

Document:-
A/CN.4/SR.1631

Summary record of the 1631st 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:-
1980, vol. I

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the answer, but the use of that word by a lawyer was, in a certain sense, a *testimonium paupertatis*. Since the distribution of natural, human and technological resources throughout the world was far from equitable, the introduction of that notion lacked conviction. The concept of equity as a basis for liability resulted in a somewhat half-hearted approach, since the rules neither prohibited nor permitted a certain line of conduct, but, in effect, combined such conduct with a mandatory obligation to make reparation for any injurious consequences.

29. It seemed to him that the law's intermediate position had its origin in two phenomena. First, so far as nature itself was concerned, territorial frontiers between States were determined in a very arbitrary manner. Secondly—and again the forces of nature were involved—there might well be an element of hazard in the chain of causation linking the conduct of or in one State with the effects for or in another State, for which hazard none of the States concerned could be blamed. Indeed, without the active intervention of that element of hazard, there would be no reason for not prohibiting the conduct in question at the outset.

30. In cases where those two phenomena were both present, it would seem that a duty should be imposed to consult and negotiate on preventive measures, with a view to limiting the risk, as well as on equitable risk allocation in the event that damage occurred. As was clear from State practice, States were often willing to consult and reach agreement on preventive measures, but generally did not wish to accept liability for the consequences when the agreed measures had not been taken. Nor were States willing to accept that, where such measures had been taken, any degree of liability was excluded. In other words, they were not normally willing to accept an absolute link between agreed preventive measures and liability. The same applied in municipal law, where legislation frequently provided that prior authorization was required for certain activities, but neither that legislation nor the authorizations given or refused under it were deemed conclusive for the purpose of establishing liability under civil or common law.

31. In his view, liability, or even a degree of liability, for the injurious consequences with which the Commission was concerned was no more than the counterpart of what he would term the "internalization" duty, namely the duty of each State to take care that the activities within its frontiers did not, as a result of the irresistible forces of nature, adversely affect another country's interests.

32. The forces of nature, of course, likewise operated within the territory of a State, a fact often recognized in municipal law. Consequently, there were other intermediate solutions under international law which fell short of either total prohibition or total freedom of conduct, and those solutions were reflected in State practice. For instance, there were certain international rules relating to matters dealt with under

municipal law that imposed an obligation on the State to frame and apply its municipal law in such a way that equal protection was accorded to the interests situated in the territory of that State and to similar interests situated in another State. Other international rules went a step further and provided that the procedural protection guaranteed under municipal law to persons whose interests were threatened by the conduct of another should also be extended to "foreign" persons; that was known as the principle of equal access. That rule was sometimes even applied to remedies available under municipal law, such as compensation.

33. In that connexion, it was clear that, to the extent that municipal law accepted the "polluter pays" principle, the effect of the extension of its application to foreign interests and foreign persons would be very similar to the consequences of liability for injurious consequences. Indeed, that principle was the counterpart of the "internalization" duty.

34. He therefore felt very strongly that the topic should be limited to the type of situation he had described. He also considered it necessary to explore the question of degrees of liability and risk allocation, and to give some thought to the other intermediate solutions ranging between freedom and prohibition.

35. He had not at that stage formed any clear idea about the general rules that could be drafted, even in the limited field of the physical environment, but no doubt the Special Rapporteur would provide the Commission with the necessary guidance. He considered that some overlap with Mr. Schwebel's topic (the law of the non-navigational uses of international watercourses) was unavoidable, but he was not concerned about any overlap with his own topic (State responsibility), since the central idea of sharing resources and liability fell outside its scope.

The meeting rose at 11.55 a.m.

1631st MEETING

Friday, 11 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr Barboza, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/334 and Add.1 and 2)

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (continued)

1. Mr. SUCHARITKUL said that the Special Rapporteur's presentation at the 1630th meeting of his preliminary report (A/CN.4/334 and Add.1 and 2) had been most illuminating for the members of the Commission, especially as the scope of the topic had not yet been clearly defined and the line of distinction between lawful and unlawful acts of a State was still blurred.

2. In response to the Special Rapporteur's request for comments by members of the Commission, he said he was inclined to agree with the conclusion expressed in paragraph 13 of the Working Group's report,¹ that, as a minimum, the scope of the topic under consideration should be limited to the way in which States used, or managed the use of, their physical environment, either within their own territories or in areas beyond their territories, whether or not those areas were subject to the sovereignty of any State. Indeed, it was quite possible for a State to use, or manage the use of, the physical environment in the territory of another State, particularly that of a neighbour. An example that came to mind was when a State induced rainfall by artificial means and adversely affected the physical environment of another State.

