the development of the study. When the study had reached a more advanced stage, however, other principles might have to be brought into play and those already taken into account might have to be reviewed.

The meeting rose at 11.25 a.m.

1973rd MEETING

Monday, 23 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barbosa, Mr. Calero Rodríguez, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Filian, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

Organization of work of the session (concluded)*

[Agenda item 1]

1. The CHAIRMAN suggested that the meeting should be suspended to enable the Enlarged Bureau to meet and consider matters of importance for the continuation of the Commission’s work.

The meeting was suspended at 10.05 a.m. and resumed at 11.50 a.m.

2. The CHAIRMAN informed members that the Commission would consider agenda item 7 (International liability for injurious consequences arising out of acts not prohibited by international law) until 25 June inclusive, after which it would consider item 6 (The law of the non-navigational uses of international watercourses) until 1 July inclusive. One further day would be allocated for the consideration of item 3 (Jurisdictional immunities of States and their property) and another for the consideration of item 4 (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).


* Resumed from the 1955th meeting.
1 Reproduced in Yearbook ... 1985, vol. II (Part One)/Add.1.
2 Reproduced in Yearbook ... 1985, vol. II (Part One).
3 Reproduced in Yearbook ... 1986, vol. II (Part One).

3. Mr. USHAKOV congratulated the Special Rapporteur on his second report (A/CN.4/402), which contained valuable information on the general theory and development of contemporary international law. He nevertheless had some doubts as to the merits of the schematic outline proposed by the previous Special Rapporteur and adopted in some measure by the present Special Rapporteur. He feared that, if the Commission adopted the outline as the starting-point for its work, it would succeed neither in codifying the existing rules of general international law—which in the present case were to be found more in customary law than in treaty law—nor in legislating by proposing rules that had yet to come into being. The schematic outline was defective in two respects: it did not specify which activities would be covered by the draft articles and it made no distinction between injurious consequences of limited scope and those that affected all of mankind.

4. With regard to section 1 of the schematic outline, which related to scope and definitions, he wondered whether it was advisable to refer first to activities within the control of a State—and it would in any event be preferable to use the word “jurisdiction”—and, thereafter, to activities conducted on ships or aircraft. The main point in that regard was not to define, but to specify clearly, the activities to be covered. Given that any human activity had some harmful consequences, section 1 added nothing to the study of the topic, for its scope was too vast.

5. He would draw a distinction between activities which had minor consequences and were of concern only to the States adjacent to those on whose territory they were conducted, and activities whose consequences could have repercussions from one end of the Earth to the other. In the first case, even though it was open to question whether the source State should inform the neighbouring States of its intention to carry out an activity or of the technical aspects of the activity itself, it was comparatively easy to decide about which matters the first State should inform the others and, if need be, hold discussions with them, as was sometimes the practice with regard to the use of “shared resources”. An example had been provided by France and Spain in connection with Lake Lanoux.

6. In the second case, however, the question that arose concerned the obligation to inform and negotiate that would be incumbent on the source State. To which items would the information relate? Was all of mankind to engage in negotiations on a technical project? The really major problems with which mankind was now confronted were caused by air and marine pollution. Such pollution, which was also governed by such imponderable factors as winds, was not always limited to countries situated in any particular direction by reference to the source State, and could affect the entire planet. The problem was further aggravated by the fact that it was not always possible to foresee the consequences of a particular activity. The inventor of DDT, for example, had received the Nobel prize for the insecticide’s benefits to the development of agriculture, but...
in the long term it had been realized that DDT posed a serious threat to the flora and fauna of all countries.

7. So far as the Chernobyl disaster was concerned, it was the kind of accident that militated in favour of co-operation among all States with a view to the adoption of adequate preventive and safety measures. That was why, following the accident, the Soviet authorities had requested IAEA to convene a conference on possible technical measures to be taken with a view to preventing any future accident involving the peaceful uses of nuclear energy. Scientists and technicians from all over the world should work together to develop preventive and protective measures. Serious pollution problems of that kind, which arose at the global level, could not be dealt with in the same way as those that gave rise to compensation. International co-operation in that sphere was thus essential.

8. In the light of those considerations, he was sceptical about the basic concepts of the report under consideration. The Commission had to decide which activities were the most dangerous for mankind with a view to proposing primary rules and introducing the principle of international co-operation for preventive purposes, rather than adhering to the principle of material liability. In the manner envisaged, the study on international liability would lead nowhere save to a dead end. If, on the other hand, the activities to be covered were clearly specified, it would be possible to go beyond the stage of liability and compensation and to tackle the real problem, namely co-operation among States.

9. Mr. McCaffrey said that, in the past four years, the discussion of the topic under consideration had given rise to some confusion about the type of activities to be covered. In the English title of the topic, moreover, the word "acts" should be replaced by "activities". The Commission was focusing on catastrophic accidents that caused widespread harm but were the result of normal activities regarded as lawful by the international community. In other words, the activities in question were considered to be desirable because they were socially beneficial, for example the operation of nuclear reactors, chemical plants and dams.

10. Several questions arose in that regard. The first was whether it was an internationally wrongful act to introduce such an activity in a border or other region where it would harm other States if an accident occurred. In his opinion, the answer was negative. The second question was whether it was the duty of the source State to inform and negotiate, and he believed that international law did entail such a duty. The third question was what happened if an accident occurred even though the source State had taken all the precautions it possibly could. He did not believe that an internationally wrongful act was involved in such a case, since it had been deemed permissible to conduct the activity itself. The question whether the source State had the duty to provide compensation did, however, deserve close scrutiny, and in his view the answer to that question was affirmative. What remained to be decided in such a case was the scope of the duty to provide compensation.

