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Summary record of the 1851st meeting

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

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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 preparation. 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. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Lacleta Muñoz, Mr. Malek, Mr.
McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.


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) 4 (continued)

1. Mr. BALANDA said he would speak on the Special Rapporteur's fourth report (A/CN.4/373) as well as his fifth report (A/CN.4/383 and Add.1), which contained draft articles testifying to a commendable effort.

2. Referring to the fourth report, in which the Special Rapporteur had analysed the views of representatives in the Sixth Committee of the General Assembly on the topic under consideration, he explained that the feeling he had expressed in the Sixth Committee (A/CN.4/373, footnote 35) had not been disappointment, but rather a certain scepticism which he had shared with others at that time. However, after reading the fifth report, which grasped the subject more firmly, he wished to encourage the Special Rapporteur to continue his work.

3. In the fourth report (ibid., para. 63), the Special Rapporteur had stated that the scope of the topic would be confined to physical activities giving rise to physical transboundary harm, and it was on that basis that article 1 had been drafted. Some speakers had said that it was quite unnecessary to draft rules on the topic under consideration, for since it fell within the exclusive competence of the States concerned, no rules of international law as such were applicable. He did not think that view could be accepted, at least not in principle or in such absolute terms. Internal law on the subject had once been where international law was now, and it had been very reluctant to adopt the notions of risk-based liability, strict liability or no-fault liability. That precedent should encourage the Commission to explore the subject further, albeit with caution, and to consider the possibility of drafting rules to regulate an area not yet regulated except by specific agreements.

4. The study should therefore focus on the nature of the rules to be adopted. Should they be binding or even peremptory? The question raised some difficulties. The first was inherent in the subject-matter itself, which was still in the raw state; it would be for the Special Rapporteur to refine it, taking account of the comments made in the Commission and in the Sixth Committee of the General Assembly. He noted that it was stated in the fourth report that the schematic outline could not "provide for the enthronement of the principle of strict liability" but that it could "work pragmatically for its near-achievement" (ibid., para. 68). He subscribed to the second of those statements and thought that the Special Rapporteur's remark that not all transboundary harm entailed the acting State's liability deserved attention. The Special Rapporteur did not wish to establish a direct link of cause and effect between the activity and its injurious consequence. But it was necessary first to define what was meant by the "acting State". The State which was the source of the injurious act could not always be identified precisely. For example, if several neighbouring States having common frontiers conducted similar activities which affected another neighbouring State, it would be difficult to determine which of them had caused the damage and might have to make reparation. The Special Rapporteur was certainly aware of those difficulties and should perhaps study specific cases to find means of overcoming them.

5. The question also arose as to which State should be asked to make reparation in a case where one State had authorized another to use its territory to carry out an activity which had caused harm to a third State. For example, a State might have authorized another State to carry out nuclear tests in its territory. In the event of an accident, which State would be responsible for the harm done: the State which had lent its territory, or only the State which had in fact carried out the injurious activity? Or could there be joint liability? That question would have to be decided, and it would also be necessary to determine whether, if a claim was made against it, the State which had lent its territory could have recourse against the State which had actually carried out the activity. Similarly, it would have to be determined whether a State which carried out an activity in the territory of another State was required in every case to make reparation for injurious consequences, or whether it could benefit from an exoneration clause. The Special Rapporteur had hinted at the latter possibility, which should be explored.

6. The Special Rapporteur had said that he wished to confine his study to physical transboundary harm, as opposed to moral harm. Yet draft article 2 implied that a natural person could be the victim of an injurious act. If that were so, moral injury could not be completely ignored in the draft articles.

7. In his desire to avoid the controversy which loomed behind the concept of strict liability, the Special Rapporteur was trying to exclude any systematic causal link between the act as such and the possible injury. To that end,
he had introduced the element of a “tolerable threshold” of harm, beyond which reparation should be made. That approach was in line with the conduct of States, which declined to recognize their liability directly, but were willing to compensate when they had committed the injurious act. The case of the “Fukuryu Maru”, mentioned by the Special Rapporteur (ibid., para. 38), illustrated that point. But who was to determine the threshold: the source State alone, or the affected State, or both States in collaboration, or a third party? Developing countries making use of advanced technologies would find it difficult to take part in joint prevention activities because of the limitations imposed by their financial and human resources.

