

Document:-  
**A/CN.4/SR.1850**

**Summary record of the 1850th meeting**

Topic:  
**International liability for injurious consequences arising out of acts not prohibited by international law**

Extract from the Yearbook of the International Law Commission:-  
**1984, vol. I**

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Committee the Commission's appreciation and its best wishes for future success. He also took that opportunity to express the Commission's gratitude to Mr. Reuter for representing it at the Committee's session. Lastly, he assured Mr. Herrera Marcano of the Commission's earnest wish for continuing co-operation with the Inter-American Juridical Committee.

46. Mr. DÍAZ GONZÁLEZ congratulated Mr. Herrera Marcano on his excellent statement. The members of the Commission were well aware of the work which the Committee was doing, not only in the sphere of inter-American relations, but also as a research body working on international law in general. It had often been said that Latin Americans were inclined to be too active in the legal field. That was explained by their heritage of two very strong cultural influences: on the one hand, the Graeco-Roman and Judaeo-Christian influence exerted through Spain, a country in which the law had played a primordial role, and on the other hand the cultural influence of France, another country much attached to legal rules, whose influence on the legislation of the Latin countries had been decisive. It was in the interests of the whole international community that the close co-operation established between the Committee and the Commission should continue.

47. Mr. BARBOZA thanked Mr. Herrera Marcano for his detailed statement on the Committee's activities, the extent of which should not surprise those who had followed its progress and knew how it honoured the legal tradition of Latin America.

48. Mr. REUTER asked Mr. Herrera Marcano to convey his gratitude to the Inter-American Juridical Committee for the welcome it had given him. The Committee differed from the Commission in that it held two sessions a year, had a permanent secretariat and concerned itself with both public and private international law. He took pleasure in emphasizing the family spirit which prevailed among its members.

49. Mr. MAHIOU, speaking on behalf of the African members of the Commission, thanked Mr. Herrera Marcano. His statement on the contribution of the Inter-American Juridical Committee to international law had shown the mutual interest of co-operation between the Committee and the Commission, both of which were trying to promote the rule of law, though sometimes by different means.

50. Mr. McCAFFREY, speaking also on behalf of the Western European members and Mr. Quentin-Baxter, expressed admiration for the fruitful and ambitious work of the Inter-American Juridical Committee. Like the Commission itself, the Committee provided an excellent example of what could be achieved by constructive co-operation between experts representing not only different cultural traditions, but also different legal systems. That remark was fully borne out by the Committee's past achievements and also by its programme of work, which covered the most important problems of the day in both public and private international law. The Commission had greatly benefited, both directly and indirectly, from the work of the Inter-American Juridical Committee.

*The meeting rose at 1.10 p.m.*

## 1850th MEETING

*Thursday, 28 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law** (*continued*) (A/CN.4/373, <sup>1</sup>A/CN.4/378, <sup>2</sup>A/CN.4/383 and Add.1, <sup>3</sup>A/CN.4/L.369, sect. H, ILC(XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR  
(*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

ARTICLE 5 (Cases not within the scope of the present articles) <sup>4</sup> (*continued*)

1. Mr. SUCHARITKUL recalled that, when he had spoken on the Special Rapporteur's fourth report (A/CN.4/373) at the previous session, he had concurred with the approach adopted by the Special Rapporteur. <sup>5</sup> As the representative of his country in the Sixth Committee of the General Assembly at its thirty-eighth session, he had expressed similar views and had supported the Special Rapporteur's schematic outline. <sup>6</sup> He was therefore pleased to see that there appeared to be growing support for the topic under consideration.

2. The Special Rapporteur's fifth report (A/CN.4/383 and Add.1) contained general provisions in the form of draft articles 1 to 5. As it now stood, draft article 1 afforded a very satisfactory working basis for further discussion. It contained many useful elements, such as the reference to "activities and situations", which adequately covered all possibilities. The reference to the

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> For the texts, see 1848th meeting, para. 3.

<sup>5</sup> *Yearbook ... 1983*, vol. I, p. 266, 1801st meeting, paras. 1-6.

<sup>6</sup> See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 36th meeting, para. 59.

“territory or control” of both the source State and the affected State was also particularly useful. The reference to the use or enjoyment of “areas” within the territory or control of a State would serve a dual purpose: the term “area” had a spatial or territorial connotation, but it also had a substantive connotation and related to the subject-matter of control.

