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Summary record of the 1534th meeting

Topic:
State responsibility

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1534th MEETING

Friday, 18 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.

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*)

1. Mr. FRANCIS, said that, in considering the principle embodied in draft article 28, it was important, while discarding those aspects of the past that were no longer relevant, not to overlook the realities of the present and the implications for the future. That was particularly applicable to the situation unfolding in southern Africa, which was marked by the systematic creation of client States. Rhodesia was but one example, and he would raise the question whether the armed attacks on Zambia, Mozambique and other front line States in Africa were to be regarded as the theoretical responsibility of the United Kingdom or the responsibility of a *de facto* dominant partner, South Africa. Another example was Namibia which, although an entity internationally recognized by the United Nations, was likewise clearly evolving as a client State of South Africa. Both situations were an extension of the *apartheid* principle which the United Nations had condemned in countless resolutions. Another point that merited consideration in the context of the existing situation in southern Africa was the way in which the elements of aid and assistance, referred to in article 27,[2] and direction or control, dealt with in draft article 28, existed in reference to the dependent and dominant States, respectively.

2. With regard to the important issue of coercion, which was the subject of paragraph 2 of draft article 28, it was his view that, under Article 2, paragraph 4, of the United Nations Charter, the threat or use of force must be regarded as a breach of a peremptory norm of international law. Consequently, where one State coerced another into committing an act and thereby incurred responsibility, it was logical that it should likewise be responsible for the consequences of the act vis-à-vis any third State.

3. Lastly, he would favour the deletion of the word "indirect" from the expression "indirect responsibility", since any such qualification might create doubt in a sensitive area.

4. Mr. QUENTIN-BAXTER noted that Mr. Ago's detailed commentary and the Commission's discussion on draft article 28 revolved upon the words "indirect" and "exclusive". Like the majority of the Commission's members, he felt that neither of the two concepts could remain in the final draft. Exclusiveness seemed to be somewhat akin to superior orders in the law of war. There was, of course, a point at which a subordinate ceased to be the actor and became a mere instrument to whom responsibility could not attach. That point was not readily reached, however, and it was certainly not for the Commission to lay down the general proposition that the lack of complete freedom of decision negatived responsibility or, in the light of the general structure of the draft, to concern itself with propounding such a statement in chapter IV. What it was endeavouring to do in that chapter was to define the circumstances in which a third State's international responsibility was incurred. Chapter V of the draft, which would deal with the important question of grounds for exemption from responsibility, including *force majeure,* would have as much relevance to the matters under consideration as to the other general terms of the draft. It was therefore desirable to sever from the draft article the negative statement in both paragraphs "does not entail the international responsibility of the State". The degree of responsibility of the State implicated in another State's act could be regulated in the general context of the draft when it was completed.

5. A more difficult matter concerned the concept of indirect responsibility. It was not simply a matter of deleting the word "indirect", since the article was based on the concept of responsibility of an exceptional kind, involving as it did separation of the act from responsibility for the act. He could appreciate why some members thought that to remove the idea of indirect responsibility would divest the article of its *raison d'être,* although he would not himself go so far as that.

6. As was clear from Mr. Ago's report, jurists had had to struggle hard, in the earlier phases of international law, towards the goal of substantial justice. Their concept of the State as a sovereign entity admitting of no power beyond itself, although appropriate in its context, had been capable of being used perversely: in international law, far more than in any developed system of domestic law, it had been possible to raise as a barrier to responsibility the fact that, if an entity was admitted to be sovereign, then, whatever the legal or practical fetters on its freedom, that precluded the attribution of responsibility to any other State involved in precipitating the action. As a result, the notion of indirect responsibility had been developed with some subtlety to ensure that real responsibility was not

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

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

avoided because of the apparently absolute nature of sovereignty. In some instances, however, a broader view had been taken, it being held in effect that, in the case of a puppet, responsibility was incurred by the party manipulating the strings. In the circumstances, it was not surprising that there was a general sense of unease about carrying forward the subtleties developed to meet the limitations of the older law and, in particular, a situation where so much emphasis was placed on form and so little on substance.