8. The concept of a “tolerable threshold” also raised the question whether the draft articles under consideration were not related to the draft on State responsibility. In other words, could the element of wrongfulness be completely excluded? Even if emphasis was placed on strict liability, the element of wrongfulness would arise in one way or another and it was precisely through the notion of a threshold that the draft articles would connect with the topic of State responsibility. For if a threshold was set, States which were unable to ensure the security of other States beyond that threshold would be acting wrongfully. As the Special Rapporteur had himself recognized, if the notion of a tolerable threshold was maintained it would be necessary to revert to that question at a later stage in the work.

9. The Special Rapporteur was proposing a set of rules, including rules on co-operation and solidarity between States, and there the topic connected with that of the law of the non-navigational uses of international watercourses. He would not go so far as to attempt to determine the foundations of the obligation of co-operation and solidarity, but would point out that such cooperation would sometimes be difficult to achieve. For all co-operation in preventing harm necessarily presupposed good relations between the partners and common interests. Within the framework of the draft under consideration, however, such community of interests was not in evidence. States wishing to carry on an activity were guided by their own interests and did not care about their neighbours. He therefore believed that the realization of such co-operation and solidarity, of which he was in favour, would meet with some difficulties. The balance frequently mentioned in the fourth report could only be established if the interests of States coincided.

10. He agreed with the Special Rapporteur that the rule on sharing costs and benefits should not apply automatically on a mandatory basis. Such sharing could take place only if an interest existed, and a State which had no interest could not be obliged to contribute towards the prevention of damage. That was especially true of developing countries, which could not afford to help other States in their efforts to prevent the injurious consequences of activities which those other States carried on in their own interest.

11. He took the view that international organizations should be excluded from the scope of the draft. If States alone were concerned, it would be logical that, for the time being at least, only their activities, and not the activities of commercial companies within their territory, should be taken into account. It would be difficult to establish the liability of States when they had not themselves conducted the injurious activity. It might perhaps be appropriate, therefore, to delete the word “international” before the word “liability” in the title of the draft articles.

12. It seemed to him that, in the case of State liability for an injurious act, to consider that the victim of that act could be either a juridical or a natural person was tantamount to creating a direct liability of the State to such a person. Outside the field of human rights, that was an innovation in international law which deserved consideration. The Commission should ask itself whether, apart from the machinery of diplomatic protection as such, it was possible to establish a direct obligation of a State to a natural or juridical person. Some clarification would be welcome, because if that was possible the question arose whether the rule of exhaustion of internal remedies should not also be omitted from the draft articles. If direct liability of the State was to be established, should the exhaustion of internal remedies be required or would the injured natural or juridical person be able directly to invoke the international liability of the State which had committed the injurious act?

13. The Special Rapporteur dwelt at length on the continuum of prevention and reparation, and he himself agreed that the effort to prevent injurious acts required attention. But if the effort came to nothing and injury occurred, it was necessary to accept all the consequences, not to stop half-way saying that liability would not always arise. Liability was bound to arise, and the Commission would be compelled to revert to the causal connection which had been rejected at the outset.

14. As he had already said, for developing countries the cost of prevention was high in terms of financial and human resources. Prevention did not necessarily preclude reparation; when a State took specific measures to remedy an injurious situation, it could also take preventive measures at the same time, as was shown by the Colorado River case (ibid., para. 48). Hence the effort of prevention should not be categorically contrasted with reparation, at least so far as the prevention of future risks was concerned.

15. Turning to the Special Rapporteur’s fifth report (A/CN.4/383 and Add.1), he expressed the view that draft article 1 should refer only to activities by States, to the exclusion of activities carried out by entities other than the State within its territory, and of “situations”. Geographically speaking, the draft articles were supposed to apply to the whole of a State’s territory, including outer space. But developing countries could not always control what happened within their territory, understood in that broad sense—that was true of Zaire, whose territory was immense. That being so, it would be difficult to make them responsible for “situations” occurring in their territory if those situations had injurious consequences. Liability should be confined to specific activities and not extend to situations.
16. The Special Rapporteur had introduced the notion of "control" side by side with that of the "territory" of a State. But it was difficult to determine the extent to which a State, especially a developing one, exercised control over its territory. Hence the reference to "control" should perhaps be deleted and draft article 1 be amended to read:

"The present articles apply with respect to activities which are within the territory of a State and which give rise or may give rise to physical damage (or injury) affecting areas within the territory of another State."

