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Summary record of the 2017th 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:-
1987, vol. I

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(<http://www.un.org/law/ilc/index.htm>)*

its territory—to set in motion the machinery and procedures provided for in the present articles” (*ibid.*, para. 53). That also applied to article 3. Careful thought should therefore be given to the consequences, which might be even wider than those mentioned in the report (*ibid.*). As the Special Rapporteur pointed out (*ibid.*, para. 43), the definition in article 2, paragraph 5, covered persons and objects and it would therefore include foreigners and their property as well as the property of foreign States. Thus the rights were not limited to the States in whose territory the adverse effects were felt. He was not sure that the cumulative effect of those two definitions was desirable or necessary, but if it was, attention should be drawn to it.

39. The expression “transboundary injury” was used to denote not only transboundary harm or loss caused by a wrongful act, as in article 6, but also transboundary adverse effects caused by lawful acts involving appreciable risk, as in article 2, paragraph 6, and article 4. The Special Rapporteur rightly pointed out in his report that there was a great difference between the duty to make reparation in the case of State responsibility for wrongful acts and the duty of reparation in the context of State liability. The difference arose when the claim to reparation in the latter context was reduced to a compensation claim, and continued as it became clear that it was dependent not directly on the damage caused, but on many other factors, as the Special Rapporteur explained (*ibid.*, paras. 57-58). Possibly, therefore, the word “injury” should be reserved for a breach of a legal obligation which might, but need not necessarily, entail material damage. In the context of liability, it would be better to speak of “harm” or “loss” rather than “injury”, to make it clear that the reference was to material damage and also to avoid any confusion with injury caused by wrongful acts.

40. In his report (*ibid.*, para. 17), the Special Rapporteur asked how the existence of an appreciable risk could be determined and then referred in passing to agreement between the States concerned. It was the latter element, however, which provided the real basis for any such determination; for even if States agreed to seek a third-party decision, the determination whether a certain activity involved an appreciable risk would be the outcome of agreement between the States concerned—just as the Commission’s draft would acquire legal force only as and when it was accepted by States. Hence he did not agree with the Special Rapporteur that it would be “imperative to resort to machinery for fact-finding” (*ibid.*). Nor did he accept the statements that “for the purposes of the present study, the objective opinion of a third party is the only way out of the impasse” (*ibid.*, para. 18), and that “if third-party involvement in ascertaining these facts is not accepted, no régime will be able to function” (*ibid.*, para. 19). He was convinced that it was for the States concerned to decide what activities should be deemed to entail appreciable risk, and what means or machinery they would use for the settlement of disputes.

The meeting rose at 12.35 p.m.

2017th MEETING

Thursday, 18 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/402,² A/CN.4/405,³ A/CN.4/L.410, sect. F, ILC (XXXIX)/Conf.Room Doc.2⁴)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLE 1 (Scope of the present articles)
ARTICLE 2 (Use of terms)
ARTICLE 3 (Various cases of transboundary effects)
ARTICLE 4 (Liability)
ARTICLE 5 (Relationship between the present articles and other international agreements) *and*
ARTICLE 6 (Absence of effect upon other rules of international law)⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he would reply only to some of the issues raised in the discussion so far. In reply to a question by Mr. Tomuschat (2015th meeting), he explained that general lines for the development of the present topic had already been submitted in 1982 in the form of a “schematic outline”. That outline had two basic objectives, one being to propose to States certain procedures for the establishment of régimes to regulate activities which gave rise or might give rise to transboundary harm, and the other being to provide for situations in which such harm had occurred prior to the establishment of a régime.

2. The schematic outline had been well received by the General Assembly, and the then Special Rapporteur, R. Q. Quentin-Baxter, had been encouraged to proceed

¹ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

⁴ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission’s thirty-fourth session, is reproduced in *Yearbook* . . . 1982, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter’s fourth report, submitted at the Commission’s thirty-fifth session, are indicated in *Yearbook* . . . 1983, vol. II (Part Two), pp. 84-85, para. 294.