7. As Mr. Ago had rightly pointed out, the maxim *qui facit per alium facit per se* was not totally accepted in the history of international law; personally, however he thought the time was coming when it would be recognized, and should be stated as a general principle of law, that a State which acted through another was itself responsible.

8. He was not sure how much of the detail of the draft article should be retained but, as far as "coercion" was concerned, it seemed to him that it meant something much broader in that context than a resort to the use of force. Obviously, coercion would in most cases be an illegal act in itself, but in the case of economic aggression it might also extend, for example, to the payment of large sums of money to induce another to perform actions that were in themselves unlawful. Consequently, it was not necessary to postulate that coercion was always unlawful.

9. Historically, both in law and in fact, there had been situations of legal relationships in which States had been recognized as sovereign although their freedom to control their own affairs had been considerably curtailed. Happily, those situations belonged largely to the past. It would, however, be a mistake to believe that all present or future relationships were or would be simple, as could be seen by the range of circumstances covered by the term "associated State". At one extreme, it could mean a State which, constitutionally, had complete freedom of action and alone could determine its future but which chose for the time being to submerge part or all of its international personality in an association with another State. Whether such a relationship was governed by law or was one of fact depended on the approach. Constitutionally, it fell within the sphere of domestic law but, from the standpoint of international law, it was a situation of fact. The situation might perhaps be categorized by the degree of recognition accorded by other States, in which case the relationship would be more one of law than of fact.

10. Lastly, while he thought it would be advisable to shorten article 28 and make it less specific, he considered that its kernel was well worth a place in the draft articles.

11. Mr. TABIBI considered that, given the importance of the principle embodied in draft article 28, the article should be retained, even if not in the precise terms proposed. The article also provided the necessary complement to article 27, dealing with direct aid or assistance, without which the whole concept of indirect responsibility would be incomplete.

12. That concept had passed through three main stages. The first, coinciding with the height of the colonial era, had been the period before the First World War, when a handful of States in Europe had been responsible for the affairs of all the others. In that connexion, it had rightly been said that the freedom of the latter was a fiction. It was during that period that certain jurists, including Anzilotti, had evolved the concept of indirect responsibility. The second stage, after the First World War, had seen the creation of the League of Nations and the emergence of mandates and protectorates. There had followed the third stage, marked by the creation of the United Nations and heralding an important change in the history of the times. The concept had come to be viewed within the context of the United Nations Charter, considered as an instrument of positive international law. Thenceforth, all States had been held to be equal and independent and, notwithstanding the obvious differences between the large nations and countries such as Nepal or Afghanistan, there had been no limitation in principle to their sovereignty and independence.

13. Consequently, in his view, any reformulation of draft article 28 should reflect those developments, in line with the principles of the United Nations Charter. At the same time, he considered it essential to retain the notion of coercion, dealt with in paragraph 2 of the article, since coercion, whether military, economic or political, was undeniably a feature of the times.

14. Mr. AGO, answering the comments made by members of the Commission on draft article 28, noted that Mr. Ushakov (1533rd meeting) disputed the very existence of the concept of indirect responsibility. Yet that concept was recognized, as far as internal law was concerned, in the legal doctrine of all States, and there was every reason that it should obtain recognition in international law too. For his own part, he wished to point out that the concept of indirect responsibility, or of responsibility for the act of another, had no connexion, in international law, with other concepts with which it had sometimes been confused, such as that of State responsibility "for acts of individuals", as it was known, which was in fact a responsibility incumbent upon a State for its own act on the occasion of acts committed by individuals. Indirect responsibility was the responsibility attributable to a subject of law by virtue of a pre-existing relationship between the two subjects. Under internal law, for example, an employer was answerable for what his apprentice had done, because between the employer and the apprentice there was a pre-existing legal tie by reason of which the employer was answerable in lieu of the apprentice for wrongful acts committed by the latter. The same was true of the responsibility of parents for their children's acts, a case mentioned by Mr. Ushakov. That kind of responsibility was not based on a legal fiction, for after all the act had been committed by the apprentice, not by the employer. Nor was it based on a temporary lapse of supervision, but on a

permanent relationship between two subjects. Then again, it constituted a safeguard for injured third parties.