That provision would suffice, and would allow a balance between the interests of States to be maintained.

17. Draft article 2 was indispensable. Draft article 3 was premature at the present stage of the work; the content of the topic should be more clearly defined before tackling that problem. Draft article 5 would be improved by being cast in affirmative rather than in negative form, so that cases within the scope of the draft would be precisely defined.

18. In conclusion, he believed that the Special Rapporteur, aided by the comments of members of the Commission, should continue his research on the very thorny topic entrusted to him.

19. Mr. McCaffrey expressed gratitude to the Special Rapporteur for an impressive report (A/CN.4/383 and Add.1) which reflected profound thought and scholarship. The topic was not an easy one, since it did not involve a traditional branch of international law. Rather, it was a topic of the present and the future, and one that would therefore demonstrate the responsiveness of the law to the revolutionary changes of mankind. The fact that it was a new field did not mean that there was not a solid foundation for the Commission's work: indeed, such a foundation was to be found in the principles of co-operation, friendly relations and good-neighbourliness. Those principles, however, were but skeletons and it was the task of the Commission to put flesh on the bones.

20. With regard to the title of the topic, he considered that the French version was more accurate than the English, because it spoke of activities rather than acts. He would, however, prefer not to speak of liability, since that was not what the topic was about: it was more concerned with the methods devised by States to avoid and resolve transboundary environmental problems—methods necessitated by one of the great imponderables of international law, the principle of territorial sovereignty. "Transboundary environmental problems" usually meant transboundary problems in regions that happened to be divided by politically drawn borders to which natural phenomena owed no allegiance. He would therefore encourage the Special Rapporteur to develop a title for the topic that conformed more closely to its existing contours, even if they had yet to be precisely delineated. Members of the Commission should assist the Special Rapporteur in that task. As to the ultimate form of the draft, the Commission's immediate task was to draft a framework instrument of some kind; in his view, the ultimate form of that instrument need not concern it at the present stage.

21. In regard to the scope of the topic, he endorsed the Special Rapporteur's view, stated in his fourth report (A/CN.4/373, para. 63), that it should be confined to "physical activities giving rise to physical transboundary harm". Naturally, at the present stage its outer limits were still blurred, and one of the Commission's tasks should be to identify more precisely the types of activity or situation that fell within the scope of the topic. For that task, the Commission's rich debate had been of great assistance.

22. The Special Rapporteur had provided the Commission with three groups of factors to consider in its attempt to define the scope of the topic: the transboundary element; the element of a physical consequence; and the effects of the physical consequence on use or enjoyment. As he saw it, those three elements were vectors which intersected and the Commission was endeavouring to narrow them so that the area covered by the topic could likewise be narrowed. In that context, the Commission should perhaps consider whether the topic should cover, for instance, actions by one satellite or space object in respect of another, whether accidental or otherwise. It might also wish to consider the extent to which radio waves and other forms of energy, referred to in the fifth report (A/CN.4/383 and Add.1, para. 17), should be included, even though that might seem to be an area that touched upon the realm of theoretical physics. In a case decided in the United States of America, an action in trespass had been brought for inconvenience and damage to property caused by imperceptible matter emitted from a factory. The court, relying on a theory of Einstein, had held that the imperceptible matter could be regarded as a physical invasion, in the same way as any physical entry by a defendant onto the territory of a plaintiff. On that basis it would seem that radio waves and other forms of energy that gave rise to a disturbance should fall within the scope of the topic.

23. He shared some of Mr. Riphagen's concern (1850th meeting) regarding the relationship between the topic under consideration and the law of the sea, and in particular the principles embodied in the 1982 United Nations Convention on the Law of the Sea.