3. Although the title of the topic was long and difficult to remember, it gave a very clear indication of the content of the subject under discussion. Whether that content should be expanded was, however, a question for further discussion. He also agreed with the Special Rapporteur's view that using the term "liability", rather than the term "responsibility", would be a convenient way of distinguishing between the scope of the topic under consideration and that of the topic of State responsibility.

4. With regard to the attribution of liability to a State, he noted that, in its discussions on State responsibility, the Commission had already decided that an act of a State could be a link or bridge to its responsibility. In the present context, a solution to the problem of the attribution of liability might fill the gap between State responsibility and international liability, which existed because international law was never quite able to keep up with acts entailing injurious consequences or harm. In discussing the question of attribution, which was of crucial importance, the Commission would have to decide whether or not it wanted to go beyond the normal criteria for attribu-

ting liability to a State. If it did, it would have to consider such matters as the differences in the level of technological and legal advancement of different countries. It might need to take account of the fact that, although the laws of developed countries on the establishment of factories often contained provisions relating to the prevention of pollution, the same was not always true of the laws on the same subject in developing countries, where the state of the law was not so far advanced.

5. The Commission should also bear in mind that a law prohibiting the establishment of a certain type of factory in a developed country might say nothing about the establishment of such a factory outside its territory—for example, in a developing country. It was his view that, in such a case, the developed country had a moral responsibility to prevent its nationals from engaging in activities that might have injurious consequences for a developing country.

6. Another matter of interest at the preliminary stage in the Commission's work was that of the duty and standard of care, in connexion with which it should be clearly recognized that a State could be liable even for acts that were perfectly lawful but could, in the event of injurious consequences, entail liability. In cases where liability was most likely to be incurred as a result of the slightest negligence, the highest standard of care was obviously called for. The Special Rapporteur had also rightly referred to the question of risk, and to examples in which the State created an unnecessary risk and thus incurred liability regardless of whether it had been negligent or had exercised the necessary care.

7. Lastly, he noted that the example of the hydrogen bomb tests referred to by the Special Rapporteur in foot-note 66 of his report illustrated the fact that the rules of international law relating to the distinction between lawfulness and unlawfulness were constantly changing and developing. Indeed, what might have been lawful in the past might be unlawful at present. Thus, although the scope of the topic under consideration might be narrowed down by the progressive development of international law, it might also be broadened as a result of scientific advances. In trying to delimit the scope of the topic, the Special Rapporteur might therefore find himself in a kind of twilight zone between darkness and light for some time to come.

8. Mr. CALLE Y CALLE said that the topic under consideration was of particular relevance at the present time. For in the past, the activities of States within their own borders had rarely had the same devastating and irreversible consequences, in the territories of other States, as the activities now carried on by States which possessed advanced technology. States had, however, always had a general obligation to provide compensation for the injuries they caused, and that obligation remained.

¹ See *Yearbook* . . . 1978, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex.

9. The scope and nature of the topic had been outlined in the report of the Working Group. Its title, which was long and difficult to remember, but descriptive and comprehensive, was composed of four elements, namely, liability, "internationality", injurious consequences and acts not prohibited by international law. In his view, the fourth element included all acts and activities of States except those specifically prohibited by a customary or conventional rule of international law. International law was thus both permissive and restrictive, in that it allowed States to act according to their wishes except in areas where a prohibition existed. It could therefore be said that permissiveness stopped at a State's border and that international liability was incurred as a result of acts that were quite lawful, but involved risks.

10. It had been said that the sole source of international liability was treaty law, or, in other words, that international liability could be incurred only when a specific convention governed a particular subject-matter. He believed, however, that international liability could also be incurred as a result of conduct not regulated by a specific convention. In matters relating to the environment, the peaceful uses of atomic energy and outer space, for example, it was generally agreed that States could incur liability for injurious consequences whether or not they were parties to conventions relating to those matters. It would be all too easy for States to deny liability if that were not the case.

11. As to injurious consequences, he believed that injury must be regarded as a basic element of liability because, without it, no liability existed. Account must also be taken of the second element he had mentioned, namely, the international nature of the injurious consequences of the act. Those consequences had to be felt in the territory of another State, and they imposed on the State which produced them an obligation to provide compensation. It should, moreover, be borne in mind that, in cases of expropriation, for example, the amount of compensation to be provided should be determined by internal, municipal law, not according to the wishes of the injured party, because the damage done was sometimes much less than the great profits of the foreign enterprise or transnational firm, claimant for compensation.

