/CN.4/L.289.

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

affirm that the member States of a federal State did not possess complete freedom of decision and that they were subject to the control of the federal State. If they lacked competence in international relations, they were incapable of incurring any international responsibility of their own. On the other hand, if a member State of a federal State, such as a Swiss canton, was qualified to conclude international agreements, it alone was responsible for the agreements it concluded, within the limits of its competence. But that was no reason for regarding a Swiss canton as subject to the domination of Switzerland.

16. So far as occupied States were concerned, a distinction should be drawn between the military occupation of the entire territory of a State by an aggressor State—an unlawful situation—and a liberating military occupation. Only in the former case could one truly speak of occupation. Surely, the responsibility of such an occupied State could not be equated with that of the sovereign and independent States with which the draft was concerned, for an occupied State was not free to act. Similarly, if only part of a State's territory was occupied, that State was not sovereign and independent in that part of its territory, and should not be held responsible for whatever happened there. In either case, the situation was unlawful and not within the scope of the draft articles, which should in principle apply only in the context of lawful situations.

17. The earlier theory of general and compulsory international representation had been evolved with the object of giving colonial territories the semblance of States. For that purpose, the concept of partial sovereignty had been invented—a concept which ought to be rejected, for sovereignty could not be restricted. It was by pure fiction that colonies, protectorates, mandated territories or trust territories and other non-self-governing territories had been considered as so-called States whose international representation must be ensured, whereas they had not been sovereign and independent States. Consequently, dependent territories, too, were not States within the meaning of the draft articles. In short, paragraph 1 of draft article 28 did not apply to any of the situations described by Mr. Ago.

18. The coercion referred to in paragraph 2 of article 28 was not, presumably, a moral coercion; rather, he took it that the provision was meant to refer to the case of the use of force in international relations, which necessarily led to an unlawful situation. If a State exerted coercion or proposed to exert coercion by recourse to the use of armed force, it manifestly created an unlawful situation for which it was answerable. But was it arguable that a State which, under the pressure of coercion, committed an act of aggression or an act of genocide, or even resorted to force in order to maintain a situation of colonial domination, could be wholly exonerated from responsibility? Such an argument was quite untenable, and yet that was the situation provided for in paragraph 2 of draft article 28. An exception should, of course, be made for the case where a State committed an internationally wrongful act under coercion exerted by an invading State, but that case should not be taken into consideration by the Commission since it presupposed an unlawful situation.

19. To sum up, he considered that the provisions of draft article 28 were not justified. However, he paid a tribute to Mr. Ago, whose research had thrown light on earlier theories and had made it possible to form a better idea of the problem as a whole.

20. Mr. PINTO said it was apparent from the formulation of article 28 that Mr. Ago, from a sense of justice, had tilted indirect responsibility away from the subordinate State to the dominant State and had also taken account of the right of third States that had suffered damage to claim compensation from the party best able to provide compensation, which was also most likely to be the party truly responsible for the internationally wrongful act. Normally, an article cast in such terms would have commanded his support, but he experienced some hesitation because he had sought to view article 28 in the context of the internal logic of the draft articles as a whole.

21. The basic principles enunciated in the earlier draft articles indicated that, before a State could be determined to have incurred international responsibility, it must be demonstrated that the State in question had committed an internationally wrongful act. Since the State was conceived as acting through other entities, articles 5 to 15 specified with some degree of precision whose acts could engage the responsibility of the State—for instance, not only the actual organs of the State but also other entities or persons or groups of persons empowered by the State to act on its behalf. Generally, there must be some real connexion between the entity or person perpetrating the act and the authority of the State—in other words, the entity or person must have exercised "elements of the governmental authority", as prescribed in articles 7, 8 and 9. Accordingly, the entity or person in question was seen to be acting as the State or on behalf of the State, in which case the act was attributable to the State. In other cases, the general rule, as reflected in articles 11, 12, 13 and 14, was that the act could not be attributed to the State. If the entities or persons concerned did not exercise elements of the governmental authority, they did not act as the State or on behalf of the State, and their acts did not entail the responsibility of the State.

22. Chapter IV of the draft articles introduced a new range of circumstances which gave rise to international responsibility, circumstances in which a State was not the sole perpetrator of the act but was implicated in the internationally wrongful act of another State. Presumably, however, the same principles of attribution would apply also in the articles of chapter IV. For example, under article 27, aid or assistance by a State to another State for the commission of an internationally wrongful act must be found to be attributable to the State before its responsibility could be entailed, and such aid or assistance must be rendered by an entity or person exercising elements of the governmental authority. However, article 28, dealing with the

concept of indirect State responsibility, appeared to depart from the previous internal logic of the structure of the draft because the essential connexion between the State and its responsibility for an internationally wrongful act, namely, attribution of the act to the State on the basis of the exercise of elements of the governmental authority, was missing.