24. He applauded the Special Rapporteur's efforts to identify situations which would fall within the topic but did not involve a classical transboundary situation of the type dealt with in the Trail Smelter case. The Special Rapporteur had said, for instance, that the topic could also cover a situation involving continuous passage, overflight and space objects. In his own view, however, the kinds of situation that would be particularly amenable to treatment and would cause least difficulty were those that could be regarded as involving what had been referred to as "regional land-use planning", except that the regions in question were bisected by political boundaries.

5 See 1848th meeting, footnote 4.
6 Ibid., footnote 10.
25. Mr. Balanda had observed that it was difficult for States which had no common or reciprocal interests to co-operate, and it should be noted that in his schematic outline the Special Rapporteur had described certain procedures which could be very helpful in cases of that kind. In practice, however, States nearly always did have reciprocal interests, simply because it was in their own best interests not to act in total disregard of the interests of their neighbours. There were, for instance, two projects involving the United States and Canada—the Garrison Diversion Project and the Poplar River Project—in which the course of the dealings between the two countries demonstrated that it was in the interests of each of them to come to a mutually satisfactory arrangement.

26. The Garrison Diversion Project involved an attempt to irrigate an expanse of land in North Dakota by pumping water from the Missouri drainage basin system into a reservoir. Canada's difficulty was that it feared the creation of a reservoir, had not been completed, largely in response to a report by the International Joint Commission. The Poplar River Project involved, among other things, the working of an open cast coal-mine in Saskatchewan, which the downstream interests in the United States feared would reduce the quality of the water of the Poplar River flowing into the United States. Following a reference to the International Joint Commission, the Canadian interests had agreed not to allow any significant deterioration in the quality of the water used on the other side of the border. Thus it was not so much a question of an absolute veto as of a shared expectation with regard to the uses and needs on both sides of the border.

27. There was also the Salzburg Airport case, in which it had been held by the Austrian Administrative Court that the aggrieved parties across the border in the Federal Republic of Germany who had objected to the proposal to lengthen the runway did not have the right to intervene in administrative proceedings in Austria to challenge the application. The States involved had therefore had to deal with the matter at governmental level.7

28. Another question raised by the scope clause was the extent to which a risk-exposed State could avail itself of the procedures provided for in the schematic outline if it believed that the siting of a facility in a border region created an intolerable or serious risk of grave transboundary harm. In his view, the procedures envisaged in the schematic outline would apply to such a situation, and the scope clause itself used the words "give rise or may give rise". In an article on abnormally dangerous activities in frontier areas, Professor Günther Handl, a leading expert on the subject, had concluded that it was generally not lawful for a State unilaterally to locate in a frontier area an activity involving a major risk of transboundary harm (see A/CN.4/373, footnote 46). One of the authorities relied upon in support of that proposition was the Swiss case Aargau v. Solothurn,8 in which one canton had claimed protection against risks arising from target practice in a border area of another. The court had initially held that the risk-exposed canton was entitled to complete protection from the risk,9 but had subsequently reversed its own decision in the light of federal legislation enacted later, under which cantons were required to provide rifle-ranges for the military. The court's initial decision none the less went a long way towards illustrating the kind of situation with which the topic might deal and supporting the inclusion within the scope of the draft of activities within the territory or control of a State that created a significant risk of transboundary harm.

29. He agreed with Sir Ian Sinclair (1849th meeting) that some clarification of the concept of "areas" might be helpful. If he understood correctly, the Special Rapporteur intended to restrict the application of the draft to transboundary cases by requiring that the harm must occur within the territory or control of another State. But the question remained whether injury to health, for example, was covered by the notion of "enjoyment of any area". He requested clarification on that point.

30. He agreed with the view expressed by the Special Rapporteur in the fifth report on the concept of "situations" and particularly that there were states of affairs to which the topic applied (A/CN.4/383 and Add.1, para. 31). It might well be that there was no better term than "situations" to describe such states of affairs, but it would be helpful if the concept could be clarified. He was not sure whether the term "occurrence" would cover it, and work on identifying the kind of situation to which the articles should apply would obviously have to continue.