12. With regard to chapter II of the Special Rapporteur's report, although he agreed with him that the Commission should base its study of the topic on primary rules of general international law, he was not certain that a conventional regime was necessary, because the secondary rules governing international liability would merely provide a conceptual framework containing empty space to be filled by the effect of the primary rules. Lastly, he thought that chapter IV of the report would provide the Commission with a very sound basis for its future work on defining the scope of the topic.

13. Mr. ŠAHOVIĆ said he agreed with most of the views expressed by the two previous speakers. The task entrusted to the Special Rapporteur was not easy, and much remained to be done before the subject was sufficiently well delimited for the Commission to proceed to the formulation of draft articles. For the subject was indeed a complex one and certain points still needed to be clarified, so that it was too early to take a decision on the nature of the future draft.

14. In drafting his report, the Special Rapporteur had rightly been guided by the report of the Working Group, which had been approved by the Commission as the basis for the work to be done on the subject, and he had successively taken up the arguments advanced in that report.

15. In paragraphs 62 to 65 of his report, the Special Rapporteur had reached conclusions which seemed rather too negative. He gave the impression of not being sure of the direction to give to his work in the light of the decisions taken by the Commission. In that connexion, it should be noted that, in dealing with the question of State responsibility for an internationally wrongful act, the Commission had more than once taken the view that it would be possible to formulate articles on the subject under study with its existing title. But the Special Rapporteur said in his report that the title of the topic was "abstract and of unlimited generality" (para. 62), and that the Commission and the General Assembly might perhaps agree expressly "to limit the topic" (para. 65). He then went on to suggest that the topic might be "renamed, more modestly and concretely, to reflect the ambit of its actual concern" (para. 65). In his (Mr. Šahović's) opinion, it would be premature to try to change the title of the topic when there seemed to be no obstacle to further research in the direction so far indicated by the Commission.

16. It was not the first time that in studying one of the major topics of international law the Commission had found it necessary to postpone the study of certain aspects. Within the general framework of the codification of diplomatic law, the Commission had reserved a separate place for special missions. Similarly, within the general framework of the law of treaties, it had reserved separate places for treaties to which international organizations were parties and for the most-favoured-nation clause.

17. The subject under study should be tackled by the method generally followed by Special Rapporteurs, which had proved its worth. In accordance with that method, the Special Rapporteur had enquired what were the bases of the liability he was required to study and what were the relations between primary and secondary rules in that sphere; he had referred to the existing case law and had emphasized principles based on international law. The subject-matter did not seem to require the Commission to be entirely innovative. Legal rules could be derived, on the one hand, from traditional international law and, on the other hand,

from the practice of States and the many conventions mentioned in the report, which stemmed from the technological revolution.

18. No State appeared to be opposed to the idea of the codification and progressive development of the law related to international liability for acts not prohibited by international law, but it was important to stress the practical aspects of the undertaking. Like other topics on the Commission's programme of work, the topic under consideration required reflection, and the Commission should take care not to make hasty decisions. Above all, it must have material which would enable it to reach conclusions on which to base the subsequent formulation of draft articles. It might perhaps reach the conclusion that a set of draft articles was not justified or, on the contrary, that the draft articles should not be confined to liability, or again, that the draft should contain primary rules rather than secondary rules. All those questions arose, but it was as yet too soon to decide what responses they required.

19. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with comments of the previous speakers. The topic seemed to be generally understood in terms of obligations arising out of damage not wrongfully caused. Breach of prohibition attracted wrongfulness, except where wrongfulness was precluded, which implied that where there was no prohibition there was no wrongfulness. It was to that aspect that the Commission had to direct its attention.

20. With regard to the use of the word "acts" in the title, he wondered whether it should be understood to include "omissions". Failure to act, when action was not required by international law, was not wrongful; but the question arose whether such failure attracted liability for the damage that might result.

21. In his opinion, the topic under consideration was one of the most important to have come before the Commission, and its study would significantly contribute to the development of new dimensions of the international legal order in its function of reflecting an emerging international economic and social order. The Special Rapporteur had approached his subject with caution and, because of its newness, had sought to support his several tentative theses with as much State practice as possible. But the real and essential support for those theses would be the facts of life in a changing world.