11. Some ongoing activities, such as industrial or agricultural activities, of which the source State was aware and which it could control would, however, seem to give rise to State responsibility for the harm they might cause and should therefore be eliminated from the scope of the topic under consideration. In that connection, reference might be made to the Trail Smelter case and to Principle 21 of the Stockholm Declaration.

12. Another category of activities which could be eliminated was the one to which Mr. Ushakov had referred and which might, for example, involve the use or manufacture of a chemical that was not initially known to be harmful, but was later discovered to be so. Examples were DDT, other chemicals and elements such as mercury and cadmium. In his own view, until the point when the harmful nature of the activity became known, there would be no duty to provide compensation: the source State could not be expected to monitor and regulate harmful consequences of which it was unaware. Once the harmful nature of the activity became known, however, the source State did have the duty to control and stop those consequences. At that point the situation came within the topic of State responsibility being dealt with by Mr. Ripphagen.

13. In connection with the duty to inform and to negotiate, the question was: whom to inform and with whom to negotiate? Theoretically, the source State had the duty to inform all States that might be affected by a catastrophic accident; but in practice that would obviously be impossible in the case of activities such as the operation of nuclear plants. That was the reason for international organizations such as IAEA, which was currently preparing two conventions on information in the event of disaster and on safety. The fact that only States in the region would have to be notified would, however, not mean that the source State did not have a duty to provide compensation for harm suffered as a result of an accident. Thus, if the international community considered such activities to be lawful, despite the catastrophic damage they might cause, it had to find a way to limit the source State's duty to provide compensation.

14. In conclusion, he said that the entire topic could be viewed as an attempt to codify the thrust of the arbitral award in the Trail Smelter case. In that connection, he referred members to his second report on the law of the non-navigational uses of international watercourses (A/CN.4/399 and Add.1 and 2, paras. 125-128). The similarity lay not in the nature of the activities in question, but in the process followed: the States concerned had negotiated, submitted their dispute to arbitration and accepted the régime established by the arbitral tribunal. Any harm caused by an activity carried out in compliance with that régime would not strictly speaking be wrongful, but would entail a duty to provide compensation for the damage caused. A similar régime might govern the safe operation of a nuclear plant.

15. Mr. Koroma said that he agreed with the distinction made by Mr. McCaffrey between "acts" and "activities". He...
"activities". But he believed that the Commission should focus on "acts", not on "activities", and he would explain why in a future statement.

The meeting rose at 1 p.m.

---

1974th MEETING

Tuesday, 24 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balandra, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Filian, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.


[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Sir Ian SINCLAIR noted that the meaning of the terms "responsibility" and "liability" had been a source of confusion in the Commission's debates in previous years. The Special Rapporteur's comments (A/CN.4/402, paras. 2-5) fortunately shed new light on the distinction between the two terms. He had been particularly struck by L. F. E. Goldie's observation, cited in the report under consideration (ibid., para. 4), that, in the context of articles VI and XII of the Convention on International Liability for Damage Caused by Space Objects and of article 235 of the 1982 United Nations Convention on the Law of the Sea:

... responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required. That is,

liability connotes exposure to legal redress once responsibility has been established...

2. It was in that broad sense that the two concepts must be understood in the context of the present topic. Some of the recent confusion had arisen from the idea that, in traditional international law, responsibility could be attributed to a State only where it had committed an internationally wrongful act: that view formed the basis for part 1 of the draft articles on State responsibility. However, since the term "responsibility" had a broader meaning in comparative civil law, where it denoted the duties or standards which the law imposed on the performance of a function in society, it had to be asked whether similar duties or standards could not be derived from international law in relation to activities which, though not unlawful in the territory where they were being carried out, none the less had or might have injurious consequences for persons or things outside that territory. He believed that the answer to that question had to be affirmative. The notion of responsibility in that broader sense thus had to apply also to lawful activities which were carried out within a territory and caused or might cause physical transboundary harm, and the consequential notion of liability, which, according to that view, was limited to the consequences of failure to perform the duties or to fulfil the standards imposed by the law, must also apply to such activities. Responsibility in that broader and more generic sense encompassed the consequential and narrower notion of liability and was not limited to internationally wrongful acts.

3. The foregoing led to the conceptual problems discussed by the Special Rapporteur in his report under the heading "Unity of the topic" (ibid., paras. 6-10). Initially, he had had some reservations about the Special Rapporteur's analysis (ibid., para. 7), but on further reflection he agreed that, in the context of the present topic, prevention and reparation fell within the domain of primary rules. Prevention certainly did, but he would submit that reparation also did, at least if certain conditions were met. He had referred to some of those conditions in earlier statements. For example, the activity must be such that the risks of its causing physical transboundary harm were known to the source State. If the source State permitted a dangerous chemical plant or nuclear reactor to be built close to its border with another State, it must be presumed to have accepted the risk that, in the event of an accident, physical transboundary harm would occur.

4. Things were, however, not always that simple and several examples had already been given of cases where, despite the most careful monitoring of the activity by the source State, the risks inherent in the pursuit of that activity had not been known, or could not have been known, to the source State at the time when it had permitted the continuation of the activity. New scientific and medical discoveries were thus constantly having an impact on the law. Should the source State be liable for the consequences—whether for all the consequences or only for those which were reasonably foreseeable—of permitting the continuation of an activity which, because of the lack of scientific or medical evidence, it had not known or could not have known to be in-