31. With regard to the transboundary element and the extent of the duty of the State to regulate, he was perhaps not so greatly concerned as some other members, since it seemed to him that the Special Rapporteur had anticipated the problem and started to deal with it. It was clear that, for a case to be covered by the topic, the Special Rapporteur would require it to involve a transboundary element and, as stated in the fifth report (ibid., para. 15), such an element might not be deemed to be present where a State imported an inherently dangerous activity. There was, however, a certain dilemma which was well stated in Principle 21 of the Stockholm Declaration (ibid., para. 34), relating to the sovereign right of States to pursue their own environmental policies. Certainly, there should be no question of paternalism in the draft; there was a delicate balance to maintain in that respect.

32. The transboundary element and the extent of the duty to regulate involved a question of imputability, or


33. With regard to draft article 5, he believed that the Commission should consider further whether to include international organizations within the scope of the topic. Admittedly, the Special Rapporteur’s careful formulation would permit the application of the draft articles to international organizations, but given the ever-increasing involvement of such organizations in activities that might cause transboundary harm, he tended to agree that the Commission might wish to consider including them in the draft in more affirmatory terms.

34. As to the elaboration of procedural rules, he noted that there were a number of fundamental principles which would provide the basis for a general approach, such as those contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. There was also the duty to co-operate, the precise meaning of which in the context of the topic would have to be refined, as well as the duty to consult and to warn. The Special Rapporteur’s approach to the avoidance and resolution of environmental problems was itself epitomized in the basic principle that one State should not do to another what it would not wish to have done to itself. There were also several recent examples of the type of co-operation envisaged in the schematic outline: for example, the Agreement between the United States of America and Mexico on Co-operation for the Protection and Improvement of the Environment in the Border Area, of 14 August 1983, and the Agreement between Canada and the United States of America to Track Air Pollution across Eastern North America, of 23 August 1983.

35. It should, however, be constantly borne in mind that the topic dealt with by Mr. Riphagen picked up where Mr. Quentin-Baxter’s topic left off and that, independently of the latter topic, there was a residual rule of wrongfulness which provided the affected State with a safety net. He regretted that so few meetings had been allocated to discussion of the topic and trusted that at future sessions there would be more time to do justice to it.

Mr. Barboza, Second Vice-Chairman, took the Chair.

36. Mr. AL-QAYSI said it was evident that the doubts regarding the viability of the topic had not yet been dispelled, and a critical stage had now been reached. In his fourth report, the Special Rapporteur had confirmed the opinion of some representatives in the Sixth Committee of the General Assembly that “the Commission should take an early decision whether to continue its consideration of the topic” and had said that “1984 is perhaps the earliest and the latest year in which such a decision should be taken” (A/CN.4/373, para. 59). The Commission was therefore duty-bound to answer the question raised by the Special Rapporteur.

37. The Commission’s conclusions should be put forward on the basis of what was now being advocated, rather than of what had originally been conceived. In his fourth report, the Special Rapporteur had said that...

Despite the link with State responsibility, however, the present topic was different in nature: it was concerned with liability arising directly from a primary rule of obligation which always depended upon the occurrence of loss or injury, regardless of wrongfulness.

38. In his preliminary report, submitted to the Commission at its thirty-second session, in 1980, the Special Rapporteur had stressed that the main thrust of the topic should be to minimize the possibility of injurious consequences, and to provide adequate redress where injurious consequences did occur, with the least possible recourse to measures which prohibited or hampered creative activities. In that regard, two principles were said to be involved: a standard of care commensurate with the nature of the danger, and guarantees related to the occurrence of injury, rather than to the quality of the act causing injury.

39. In his second report, submitted to the Commission at its thirty-third session, in 1981, the Special Rapporteur had put forward the structure of a broad obligation for a State not to allow activities within its territory or control to cause “substantial”, “physical” transboundary harm to other States and their nationals, coupled with a supporting obligation to do whatever might be necessary to make the first obligation effective. A régime had to be constructed providing for a duty of care or protection, composed of obligations of prevention and an obligation to compensate where prevention had proved insufficient.

40. A considerable difference of opinion had arisen in the Commission, however, regarding the validity of the structure presented by the Special Rapporteur, the central principle of which was the duty of care. That duty, in the opinion of several members, did not yet have the status of a rule of customary international law. To others, however, it was a fundamental duty representing...
the minimum standard of acceptable behaviour in an age of interdependence. Others, again, saw the topic as a "twilight zone".