22. There were two paragraphs in the report that were of crucial importance: the philosophical outline contained in paragraph 31 and the tentative, though bold, themes condensed into paragraph 60. There were also many essential elements outside those two paragraphs, including the roots of liability in the principle of equality of rights and obligations of States; the derived primary rule embodied in the maxim *sic utere tuo ut alienum non laedas*; recognition of the interdependence of interests of all States; and what the

Special Rapporteur had referred to as "the variable concept of harm".

23. In an article published in 1943 entitled "A Survey of Special Interests",² R. Pound had identified a variety of social interests and suggested a hierarchical order for them. Two of those interests might be adopted as a means of placing the current topic in its essential social context. The first was "the claim or want or demand . . . to be secure against those forms of action and courses of conduct which threaten [society's] existence"; that was the "paramount social interest", which was described not as one, but several interests, such as general safety, public health, peace and order, the security of transactions and the security of acquisitions. The second social interest was "the claim . . . involved in social life in civilized society, that the development of human powers and of human control over nature for the satisfaction of human wants go forward; the demand that social engineering be increasingly and continuously improved; as it were, the self-assertion of the social group toward higher and more complete development of human powers." That was the social interest in the general progress, which meant, in effect, economic progress and, by necessary implication, scientific and technological progress. It was at the point where those two great social interests, which should go hand in hand, actually collided at the international level that it was necessary to recognize rules of law that would redress any imbalance which might occur and effect reconciliation.

24. Pound had gone on to recognize four major policies involved in the social interest in economic progress: the policy of freedom of property from restrictions on sale or use; the policy of free trade and against monopolies; the policy of free industry; and the policy of encouraging invention by the grant of exclusive patent rights. Those were, in effect, the classic identification marks of an industrial society and a free-market economy. Few would deny that mankind's recent tremendous advances in science and technology owed much to the individual initiative and drive fostered by the system of free private enterprise in the industrialized States, or that those States had set the pace in modern progress, which was inextricably linked with scientific and technological advancement. But in areas where the free-market system prevailed, the State only created conditions for the competitive advance of science and technology; it rarely participated directly in the process. Such participation was a function of private companies; which determined to keep their competitive advantage, undertook research and development programmes, thus creating new processes and often, at the same time, new risks.

25. The State apparatus, committed to the policy freedom of the market economy, based on competition and profit, had been slow to act restrictively at

² *Harvard Law Review* (Cambridge, Mass.), vol. LVII, No. 1 (October 1943), pp. 1 *et seq.*

home and even slower to act restrictively in regard to external consequences. But when those external consequences involved damage in another State, the State within which the activity took place or whose nationals had initiated the activity should be called to account. Generally, it was that State which was likely to have profited, directly or indirectly, by the commercial or economic activity which had caused the damage. The activity might be an intrinsically lawful one, but the social interest which the State perceived in its protection of the freedom to practise that activity had come up against the social interest of another State and its general security. In such a case, where did the loss fall, and how were interests to be reconciled?

26. As the Special Rapporteur had pointed out in his report, the nature of the "harm" might be relevant. He understood that in its widest sense, as encompassing both the nature of the damage and the attitude of the injured State, and as taking into account the nature of the relationship between the States concerned. If, for example, two States were engaged in advanced activities in space, were collaborating with each other and had an intimate knowledge of each other's safety procedures, which they believed to be reasonable, damage caused by a space object of one of the States to the property of the other might well be dealt with differently than in a case where the damage was caused to an economically backward country with no interest in space activities. For the latter case there was no shared interest in the particular form of progress in the pursuit of which the damage had been caused. But even assuming that harm must be assessed in different ways, difficult cases could occur. For example, if a pharmaceutical factory was manufacturing a cure for cancer in one country and caused damage in another country, there were two aspects to consider. Certainly, all States must share the view that the elimination of cancer represented a form of progress, but there was no particular reason why the injured State should bear the cost of the endeavour or any part of it. In general, whoever profited most should pay most, and those who profited not at all, or to a negligible extent, should pay nothing or very little. Those who risked a great deal in order to profit a great deal ought to pay a large amount in the event of damage being caused to States not parties in the interest, for, as William Penn had written, "To hazard much to get much has more of avarice than wisdom."