⁵ For the texts, see 2015th meeting, para. 1.

along those lines. In particular, the outline included three important principles. The first drew on Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration),⁶ which proclaimed that all human activities could be conducted with as much freedom as was compatible with the interests of other States. The second was the principle of prevention, together with the related principle of reparation for harm if any occurred. The third was the principle that an innocent victim should not be left to bear his loss, subject to certain conditions.

3. Those were the principles on which he had asked for the opinion of the Commission, since that opinion was essential in the task entrusted to the Commission by the General Assembly. In his second report (A/CN.4/402), he had explained how those principles derived from that of the sovereign equality of States:

. . . At the very root of the international legal order is sovereignty, conceived in the only way it can be, given the fact of international coexistence, namely in the context of interdependence. In turn, such coexistence is inconceivable unless the coexisting States are equal before the law. To disregard a State's right to undisturbed use and enjoyment of its territory (and therefore to refuse to be a party to a régime which regulates the rights and obligations of every State with respect to an activity), or to refuse to make reparation for damage caused, only upsets the balance, destroys the equality between States. The principle of equality before the law is very general, and if it is to be implemented, there must be more specific rules, which would be either primary or secondary depending on the nature of the topic. Therefore, proposing rules to implement it amounts to nothing more than the inevitable application of a legal technique to the situation. (*Ibid.*, para. 53).

He did not believe that the Commission was facing an impossible task in being asked to pronounce on such principles, which had already been the subject of many declarations by international conferences and bodies, some of them having the same membership as that of the General Assembly. From those principles, the Commission could endeavour to construct the remaining articles, but the principles themselves were essential. Of course, accepting the principles did not mean that the Commission would have to accept the concept of strict liability or any other form of liability.

4. On another point, a number of members had expressed the opinion that there was not, or should not be, any separation between the present topic and that of State responsibility: a *continuum* was said to exist between the two topics and any attempt to break it would be artificial and arbitrary. The Commission had actually considered that question at the outset of its examination of the topic of State responsibility. It had then taken the view that:

. . . Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. . . .⁷

By thus speaking of "the different nature of the rules governing" the two fields, the Commission had no doubt meant to refer to the distinction between primary

rules and secondary rules. Rules of State responsibility were secondary rules because they came into play when an obligation was violated. Rules of international "strict" liability were primary rules because they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation—in other words, the harmful event—had taken place; such a situation was in fact a constituent element of the primary rule.

5. If it was thought better not to resort to that division into primary rules and secondary rules, exactly the same statement could be made by saying that State responsibility dealt with wrongful conduct, namely conduct that entailed the breach of an obligation, and strict liability dealt with conduct that was lawful. The difference was important. To begin with, wrongful conduct was prohibited, whereas lawful conduct was protected by the law.

6. There was, moreover, an enormous difference between the effects of the two situations. In part 1 of the draft articles on State responsibility,⁸ the closest thing to the present topic was the obligation to prevent a given event; but even in that regard there were important differences. In the realm of State responsibility, the harmful event which triggered the effect of that obligation was the breach of the obligation itself. In the present topic, on the other hand, the harmful event was a foreseeable event which did not constitute a breach of any obligation. In the case of State responsibility, the respondent State could discharge its responsibility simply by proving that it had used all the reasonable means at its disposal to prevent the event, but had none the less failed. Under a régime of strict liability, that would not be so, since the respondent State would have to pay in all circumstances. It was a particularly important difference and was connected with the very philosophy of strict liability: the person liable had to pay compensation in all cases, with very few exceptions. The source of liability was not a fault, but rather the advent of a situation.

7. There were other differences between the two topics, such as those relating to damages. In the field of State responsibility, the obligation imposed on the author State was aimed at restoring the conditions existing prior to the breach. In the present topic, however, reparation was determined in the context of a number of different factors and might well not be equivalent to the actual damage suffered.