41. Those difficulties were not surprising, since the scope of the topic could not be determined, in the absence of a determination of its inner content, on the basis of State practice. The only course open to the Commission had been to venture cautiously into those areas where States had shown a sense of obligation, with a careful eye on progressive development, in the hope of identifying general rules through a pragmatic and empirical examination of the sources, with minimum recourse to rules of prohibition.

42. In its report on its thirty-third session, the Commission had made the following interesting comment:

... The topic is concerned not with a breach of the duty of care—which goes to wrongfulness—but with care as a function of a primary rule of obligation. Under the present topic, the ambit of the duty of care may be a little more far-seeing than in other contexts: it may encompass a duty of reparation at least when it is foreseeable that preventive measures cannot eliminate danger. ...  

43. In his third report, submitted to the Commission at its thirty-fourth session, in 1982, the Special Rapporteur set out three basic aims: (a) alignment of the topic with the régime of State responsibility; (b) emphasis on prevention, as well as reparation; (c) a balance between freedom to act and duty not to injure. In addition, he had presented a schematic outline to chart the course of the topic and, in that connection, had stated in his fourth report that

... the motive power of the schematic outline is the duty of the source State, subject to factors such as sharing and the distribution of costs and benefits, to avoid—or minimize and repair—substantial, physical transboundary loss or injury which is foreseeable, not necessarily in its actual occurrence but as a risk associated with the conduct of an activity. That duty is a concomitant of the exclusive or dominant jurisdiction which international law reposes in the source State as a territorial or controlling authority. ... (A/CN.4/373, para. 63.)

44. Three major qualifications had been set out in the fourth report. First, the scope of the topic was to be confined to physical activities giving rise to physical transboundary harm, thereby setting aside, for example, questions that might arise in the economic sector. Secondly, the freedom of action within a State was to be preserved with regard to beneficial activities, but not at the expense of the interests of other States and their citizens. Thirdly, greater account was to be taken of the role of international organizations.

45. He believed he could safely draw a number of conclusions from that background. First, the scope of the topic had become sufficiently limited in regard to content and it was accordingly ready for mature consideration. Secondly, the cardinal issue was not that of wrongfulness or of strict liability, but simply that of equity or fairness, which flowed from the obligation of States to co-operate and maintain good-neighbourly relations. Thirdly, since the poorer and less developed States were usually those which sustained physical transboundary harm, legal regulation constituted the best guarantee for their development. Fourthly, the crucial question was that of the political will of States; hence it was the duty of the Commission as a body of independent legal experts, particularly when studying areas in which progressive development of the law was inevitable, to emphasize general and common interests rather than special and single interests. Fifthly, the main thrust of the Special Rapporteur's work was a strong plea for cooperation between States and good-neighbourly relations.

46. Those conclusions led him to believe that the topic was viable. It was, indeed, vital for the interests of all States, since it involved modalities for the resolution of conflicts, and thus made for a peaceful, orderly and stable world. Such a topic brought the Commission very close to modern realities, in regard to which the need for developing innovative legal rules and modalities for conflict resolution far outstripped dogmatic doctrines and traditional views. There was a maxim of Islamic law which could be translated as "No harm and no harming". It was interesting to note the interrelationship between the static and the dynamic aspects of harm in that maxim. To paraphrase it in more modern language, one might say: "Harm out of wrongfulness is one thing, and harming not necessarily out of wrongfulness is quite another."

47. The five draft articles submitted in the fifth report (A/CN.4/383 and Add.1) appeared on the whole to be a sound basis for discussion. Draft article 1 was the key article of the group, since it dealt with the scope of the topic. The substance was clear, but the wording needed further reflection. In particular, he shared the doubts of other members about the use of the word "situations". The Special Rapporteur had pointed out the need to deal not only with activities, but also with situations, and had indicated that situations meant "the existence of a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects" (ibid., para. 31). The Special Rapporteur had gone on to explain that those consequences could have either natural or man-made causes. But if a situation was due to man-made causes, it constituted an activity and was covered by that term. There remained the case of a natural situation, which required clarification. The suggestion made by Sir Ian Sinclair (1849th meeting) that the term "situations" should be replaced by "occurrences" was perhaps the best, since it would cover most of the cases contemplated, including anticipated occurrences and also many of the examples given by the Special Rapporteur in his fifth report (A/CN.4/383, para. 32).