27. With regard to the interdependence of rights of States, a relationship of interdependence must be recognized to exist among States for their mutual economic survival. Whereas in the past loss could lie where it fell or where a powerful State made it fall, and no principle called for redress of the balance of interests, it had today become more clearly understood that even for a highly industrialized country to maintain economic health there must be those who had the money to purchase what it produced. Furthermore, without the natural resources of some countries, others might not be able to produce at all. The essence

of that idea was contained in the formulation adopted by the General Assembly at its Sixth Special Session, as part of the Declaration on the Establishment of a New International Economic Order.³ The theme had been elaborated in articles 3, 24 and 30 of the Charter of Economic Rights and Duties of States.⁴ In that context, the variable concept of harm to which the Special Rapporteur had referred should be borne in mind. It might be seen as calling for a softening of a rigid or absolute principle of equality of State rights by the concept of mutuality. If basic inequality was to be redressed, it was not possible to insist on absolute equality of gains.

28. In conclusion, there were clear trends in the current practice of States that would support the first tentative propositions which the Special Rapporteur had placed before the Commission, particularly in paragraph 60 of his report. A rule of international law was emerging which entailed responsibility for the results of an activity where there was no wrongfulness within the usual legal meaning of the term.

29. He agreed with the Special Rapporteur that the study of the topic under consideration should remain within the terms of reference outlined by the Commission's Working Group in 1978, since those terms were sufficiently broad to accommodate all activities which Governments would wish to consider at the present time.

30. Sir Francis VALLAT said that he shared the views already expressed on the topic in general, and only wished to make a few additional preliminary observations.

31. He agreed that the title well expressed the scope of the topic. Moreover, while he trusted that the scope would not be unduly limited by too much caution, he shared the sense of care shown by the Special Rapporteur in his approach.

32. On the question of limitations, he agreed that it would be wise to focus attention on what might be described as environment in its broad meaning, and not to become involved in economic and social questions for the time being. He hesitated over the use of the term "environment", however, because in its narrow sense it had become connected with the expression "environmental law" and the concerns of ecology. It must be made clear that what the Commission was concerned with in the topic under consideration was acts having physical consequences and therefore connected with the environment in the broader sense.

33. As to the question of primary and secondary rules, he agreed with the Special Rapporteur's approach, as he understood it, of moving from secondary to primary rules, since he believed that

³ General Assembly resolution 3201 (S-VI).

⁴ General Assembly resolution 3281 (XXIX).

primary rules were the foundation of the work before the Commission. As he saw it, the Commission was no longer dealing with secondary rules, which would be to repeat the work already done on State responsibility, but were about to explore a field in which, by reason of the rules of international law, there were obligations that led to the liability of States—and that liability, it seemed to him, was mainly a liability to pay compensation.

34. He had sensed in the Special Rapporteur's oral presentation a tendency to focus, at that preliminary stage, on what was referred to in English law as "negligence" and to leave somewhat aside liability for risk. He hoped, however, that when it came to examining draft articles they would deal with both those major aspects of the topic. In many cases, the interest in liability for risk was greater than the interest in liability for the consequences of negligent acts. He believed that it was generally instinctively assumed that a State was liable for the consequences of a negligent act at the international level, but the legal position was not so clear where damage was caused through no apparent fault of the State.

35. In paragraph 46 of his report, the Special Rapporteur stated that "the duty to have regard to all interests that may be affected can be seen as arising directly from the obligation to take reasonable care", and that was a proposition with which there was general agreement. But he then went on to speak of "an adequate and accepted regime of compensation", which in his (Sir Francis's) opinion was not necessarily limited to cases where there had been negligence. For example, if a rocket was launched, and then went off course and landed on a house, it seemed to him that if there had been a defect in the mechanism which should have been corrected by the State before launching, the State had acted negligently and had a duty to compensate. But in other circumstances, where an accident which the State could not have foreseen caused the rocket to land in the territory of another State, the question arose whether liability should be excluded or not.

36. The matter could be framed as an obligation which, while permitting an activity to be undertaken, was an obligation to undertake it without causing damage to another State. In that case, it was not difficult to frame the so-called absolute liability in the form of a primary obligation. But it would then be necessary to consider what relationship existed between the primary obligation and the secondary rule, as contained in article 31 of the articles on State responsibility, concerning the preclusion of wrongfulness on the basis of *force majeure*.⁵ He thought that that and other points would necessarily involve a study

of the relationship between the new articles to be drafted and those already adopted on State responsibility.

37. With regard to Mr. Sucharitkul's remarks, he thought that, bearing in mind the different kinds of activity undertaken by a State, the Commission would have to consider carefully the question of the various standards of care required on the part of a State. In the field of common law, to take an analogy, once the standard of reasonable care was taken away, it became very difficult in practice to say what was slight negligence, ordinary negligence or gross negligence.