15. The reason why the approach adopted in article 28 was different from that followed in article 27, as Mr. Pinto and Sir Francis Vallat had noted (1533rd meeting), was that the two articles dealt with different situations. The case contemplated in article 27 was that where one State aided another to commit an internationally wrongful act. Such aid might in itself constitute lawful conduct, but an act that would normally be lawful, like the sale of weapons, for example, was tainted by illegality in so far as it facilitated the commission of a wrongful act by another State. In the case envisaged in article 28, the responsible State had provided no aid, and indeed might not have done anything at all. The sole source of its responsibility was the fact that between the two States there existed a special relationship giving to one of them power of direction or control of the activities of the other.

16. As Mr. Pinto has said, article 28 satisfied a requirement of justice, and did so in two ways: first, in the relations between the two States, for it was right that the dominant State should be answerable for the consequences of acts committed by the subordinate State, and, secondly, in relation to the third State, for it was right that the third State should in any event be able to apply to a State capable of making good the injury caused, as Huber had said in his arbitral award in the *British Claims in the Spanish Zone of Morocco* case.[3]

17. The situations of protectorate to which he had referred earlier in his analysis were obsolete situations, as Mr. Ushakov had pointed out, for in modern times all States were equal and independent, at least in theory. It was not impossible, however, that some situations of dependency might recur in the future. Mr. Ushakov had himself mentioned a fresh situation in which the problem of indirect responsibility might arise, namely, the case of supranational entities. However, before dealing with current situations, one should also consider the existing consequences of earlier situations, for it was conceivable that arbitrators or judges might at some future time have to adjudicate in cases having their origin in situations that had become obsolete.

18. That being so, the question of indirect responsibility arose not only in connexion with past situations like those of protectorates, but also in connexion with those that were unfortunately very topical, like military occupation. It was idle to inquire, as Mr. Ushakov had done, whether the occupation was legitimate or illegitimate. There were admittedly cases of "legitimate" or "liberating" occupation, like that of the Axis countries by the Allies, and there were also cases of illegitimate occupation. But the issue was not whether the situation existing between two States was or was not legitimate: the sole issue was whether the situation existed and, if so, what were its consequences. Besides, the occurrence of cases of illegitimate occupation was yet another reason for affirming the occupying State's responsibility for acts committed by organs of the occupied States. And even if the occupation should be legitimate, should the occupying State be exonerated of all responsibility for acts committed by the occupied State? In either case, the problem of the responsibility of the occupying State arose by reason of the position in which the occupied territory found itself vis-à-vis the occupier.

19. With regard to the question of coercion, he agreed with Mr. Tsuruoka and Mr. Pinto (1533rd meeting) that article 28 could be drafted in conformity with article 52 of the Vienna Convention,[4] but he appreciated, like Mr. Tabibi, that there might be different forms of coercion giving rise to responsibility for the act of another. Radically opposed positions had been taken on that question. In Mr. Tsuruoka's view, the State exercising coercion must be regarded as having exclusive responsibility, whereas according to Mr. Ushakov the State subjected to coercion could not be exempted from its responsibility. Personally, he considered both those views equally justified and equally unjustified; in his view, the responsibility of the State exercising coercion was undeniable, but at the same time the State subjected to coercion must be able to retain its own share of responsibility, by virtue of the principle *coactus voluit, tamen voluit*. Thus the responsibility of the coercing State and that of the coerced State were not necessarily exclusive. They could be concurrent responsibilities.

20. As between those extreme positions, some members of the Commission, like Mr. Reuter (1532nd meeting) and Mr. Verosta (1533rd meeting), had adopted a less categorical view: they had considered that the rule in article 28 was perhaps too exclusive and had suggested a more flexible formulation. He was ready to endorse their view for, like them, he thought that the responsibility of the State which exerted control should not always be exclusive and that in certain cases the responsibility of the State under control could be held to subsist. There was yet another reason in support of a non-exclusive responsibility on the part of the occupying State: a third State could not be obliged to apply for redress to the occupying State if it did not recognize that State and preferred to apply to the occupied State. It was therefore a sound view to consider that sometimes both responsibilites coexisted.

21. Like Mr. Quentin-Baxter, he therefore thought that the negative formulation of article 28 should perhaps be dropped; that formulation had been justified by the attribution of exclusive responsibility to the dominant State. He further agreed with Mr. Quentin-Baxter that, for the purposes of international practice, it was very important that the draft article should state that the responsibility of a subject of international law for an internationally wrongful act committed by another subject of international law differed from the responsibility for the State's own act.