8. Other differences touched upon the typical mechanisms of strict liability, such as attribution and causality. In the present topic, attribution, however it was ultimately formulated, took a completely different form from attribution in the case of State responsibility. In part 1 of the draft articles on State responsibility, an act, if it was to be attributable to a State, had to be an "act of the State", in other words the act of "any State organ having that status under the internal law of that State" (art. 5). It could also be the conduct of entities empowered to exercise elements of the governmental authority (art. 7), of persons acting in fact on behalf of

⁶ See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

⁷ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 38.

⁸ See 2016th meeting, footnote 6.

the State (art. 8), of organs placed at the disposal of the State by another State or by an international organization (art. 9), or even, in certain cases, of organs of a State acting outside their competence or contrary to instructions concerning their activity (art. 10).

9. In contrast, what would be the conditions necessary for a certain act causing transboundary injury to be attributed to a State? The only condition, according to draft article 4, was that the State knew, or had means of knowing, that the activity in question was carried on within its territory or in areas within its control. That was the only condition, although it might be formulated in a different way. The concept of "control", as Mr. Reuter (2016th meeting) had suggested, was perhaps not entirely appropriate and the concept of "territory" might also be amended somewhat. Nevertheless, the conditions of attribution in the present topic would always remain substantially different from those in the topic of State responsibility.

10. As to the question of causality, in the case of responsibility for wrongful acts, the imputation of a certain material result—which was different from that of a certain act—to a particular person was more in the nature of "authorship" than of "causation". The person was the author of a certain offence through which damage had been caused, even if it was no more, and no less, than violation of the legal order. The wrongful conduct was usually described in the law as being conduct contrary to that required by the legal norm which had established the obligation. The will of the author of the breach had to be directed at violating the obligation, or there must at least have been negligence.

11. In the present topic, the position was completely different: the will of the person liable might well have been directed at avoidance of the harmful event, but the fact that all the necessary precautions had been taken did not exonerate him from liability if damage occurred. The causal chain of events could be traced to an area within the territory or control of the State, and that was enough to make the State liable for the damage.

12. The fact that, in real life, matters of responsibility for wrongful acts and matters of strict liability normally presented themselves together did not mean that they should not be treated separately. Any other approach could lead to unacceptable results. For example, in Argentina a criminal court or judge usually ordered a criminal to pay damages to the victim or the victim's family. Such a decision was clearly a civil matter, but it did not make the judge a civil judge; still less did it make the matter of compensation a criminal matter.

13. Another question that had been raised was that of preparing a list of dangerous activities. It would certainly facilitate the Commission's work if agreement could be reached on activities forming the subject-matter of the topic. There were, however, two drawbacks to such a list. The first was that it would be obsolete in 10 years' time: in view of the pace of technological development, new dangerous activities were bound to emerge and would be at least as numerous as the ones considered dangerous at the present time. Thus the Convention of the Continental Shelf, signed in 1958, had been rendered obsolete in a

few years owing to technological developments permitting the exploitation of the continental shelf practically anywhere. The second drawback was that the General Assembly had assigned the Commission the task of progressively developing and codifying the law governing the injurious consequences of acts not prohibited by international law. That task covered all the consequences of all acts of that nature and not the consequences of only certain activities. It was preferable to get closer, if possible, to a definition of "dangerous activities" than to draw up a list with the drawbacks he had mentioned.

14. Mr. FRANCIS expressed his warm appreciation to the Special Rapporteur for his excellent presentation of the topic. He found himself in a somewhat difficult position. His original view on the topic was reflected in paragraph 67 of the Special Rapporteur's third report (A/CN.4/405); article 4, as drafted, would thus have been acceptable to him. He had, however, altered his original stand in the interest of the consensus that had subsequently emerged. The Special Rapporteur's perception as disclosed in the third report now constituted a radical departure from the path carved out by that consensus. In the circumstances, therefore, he felt duty bound to enter a reservation, since he did not wish his silence to be taken as an indication of support for the main conclusions reached in the report. Should the Commission revert to its earlier stand, he would of course reconsider his position.

15. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on the care and thought he had put into his third report (A/CN.4/405), as indeed into all his reports. It was gratifying to see that the Special Rapporteur was continuing along the same lines as those traced by R. Q. Quentin-Baxter and had put his finger on several important aspects of the topic. That would enable the Commission to focus more sharply on the major issues.