48. The term "areas", as used in draft article 1, was vague and needed clarification. The reference to "areas within the territory or control" of a State could connote a right to an interest, or alternatively a means for the exercise of a right or an interest. When it came to using the word "enjoyment", however, a reference to rights or interests would appear to be necessary. As to the term "affecting", the transboundary effect of the physical

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consequences was fundamental to the operation of the rules to be drafted, since without such an effect those rules would not come into play. As the topic was predicated upon the duty to avoid, minimize or repair transboundary harm, a mere effect would not suffice, since it might involve only tolerable harm, or even none at all.

49. He would refrain for the time being from commenting on draft article 2, since its content would largely depend on the form of later articles. Articles 3 and 4 were essential because they emphasized the residual character of the draft. Those two articles should appear early in the draft, so as to allay the anxieties of States which were already parties to treaty regimes, or were likely to construct treaty régimes tailored to their own particular needs. On draft article 5, he reserved his position for the time being.

50. In regard to the burden of sharing costs and benefits, it was important to consider the interests and needs of developing countries. Under the duty of co-operation, the level of action required of States depended to a large extent on their level of development. The overall beneficial results that would ensue from the duty of co-operation should not be sacrificed to notions of strict equality in cost-sharing at a time when the potential partners were not in fact equal in economic, financial, technological or industrial terms.

51. Law aimed at the regulation of conduct. Axiomatically, it should embody systems of conflict resolution. Such systems might antedate a conflict, in the sense that they were constructed in an anticipatory fashion. On the other hand, they might post-date a conflict and be constructed in a fashion related to the interplay of specific facts. The present topic seemed to be in the first category. The best the Commission could achieve as a final product was a universally accepted set of procedural modalities for the enhancement of co-operation and good-neighbourliness among States.

52. Lastly, he paid a special tribute to the quality of the work done by the Special Rapporteur and to the officers of the Secretariat responsible for the preparation of the very useful survey of State practice (ST/LEG/15).

Mr. Yankov resumed the Chair.

53. Mr. BARBOZA said that he had been among those who had expressed doubts about the desirability of continuing the study of the topic, and at the thirty-fourth session, in 1982, he had said that the Commission should take a decision on the way in which it intended to deal with the topic and inform the General Assembly accordingly. In the Special Rapporteur's early reports, the topic had been approached from a rather philosophical point of view and had not yet been precisely delimited. Furthermore, it had been difficult to form an exact idea of the extent of the changes proposed. The schematic outline contained in the third report, which all members of the Commission had welcomed, had provided a more complete picture of the way in which the Special Rapporteur intended to develop the topic. It was because the schematic outline had been rather far removed from the Commission's original intentions that in 1982 he had thought it preferable to seek the views of the General Assembly. However, the Commission had decided not to adopt that course, but to encourage the Special Rapporteur to continue on the path he had chosen, and the General Assembly had confirmed that approach. Thus the metamorphosis of the topic had now become official.

54. That being so, the Commission was bound to continue its study and was not required to take the decision called for by the Special Rapporteur in his fourth report (A/CN.4/373, para. 59). The topic had aroused a great deal of interest, both in the Commission and in the General Assembly. It concerned transboundary harm which resulted or could result from activities which were not yet regulated, and consequently not prohibited, and which were carried out within the territory or control of a State. In his fourth report (ibid., footnote 8), the Special Rapporteur gave a number of examples of activities of that kind. While it was true that many of them were regulated by international agreements, others were not yet so regulated, and it was to be expected that rapid technological development would lead to further activities that would not be regulated from the outset. It followed that the topic was of a residual nature: it dealt with activities which were not regulated and with the unregulated aspects of regulated activities.