[3] See A/CN.4/318 and Add.1–3, para. 8.

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

22. Sir Francis VALLAT said that, like most members of the Commission, he was in broad agreement with the analysis contained in Mr. Ago's report. The difficulty now was to give a modern formulation to the problem discussed in Mr. Ago's study and presentation of State practice and legal precedents. In resolving that problem, the Commission was rapidly reaching the stage at which it required the help of more detailed discussion of the text of article 28 in the Drafting Committee.

23. An examination of the draft articles as a whole, and particularly of articles 5 to 15, revealed that the case envisaged in article 28 was not covered by the attribution of conduct or of an act to the State. He was persuaded of the need to incorporate article 28 in the set of articles and was satisfied that, in the present instance, the Commission was concerned not with the attribution of conduct or of an act to a State but with the responsibility of a State for an internationally wrongful act of another State, an issue that was factually and juridically entirely different, and one that was rightly set in a different context and placed in juxtaposition with article 27. Naturally, it was still desirable to consider article 28 in relation to earlier articles of the draft. For example, it had some affinities with article 12, paragraph 1 of which specified that

> The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

That provision, which dealt with what could be called a third State situation, was cast in negative form, and, whereas paragraph 2 of article 12 could be expected to be in the positive form found in article 28, it simply referred to articles 5 to 10, which did not, in his opinion, cover the situation with which the Commission was now concerned. Accordingly, it was quite clear that there was a place for article 28 in the structure of the draft.

24. Reference had been made earlier to article 1, which was to some extent inconsistent with the negative formulation of paragraph 1 of article 28, and some adjustment would certainly be needed. However, he would be extremely reluctant to tamper with the wording of article 1, which enunciated the basic principle that lay at the very root of the entire set of draft articles. Any adjustments to the other articles would therefore have to be brought into line with article 1. For instance, he would not be able to agree to the deletion from article 1 of the words "of that State". Any general principle was almost inevitably subject to some qualification, but the situation under consideration included an element of exemption from responsibility, and might perhaps be more clearly emphasized in the part of the draft that would deal with exclusions rather than in the part dealing with what might be termed the positive aspect of responsibility.

25. Straightforward elimination of the negative aspect of article 28 might well prove to be the right course, but it would not necessarily solve the problem of dual responsibility. Under private law in common-law countries, it was clear that, in the event of damage to property or injury to life caused by the negligent act of a lorry driver employed by a company, the lorry driver incurred personal responsibility or liability for his own negligent act, and the employer also incurred vicarious responsibility or liability if the driver had been acting within the scope of his employment. The position in international law was not exactly the same, but analogous situations might nevertheless arise. He had in mind the terms of article 19, concerning international crimes and international delicts. Mention had been made earlier of breaches of peremptory norms forming part of *jus cogens*. Could a State that was under pressure and embarked on a course of genocide really shift the responsibility for its genocidal acts to the State which was exerting pressure? Obviously, the Commission could not accept such a proposition in the articles of fundamental importance that it was now formulating. Consequently, it was essential to contemplate the possibility that responsibility for an internationally wrongful act might be shared, although not necessarily to the same extent, by both the State committing the act and the State exercising pressure or control.

26. In terms of drafting, the question was plainly a very difficult one to resolve, and for the moment it was his impression that it might be better to deal with the matter in the part of the draft that would relate to exclusions from responsibility. Article 28 would have to be precise, as was essential in laying down a rule on responsibility, and also flexible, in view of the variety of situations that might arise. Indeed, since 1945 many different situations had arisen which had not fallen clearly under the terms of Article 2, paragraph 4, of the Charter of the United Nations, but it had none the less been necessary to deal with them within a legal framework. Admittedly, the world had moved on from the period of protectorates, but who was to say that, under the auspices of the United Nations, somewhat similar arrangements would not emerge in the future? It might be thought wise, for example, to give a measure of protection to a new State in its early years.