3. Turning to draft article 2 and, more specifically, to the definition of the term “territory or control”, he expressed support for the Special Rapporteur’s approach, which expanded the meaning of the term “territory” to include maritime areas. With regard to areas beyond the limits of national jurisdiction, the provisions of article 2 fastened liability on to States. In future, however, the Special Rapporteur would also have to explore the situation of the injured party; it was not always possible to dissociate the damage sustained by a State from the injury suffered by the individual or individuals actually affected.

4. The problem of the liability of the State for injury arising out of internationally lawful acts had been described as corresponding to a “twilight zone” and the present topic was undoubtedly one that was suitable for the progressive development of international law. He recalled that, in 1960-1961, when the Asian-African Legal Consultative Committee had, at the request of the Government of India, examined the problem of the legality of nuclear tests, it had arrived at the conclusion that such tests were illegal when carried out on land, in the atmosphere or over the oceans, but it had not taken any decision with regard to underground tests.<sup>7</sup> In 1966, the Asian and Pacific Council had adopted a similar approach. The attitude towards the problem of nuclear tests thus clearly showed that something which was not unlawful today might become totally illegal tomorrow.

5. Referring to the problems created by the transfer of factories from developed to developing countries, he noted that such highly industrialized countries as the United States of America and Japan had suffered serious physical harm as a result of the activities of industrial complexes. They had, in particular, been obliged to spend enormous amounts of money and to devote much scientific knowledge and technical skill to reducing or abating air and water pollution. In the light of that experience, those countries had adopted very strict laws and regulations with regard to the operation of factories.

6. Developing countries such as Thailand and many Pacific islands were now faced with the problem of pollution and other detrimental effects caused by the activities of factories transferred to their territories by industrialized countries such as Japan. In the circumstances, he considered that an activity which was unlawful in Japan should also be regarded as unlawful in those new industrial regions.

7. As an example of such an activity, he referred to the discharge of mercury into a river in a developing country by a factory transferred there from an industrialized

country. In a situation of that kind, it could be said that both the countries concerned were to blame. The developing country was perhaps at fault for failing to regulate the matter, even though it had probably been taken by surprise, while the industrialized country was responsible for the situation because the damage had been foreseeable, but had not been foretold. There should be a duty to give reasonable notice in such a situation. Cases of that sort often led to *ex gratia* payments, but that solution was totally unsatisfactory. In cases of transboundary loss or injury, clear international liability should be established. For all those reasons, he welcomed the inclusion in draft article 2 of the definitions of the terms “source State” and “affected State”.

8. He also welcomed the introduction by the Special Rapporteur of the idea of “a physical consequence” flowing from an act which was not prohibited by international law and of the concepts of the equitable allocation of risk, the equitable sharing of responsibility and the duty to prevent the occurrence of harm, which would all be extremely helpful to the Commission in its work on a very important topic.

9. Mr. RIPHAGEN said that, since the Commission was still trying to find a solution to the problem of the scope of the topic under consideration, with which draft articles 1 to 5 were in fact all concerned, it was quite understandable that members should continue to have some doubts, but he did not think they should decide that the topic should not be discussed further. What was needed was, rather, some further reflection on the exact scope of a subject which truly belonged to a “twilight zone”. The general technique of international law started with a division of rights between States, especially with regard to territory, and then established all manner of obligations regarding the exercise of those rights. Failure to fulfil any of those obligations gave rise to State responsibility. The phenomenon of solidarity among States had, however, come into being as a result of the moral development of international law. The concept of solidarity was, of course, known in national societies, but it was more often imposed than accepted by all.

10. The topic under consideration lay in the intermediate zone between the concept of substantive obligations established by treaty or by customary law and the idea of solidarity which the international community accepted because it realized that a limitation on the exercise of sovereign rights was necessary in its own interests. That intermediate or “twilight” zone had been illustrated by the *Trail Smelter* case,<sup>8</sup> in which it had been held that a State had no right to do certain things, although no ruling had been made on the existence of any legal obligation to refrain from certain acts. If such a ruling had been made, the issue of State responsibility would have arisen.

11. A duty to co-operate existed in that twilight zone and, in dealing with the topic under consideration, the Commission had to determine the source of that duty. In his own view, that source was to be found in the relationships between ecosystems that resulted in activities in one

<sup>7</sup> See *The Work of the Asian-African Legal Consultative Committee (1956-1974)* (New Delhi, 1974), pp. 95-96.

<sup>8</sup> See 1848th meeting, footnote 10.