55. Sections 2 and 3 of the schematic outline did not appear to propose any real obligations, the Special Rapporteur having deliberately tried to find procedures that were as flexible as possible. In his own terms, he was placing at the disposal of States an "apparatus" through which certain rules could be distilled (ibid., para. 24). He did, however, provide for the duty of the State within whose territory dangerous activities took place to provide the affected State with all available information on those activities and on their foreseeable consequences; and the proposed measures also had to be communicated to the affected State. In his view, that information phase was essential. The schematic outline then proposed what appeared to be a duty to agree to the establishment of fact-finding machinery to gather information, assess its implications and, to the extent possible, recommend solutions.

56. The setting up of international commissions of inquiry was not much in favour, despite the undeniable advantages of establishing facts at the international level, as was shown, for example, by the Dogger Bank case. The establishment of fact-finding machinery could often prevent a dispute from degenerating into a dangerous conflict. Many international disputes were due to differences of opinion on the facts, and impartially conducted inquiries could obviously help to remove many misunderstandings.

57. Section 2, paragraph 6 (b), of the schematic outline stated that the report of the fact-finding machinery "should be advisory, not binding the States concerned". That formula seemed rather too schematic and should be...
developed. A report on facts could not be advisory; the facts would have to be accepted by the parties. It might even be desirable to make the assessment of the consequences of those facts more binding. Moreover, section 2, paragraph 8, considerably weakened the procedure by stating that failure to take any step required by the rules contained in the section did not in itself give rise to any right of action. Since the draft did not provide for the establishment of a tribunal, it might well be asked what right of action was meant. Must it be concluded that, in that case, States would be deprived of a remedy available to them under general international law?

58. According to section 3, paragraph 1, if the fact-finding procedure gave rise to difficulties or if the report of the fact-finding machinery so recommended, the States concerned had a duty to enter into negotiations with a view to determining whether a regime was necessary and what form it should take. That duty to negotiate, which the Commission had already encountered in its work on the topic of international watercourses, was justified. However, paragraph 4 of section 3, which again deprived States of any right of action, put that general duty seriously in doubt.

59. The provisions relating to the prevention of harm, taken as a whole, might therefore be more binding. As the Commission had found when studying the topic of international watercourses, prevention was important, because many disputes arose before the dangerous activities were actually carried out. At that stage, the disputes were minor ones, but they could in time produce irreversible situations, especially if large investments had been made in infrastructure or interests had been created. The reason why the Special Rapporteur had not wished to impose any real obligations on States was clearly that the topic did not come under the régime of international liability so long as no harm had been done. Nevertheless, as the Commission had modified the nature and scope of the topic, it could consider introducing real obligations into section 3. In fact, the only rule which seemed to come close to international liability was the rule stated in section 4, paragraph 2, that “Reparation shall be made by the acting State to the affected State in respect of any such loss or injury”. That was an elementary principle of international relations, which the Special Rapporteur subordinated to the “shared expectations” of the States concerned. That expression would have to be precisely defined, but the fact remained that that was the principle on which the whole draft should be based, even if it meant engaging in progressive development of international law.

60. Not having had time to study the fifth report (A/CN.4/383 and Add.1) with all the attention it deserved, he would only say that it might be better not to refer draft articles 1 to 5 to the Drafting Committee until the Commission had been able to study them together with the succeeding articles. Article 1, which affected the whole draft, considerably restricted its scope by confining it to physical consequences. That limitation not only had the effect of dividing the topic into two, but also raised the problem of defining physical consequences. Was it to be inferred that economic injury, or injury of a social nature, must be left out of account?

61. In conclusion he expressed the hope that the Commission, together with the Special Rapporteur, would succeed in drafting a set of articles that would meet the international community’s expectations, now that the need to study the topic had been established.

The meeting rose at 1.05 p.m.

1852nd MEETING

Monday, 2 July 1984, at 3 p.m.

Chairman: Mr. Sompeng SUCHARITKUL

later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Diaz Gonzalez, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quinten-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Ushakov.

Tribute to the memory of Mr. Erik Castrén, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Erik Castrén, who had been a distinguished member of the Commission from 1962 to 1971.

At the invitation of the Chairman, the Commission observed one minute’s silence in tribute to the memory of Mr. Erik Castrén.


[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)

1 Reproduced in Yearbook... 1983, vol. II (Part One).
2 Reproduced in Yearbook... 1984, vol. II (Part One).
3 Idem.