27. Article 28 included expressions, such as "field of activity" and "complete freedom of decision", that unquestionably required clarification. One of the most important points to be considered was the meaning to be attached to the words "subject... to the directions or the control". In determining where responsibility for an act ought to rest, he had been accustomed for a number of years to consider the twin factors of the right to exercise sovereign power and the actual exercise of that power. Perhaps that approach could be adopted with regard to the expressions in question, so as to arrive at a clear definition which would none the less allow for flexibility. Again, the concept of coercion, employed in paragraph 2, could not be limited to the threat or use of force. A threat to withhold the supply of a vital commodity, such as the supply of wheat to a starving population, might constitute a measure of coercion. Nevertheless, coercion was extremely difficult to define and it might be necessary to point out in the commentary that coercion, in the pre-

sent context, meant placing the State committing the wrongful act in a position in which it had no real choice as to how to act. The essence of the matter was that a State should not be able to evade responsibility simply by affirming that the act in question had been committed by another State.

28. In addition, regardless whether or not the final formulation of the article would include the phrase "in law or in fact", it was essential to cover both cases. True, the *de facto* situation was more likely to occur than the *de jure* situation, but situations were conceivable in which the dominant State had a legitimate right to act in the way it did. It was, of course, of the utmost importance to deal with *de facto* control, but in that instance responsibility should be proportionate to the extent to which such control was exercised.

29. It would be preferable to delete the word "indirect" from the whole of article 28 and not to endeavour to find a substitute for it. The word would inevitably give rise to difficulties of interpretation. The Commission was concerned solely with determining the existence of responsibility, and the use of terms such as "indirect" would merely raise questions as to whether the responsibility was qualified in some way.

30. He considered, lastly, that the proposal by Mr. Tsuruoka (A/CN.4/L.289) should certainly be taken into account by the Drafting Committee.

The meeting rose at 1 p.m.

1535th MEETING

Monday, 21 May 1979, at 3 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, 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, A/CN.4/L.289, A/CN.4/L.290)

[Item 2 of the agenda]

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

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)[1] (*continued*)

1. Mr. RIPHAGEN said that draft article 28 involved the ever-present question of the interaction of fact and law. According to any concept of justice, one set of facts—for example, a certain course of conduct on the part of a State or a given result or event—required another set of facts to be realized, for instance, *restitutio in integrum*, compensation, or even an entirely different set of facts. To categorize the first set of facts as internationally wrongful and the second as concerned with the content, form and degree of international responsibility was but a legal tool for arriving at that balance which would serve justice. Consequently, in order to determine the second set of facts, the first set had to be taken fully into account, and hence outside influences on the conduct of a State could not be entirely disregarded.

2. At the same time, all legal systems, seeking to reflect concepts of justice in a body of rules and procedures, created their own realities, which were sometimes termed legal fictions, and those realities could likewise not be disregarded with impunity. Thus the claim of States to be sovereign, with all the rights which that entailed, necessarily involved their acceptance of the obligations deriving from international responsibility, as was stated in articles 1 and 2 of the draft.[2]

3. Some of the debate which had arisen seemed to stem from the conflict between those two points of view, a conflict that had already been apparent during the Commission's discussion on article 27 at its thirtieth session; that article dealt with the reverse situation, namely, aid and assistance rendered by one State to enable another to commit an internationally wrongful act.

4. One similarity between article 27 and draft article 28, which had perhaps inspired the amendment submitted by Mr. Tsuruoka (A/CN.4/L.289), was that in both cases the combined conduct of two or more States created the illegal or wrongful state of affairs. It seemed reasonable, therefore, to accept combined international responsibility, whether "shared" or "joint and several". The choice between those two forms of responsibility was one illustration of the way in which the matters covered by draft article 28, as also by article 27, overlapped with part II of the draft, which would deal with the content, forms and degrees of responsibility. At some stage, therefore, the Commission would have to consider whether the international responsibility of State A arising out of its implication in an internationally wrongful act committed by State B had the same legal consequences for both States. In that connexion, it was worth noting that the International Court of Justice, in its Advisory Opinion in the Namibia case, had stated, on the one hand, that the continued illegal presence of South Africa in Namibia and the duty of other States not to recognize that presence did not divest South Africa of its international responsibility for its acts on Namibian territory and, on the other, that non-recognition of such a presence

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

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