16. The problems identified by previous speakers should give no cause for discouragement. The topic was not a traditional subject of international law. New ground was being broken, and State practice was being extended to new technologies. In that connection, the Secretariat had prepared a remarkable study of State practice (A/CN.4/384) which would help the Commission to assist States in coping with problems arising out of new technologies.

17. The kind of problem with which the topic was concerned often arose because a State decided to undertake or authorize a particular activity despite the fact that the activity posed an unavoidable risk—usually a very slight one—that some harm, which could be of catastrophic proportions, might result in the event of an accident. The reason why States authorized such activities was, of course, because the socially beneficial effects outweighed any adverse effects. Scholars spoke of "risk-benefit analysis": the risk—or the probability of an accident occurring, coupled with the gravity of the accident—had to be weighed against the beneficial aspects of the activity.

18. If a State decided to authorize an activity which created a risk—even the slightest risk—of catastrophic harm, the question that arose was whether that State

had an obligation to notify other potentially affected States and to consult and negotiate with them. A further question concerned the obligations of the State of origin in the event of an accident, and it was that question which differentiated international liability very sharply from State responsibility. There were instances in which State responsibility shaded into the topic of international liability, but he agreed with the Special Rapporteur that, for the purposes of legal analysis, the two should be treated separately, since they were governed by entirely different legal régimes.

19. He would illustrate his proposition by reference to the *Trail Smelter* case. In that case, there had been no dispute that the damage initially caused by the smelter had given rise to responsibility for activities that were not prohibited by law. Indeed, the kind of activity involved was now covered by rules such as Principle 21 of the Stockholm Declaration,⁹ under which a State could use its territory as it wished so long as no harm to other States ensued. The arbitral tribunal in the case had, however, introduced a régime designed to prevent unacceptable levels of injury to the United States of America, and specifically to the State of Washington. Under that régime, so long as the smelter complied with certain regulations concerning the times and quantity of emissions of fumes, the smelter, and indeed Canada, would not be acting wrongfully. The question which had then arisen was what would be the position if the smelter complied with the régime but unreasonable levels of harm were still produced. Obviously, there could be no responsibility in such a case, and it had therefore been agreed that compensation would be paid for any harm resulting from activities of the smelter carried out in compliance with the régime (see A/CN.4/402, para. 30, *in fine*). What had been at issue, therefore, was not responsibility for wrongfulness, but rather a duty to compensate for action that was not wrongful.

20. Other similar situations had arisen, for example in connection with nuclear power plants. They would have to be dealt with and clarified, more particularly with reference to the obligation which arose in the event of an accident that occurred despite the best efforts of the State of origin to prevent it. Admittedly, conventional régimes dealt with some of those situations, but what would happen in the absence of a conventional régime, since such régimes were not universal? It would, moreover, be difficult to have a series of separate conventions for all the specific situations that might arise. He therefore agreed that a general treatment of the subject was necessary. He also agreed that the Special Rapporteur could perhaps provide an indication in the commentary or in a future report of the kinds of activity which, in his view, would be covered by the topic. It would not be advisable to include a list of such activities in the body of the articles themselves.

21. Speaking as Chairman, he said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 10.55 a.m.

⁹ See footnote 6 above.

2018th MEETING

Friday, 19 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/402,² A/CN.4/405,³ A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2⁴)

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THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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- ARTICLE 6 (Absence of effect upon other rules of international law)⁵ (*continued*)

1. Mr. TOMUSCHAT said that the Special Rapporteur's three reports should enable the Commission to gain a better grasp of the topic and begin to determine the direction its endeavours were to take. Some major questions still had to be resolved, and he would like to mention them in an effort to provide some answers.

2. The first related to the mandate assigned to the Commission by the General Assembly. The impression to be gained from reading the topical summary of the discussion in the Sixth Committee (A/CN.4/L.410, sect. F) was not one of very firm resolve on the part of the General Assembly that the Commission should succeed in its work, and it could not be said that the Assembly had given the Commission much guidance in

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