23. Under article 28, the State which was subordinate, or was not wholly free, was not exercising elements of the governmental authority and was not acting on behalf of the "dominant" State. The perpetrator of the internationally wrongful act was acting on its own behalf, with no stated power or authority to act on behalf of the dominant State, yet the latter's responsibility was entailed. Under comparable circumstances set out in article 11, the conduct of persons not acting on behalf of the State was not to be considered as entailing the responsibility of the State, although the control by the State over such individuals might well be far greater than the control envisaged in article 28 (the control by the dominant State over the subordinate State). He was not sure that there were adequate grounds for abandoning the guiding principle of the draft, which called for attribution of the act to the State, in accordance with the terms of articles 5 to 15, before the State's responsibility could be engaged.

24. Mr. Ago had furnished a wealth of documentary evidence in support of the principle formulated in article 28, but the question that arose was whether that principle, even if it had existed in the past, should be perpetuated in the draft. Indeed, the cases cited were full of expressions that unmistakably bore the imprint of a long-distant past. References were made to "superior", "subordinate", "vassal", "suzerain", "dominant" and "puppet" States—terms which, even if they were employed in the commentary, were likely to set up barriers to understanding and acceptance of a proposed rule, however well founded the rule might be. In the modern world, the doctrine of the sovereign equality of States was an axiom of international law. If an entity was a State, it was sovereign and, in theory, its freedem of action and sphere of activity were complete. It could be fettered only by agreements that were freely entered into or by military subjugation. Obviously, the facts of economic life created enormous disparities between States, but it would be inadmissible to say that those disparities created a legal or even a factual inequality. The rules proposed so far by Mr. Ago might well be adequate to resolve the kinds of difficulties involved in the formulation of article 28.

25. Nevertheless, if Mr. Ago considered that the draft did not cover certain circumstances and that account should be taken of the legal relationships envisaged in article 28, relationships which were undoubtedly very few and becoming rarer, the article could speak of "dependent States", as that term was understood in United Nations usage and in the draft articles prepared by the Commission on other topics. Again, Mr. Ushakov had pointed out that military occupation covered many different kinds of situations. On the other hand, if it proved necessary to include a provision concerning military occupation, it should be confined to specific circumstances, and not enunciated as a general rule. Military occupation should be approached as a *de jure* situation, and the idea of *de facto* "domination" or "superiority" should not be perpetuated.

26. In addition, responsibility arising under the terms of article 28 should be considered as direct rather than indirect. The grounds for such responsibility might be found in the ideas contained in article 21, concerning a breach of an international obligation requiring the achievement of a specified result, and in article 26, relating to a breach of an international obligation to prevent a given event. Mr. Ago might also wish to consider the suggestion that the responsibility of the entity in question should not be erased but should be apportioned between it and the other entity concerned, and related to more fundamental objective factors, such as coercion or necessity, or the non-existence of coercion or necessity.

27. In paragraph 2 of article 28, the concept of coercion should be further developed in order to demonstrate the nature, degree and level of coercion that would engage the responsibility of the State exercising coercion and might act as a defence for the State perpetrating the internationally wrongful act. In that connexion, he fully agreed with Mr. Tsuruoka that article 52 of the Vienna Convention might form a sound basis for a more precise definition of the concept of coercion. Lastly, as in the case of paragraph 1, responsibility incurred under the terms of paragraph 2 should be direct responsibility, and the notion of indirect responsibility should be dropped.

28. Mr. THIAM also doubted the wisdom of introducing the concept of indirect responsibility in draft article 28. In his opinion, the distinction between direct responsibility and indirect responsibility was defensible only for analytical purposes, in other words for the purpose of determining who had committed the act giving rise to responsibility. In the first case, the State responsible had not committed the act. So far as the consequences of responsibility were concerned, however, the concept of indirect responsibility was hardly tenable, for it was relatively immaterial whether the State responsible had or had not committed the act, since, in either case, that was the State which had to make good the damage caused. Accordingly, it seemed unnecessary to deal with the case of indirect responsibility in the context of chapter IV.

29. He agreed with Mr. Ago that the representation theory relied on a legal fiction which took no account of reality. By contrast, he thought that the concept of coercion, compulsion or control better reflected the situation under consideration since, in that case, responsibility appeared to be the counterpart of the right claimed by one State to exercise some form of control or compulsion over another State. The problem, in that case, was how much freedom the dominated State retained. Clearly, if the dominated State enjoyed no freedom, it was not responsible. However, in so far as

it enjoyed some measure of freedom, it might be responsible for an act performed in the exercise of that limited freedom.