State having effects in another. The Commission had to translate that relationship between chance and necessity into a legal relationship, namely a duty to co-operate, which, as pointed out by Sir Ian Sinclair (1849th meeting), was more a procedural duty than a substantive one. States thus had to be urged to co-operate in establishing procedural rules either in abstract terms or in concrete circumstances, as had happened in the *Trail Smelter* arbitration.

12. Although it was difficult to define the limits of a twilight zone, the Special Rapporteur and the Commission itself had already limited the topic under consideration by deciding to deal only with the physical consequences of the activities of one State within the territory of another. The Special Rapporteur had thus drawn on that fact of nature to propose that, in addition to their existing obligations under customary law or treaty law, States had a general duty to co-operate. In that connection, one unavoidable legal problem was that of determining exactly what action a potential source State had to take in order to prevent transboundary harm and whether it would be required to place under control every activity that could possibly cause such harm. The problem of the dumping of waste at sea was a case in point. The States parties to the relevant treaties already had a duty to establish a licensing system for the transport of waste by sea, but it was doubtful whether that duty could be made generally applicable.

13. Another problem was to determine whether the draft articles could add anything to existing régimes, such as that established by the 1982 United Nations Convention on the Law of the Sea.<sup>9</sup> He had some misgivings about the references in draft article 2 to matters relating to the law of the sea. The Commission must, for example, avoid giving the impression that there was any right of sovereignty in respect of the 200-mile economic zone. In matters relating to maritime areas, it would be inappropriate to consider the coastal State as being an affected State by definition and the flag-State as being a source State by definition. Actually, both States had a duty to co-operate, as well as a duty to prevent damage and to mitigate damage when it occurred. In many cases, moreover, transboundary harm resulted from unco-ordinated land uses. If a State built a residential area on its side of the border and a neighbouring State built an industrial complex on its side, transboundary harm would be inevitable, but both States would be at fault because they had failed to co-ordinate their land uses.

14. He agreed with Sir Ian Sinclair's suggestion that, in draft article 1, the term "situations" should be replaced by the term "occurrences". A "situation" was created by nature, but it was "activities" and "occurrences" that gave rise to the duty to co-operate.

15. In conclusion, he stressed that the problem of the attribution of liability or, rather, of the determination of the source of the duty to co-operate lay at the core of the topic under consideration and required a common understanding on the extent to which a State was obliged to keep certain activities under control. Further thought

would thus have to be given to the definition of the scope of the topic, but the result of the Commission's efforts might well be a model of co-operation that could be recommended to States.

16. Mr. OGISO said that the Special Rapporteur seemed to have reached the tentative conclusion in his fourth report (A/CN.4/373) that the rules being formulated should not embody the principle of strict liability. Although that principle had, of course, been reflected in a number of international treaties, such as the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,<sup>10</sup> it was still far from being a principle of international law. In the same report, the Special Rapporteur had objectively stated various views and a reader who was not very familiar with the topic might find them somewhat confusing. However, in his final considerations, he had said that the idea of treating strict liability as an alternative set of "secondary" rules had "never appealed to the Commission or to the Special Rapporteur", basically because of the "need to avoid even the appearance of putting the principle of strict liability on the same level as the responsibility of States for wrongful acts or omissions" and because "nothing should be allowed to threaten the unity of international law" (*ibid.*, para. 66). That was a very clear statement and, if his own understanding of it was correct, it would assist him greatly in participating in the discussion of the topic.

17. In dealing with the topic, the Special Rapporteur had started with the general obligation of prevention and had moved on to the obligation of co-operation or reparation. While that was an interesting approach, he for his own part would continue to be unconvinced about the viability of the topic until he had seen the substantive provisions which the Special Rapporteur would put forward in the next stage of his work.

18. The five draft articles which the Special Rapporteur had submitted in his fifth report (A/CN.4/383 and Add.1) were in the nature of an introduction to the proposed draft convention, which would cover what had been described as a "twilight zone" of international law. In the circumstances, it might be a little dangerous to enter into a discussion of the introductory part without having a clearer idea of the draft as a whole, or at least of the substantive provisions that would be submitted. Admittedly, the Special Rapporteur's fourth report included a schematic outline which was meant to be read together with the introductory draft articles. It would, however, be desirable for that schematic outline to be couched in terms that were more akin to treaty language. The very fair and objective manner in which the Special Rapporteur had presented his ideas made it somewhat difficult to see in which direction he planned to proceed.