30. Since, as Mr. Ushakov had pointed out, colonial situations belonged to the past, the time had come to consider new forms of dependence. In his opinion, the situation described by Mr. Ushakov, namely, that all States were now sovereign and independent, free to act and hence responsible for their acts, was an ideal situation hardly in keeping with reality. In modern international life, the great Powers resorted to economic or political coercion, even though it might be in a concealed form, towards smaller States, and recourse to the international community did not offer the latter guarantees sufficient to preserve their independence. He considered that such a state of affairs could surely not be ignored and that it might be advisable to deal with it in a provision that would tend to limit its consequences or even to prevent it. In his opinion, an amended article 28 might meet that concern. He therefore endorsed the principle embodied in that article.

31. Mr. DÍAZ GONZALEZ said it was an established principle that all sovereign States were responsible as subjects of international law. If that sovereignty were limited *de facto* or *de jure* by another State, whether by one of the traditional forms or in one of the new forms of control that had emerged in international relations, that other State's responsibility might, however, be entailed. Furthermore, while all States were equal in principle, in practice some were "more equal than others", as could be seen from the provisions of the united Nations Charter relating to the Security Council.

32. Paragraph 1 of draft article 28 spoke of "complete freedom of decision", which implied that if such freedom were only partial the situation would be different. Freedom of decision was, however, linked to sovereignty and therefore either did or did not exist: any State subject wholly or partly to the control of another State did not possess that freedom. Consequently, the decisive issue was the extent of control. The party exercising it, *de jure* or *de facto*, must be the one responsible. If the control was exercised *de jure*, there was no problem, but, if it was *de facto*, then draft article 28 was relevant.

33. Paragraph 2 was even more specific in that regard, in that it dealt with control exercised by force. The decisive element was coercion, used by the party exercising control in order to impose its will.

34. He suggested that the draft article might be simplified. It might be reduced to a single paragraph which would reflect those two basic elements, namely, the exercise of control and the use of coercion.

35. Sir Francis VALLAT said that, in view of the complexities of the question, he would be grateful if Mr. Ago could comment at an interim stage on the various points raised thus far in the discussion. Also, with regard to Mr. Pinto's comment that one of the leading principles of the draft was missing in article 28, he thought it would be useful to know the reason why that article had dropped the requirement that certain conduct must be attributable to the State in order for that State to incur responsibiliy.

36. Mr. USHAKOV appreciated that, from an economic, political or cultural standpoint, probably not one single State was independent, since States were under constant pressures from other States and were never absolutely free. In law, however—and the Commission should concern itself only with the law—all States were, by definition, sovereign and independent States, and therefore responsible for their acts.

37. That being so, was it possible to speak of control exercised by a sovereign State over another sovereign State? He personally thought that, with the exception of a genuine military occupation (which was unlawful and hence outside the scope of the draft articles, which dealt only with lawful situations), the only case in which it was possible to speak of control by one or more States over another was that of a supranational system. If sovereign and independent States delegated part of their sovereignty to a supranational entity, their freedom of decision and action was restricted. It was difficult to say whether it was the supranational entity that was responsible or its member States. The problem of responsibility arose in that instance only.

38. Apart from the new supranational phenomenon, the only situation of dependence which existed in law was that of the "dependent territories", as defined by the United Nations. However, the States referred to in the draft article were not dependent territories. Economic dependence and legal dependence were quite distinct notions: a sovereign State that was independent in law might very well be economically dependent on another State, for instance, for its oil supplies. That certainly did not mean that, in law, it was subject to the control of the other State.

39. Mr. REUTER thought that the question of supranational entities mentioned by Mr. Ushakov should not be broached at that juncture. He considered, on the other hand, that the problem of coercion should be raised, for it touched on substance. If a State had committed an offence whilst under coercion, even unlawful coercion, did its responsibility disappear completely? Or did it subsist in a diminished form? Or did that State remain fully responsible?

40. Unlike Mr. Ushakov, he considered that coercion by the use of armed force was not the only form of coercion. At the time when the problem of coercion had been considered in connexion with article 52 of the Vienna Convention, it had been said that there were forms of coercion other than coercion by armed force. One State might compel another State to commit an internationally wrongful act by threatening, for instance, to interrupt its supplies of arms, thus endangering its national defence. It was true that the situation was a *de facto* one, but the problem arose precisely in connexion with *de facto* situations.

The meeting rose at 1 p.m.