19. It was not clear to him why the fourth and fifth reports did not refer to the concept of the abuse of a right by a State, particularly, of course, by the source State. Specifically, he wondered whether any refusal to co-operate in taking preventive measures or making repara-

<sup>9</sup> *Ibid.*, footnote 4.

<sup>10</sup> United Nations, *Treaty Series*, vol. 610, p. 205; see article VI.

tion could be interpreted or explained on the basis of the concept of the abuse of a right. He had not studied all the relevant cases in full and had been unable to attend all the meetings during which the Commission had discussed the present topic, so that question might already have been settled. If so, he apologized for raising it.

20. The transboundary element of a physical consequence, on which the Special Rapporteur had placed the main emphasis, provided a reasonable basis and starting-point for the Commission's discussions; but, in view of the obligation to take preventive measures, the question might not be so simple. Under a specific régime governing, for example, oil pollution, an obligation could perhaps be imposed on the State to grant a licence to an oil tanker, but, if a general obligation to take preventive measures were laid down, he wondered what form it would take. He would appreciate any further clarification the Special Rapporteur could provide in that regard.

21. He also noted that the Special Rapporteur had not used the words of the title of the topic and, in particular, the word "liability" in any of the five draft articles. Was that mere coincidence, or had the Special Rapporteur deliberately avoided using the word "liability"?

22. Sir Ian Sinclair had expressed some reservation about the use of the word "situation" in draft articles 1 and 2. His own view was that that word might be useful if, for example, a number of sources, such as industrial smoke, motor vehicle exhaust and waste disposal, caused air pollution and the source State was unable to specify the exact source. The word "activities" might not suffice to cover such cases, although it would be difficult to take a definite stand on the matter before the Commission had taken cognizance of the substantive provisions of the draft. In Japan, the rules governing the disposal of factory waste in rivers or the sea were extremely strict and took account of the fact that pollution could come from multiple sources, which might raise the pollution to a dangerous level. Although Japanese standards were perhaps much stricter than those of other countries, he believed that they pointed to the general direction in which the international community would move in the future.

23. The Special Rapporteur had made a very interesting comment in his fifth report (*ibid.*, para. 38) in connection with the questionnaire addressed to international organizations. Such organizations sometimes laid down guidelines for pollution control or waste disposal. He would like to know whether the Special Rapporteur also considered that any such guidelines which had been laid down by an international organization with restricted membership and communicated to non-member States should be taken into account in connection with the general obligation to take preventive measures or make reparation. That point might be relevant to the further study of the topic.

24. Lastly, he considered that the form which the draft articles should take could be decided only when all the provisions, including the substantive provisions, had been placed before the Commission. He also considered

that the topic would require further examination before any decision could be taken on whether or not it should be removed from the Commission's agenda.

25. Mr. QUENTIN-BAXTER, referring to the element of a physical consequence, said that the Commission had initially taken the view that the scope of the topic could not be delimited until its content had been clearly defined. On the basis of the schematic outline subsequently proposed, the current members of the Commission had urged him to adopt the limitation now expressed by the proposal that the draft articles should apply only to activities giving rise to a physical consequence.

26. The element of a physical consequence was quite rigorous. A basic criterion of the entire topic was that something done within the territory or control of one State would produce a physical consequence which would or might have transboundary effects. That requirement was justified because it was not within the power of the affected State to prevent that consequence or its effects. Of course, if the water of a river was polluted, it could be argued that the affected State could have installed a purification plant at the border; that was not the point, however. If activities in State A polluted the water at the point of entry into State B, the physical consequence of those activities would inevitably produce transboundary effects.

27. He had endeavoured to emphasize the limiting effect of the element of a physical consequence in his fifth report (A/CN.4/383 and Add.1, paras. 17-21). In the case of armaments, for example, it could be said that it was highly dangerous to build up large stocks liable to be used in the event of war. That case did not, however, fall within the scope of the topic, since any such use would depend on some other human decision. On the other hand, the case in which a stock of weapons was dangerous in itself and was liable, if it fell into the wrong hands, to explode with catastrophic consequences was within the Commission's terms of reference. The distinction was absolutely rigid, so that many matters of real international interest would fall outside the topic. Despite its narrow limits, however, the topic had tremendous force, for States would, as a matter of choice, treat some of those matters as transboundary issues even though they did not fall within the scope of the topic.

*The meeting rose at 11.50 a.m.*

## 1851st MEETING

*Friday, 29 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*later:* Mr. Julio BARBOZA

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Malek, Mr.