38. The question of attribution was an important one, which might well have to be tackled at an early stage of the Commission's work. The basic question would be how far the Commission could rely on the articles already drafted on State responsibility and how far it might be necessary to have some supplementary rules. He hoped that the Commission would not have to construct another series of articles governing attribution in the present field. If it was correct to consider that there could be no liability unless there was a basic rule giving rise to an obligation under international law, it would be possible, in general, to rely on the secondary rules evolved for the subject of State responsibility. For example, if it were agreed that at the basis of every liability to pay compensation there must be the breach of an obligation at least not to do something, article 3 on State responsibility⁶ would clearly have considerable relevance to the topic under consideration. It seemed to him that, as a matter of jurisprudence, there could be no liability without an underlying obligation.

39. Mr. USHAKOV observed that international liability for injurious consequences arising out of acts not prohibited by international law was not presumed, whereas responsibility for internationally wrongful acts was presumed in international law, as in internal law. Consequently, liability for injurious consequences of lawful activities existed only in the cases defined by international law. Hence the Commission should start by specifying the cases in which such liability existed. It should also fix the limits of that liability, in order to avoid disputes between States. Those were its two main tasks.

40. Furthermore, the activities whose injurious consequences involved international liability of the State were not activities conducted by the State in its own territory but activities conducted within the framework of its international relations. Consequently it was the question of responsibility for an internationally wrongful act that arose, for there was violation of the principle of international law that a State must not cause damage to the territory of another State. However, it was not the Commission's

⁵ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 122, document A/34/10, chap. III, sect. B.2.

⁶ *Ibid.*, p. 91, document A/34/10, chap. III, sect. B.1.

task to codify that principle, which was a primary rule of international law, but to define the consequences of its breach. The Commission's third task was therefore to specify the types of international activity which might have more or less foreseeable injurious consequences.

The meeting rose at 12.45 p.m.

1632nd MEETING

Monday, 14 July 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/334 and Add.1 and 2)

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (continued)

1. Mr. BARBOZA said that the Special Rapporteur, in paragraph 20 of his report (A/CN.4/334 and Add.1 and 2), had quite rightly pointed out that obligations were the product of particular primary rules, whereas responsibility for breaches of obligations derived from secondary rules. Primary obligations such as that provided for in article 2 of the 1971 Convention on International Liability for Damage caused by Space Objects (*ibid.*, para. 21) were subject to the regime of the Vienna Convention on the Law of Treaties and did not fall within the purview of the topic before the Commission. The Special Rapporteur also had stated that the term "liability" was not used to mean only the consequences of an obligation, but rather the obligation itself (*ibid.*, para. 12). That usage did not seem to maintain the distinction between primary and secondary rules, which the Commission had been at pains to establish in the past.

2. In approaching the topic, it might be helpful to consider State activities by type, rather than individually. First, there were activities which were always damaging, such as those causing atmospheric or river pollution. The *Trail Smelter* arbitration, mentioned in paragraph 33 of the report, appeared to state a general rule of customary international law prohibiting such

activities: consequently, any damage caused as a result of them constituted an internationally wrongful act and did not fall within the scope of the topic. Secondly, there were "ultra hazardous" activities which were more likely than others to cause damage, but which could not be prohibited because vital economic or other interests were at stake. States conducting such activities were required to pay compensation for any consequent damage suffered by another State. Thirdly, there were activities which, while normally not damaging, could cause damage as a result of *force majeure* or a fortuitous event. In such cases, too, there would appear to be an obligation to compensate for any damage caused.

3. In the case of activities that were always harmful, failure on the part of a State to fulfil all the requirements of due care would constitute an internationally wrongful act entailing responsibility. In the case of hazardous activities, however, the element of due care would seem to play a less fundamental role.

4. A thorough study of the topic was called for, with a view to excluding acts entailing responsibility and delimiting the concept of hazardous activities.

5. Mr. VEROSTA said that, while he agreed fully with the Special Rapporteur's analysis of the topic, he was unable to accept a number of the conclusions contained in the report. While the title was somewhat heavy, and any amendment of it to describe the topic more succinctly would be welcome, the generality of the topic itself could not be invoked as an objection to the undertaking of the study.

6. The scope of the topic could not be limited to environmental questions. The principle *sic utere tuo ut alienum non laedas* had been recognized in Roman law and, because of its fundamental importance, had been applied in international law long before States had become conscious of environmental hazards. In order to establish the general validity of that principle, it was necessary to analyse State practice in the traditional way.

7. The report contained a number of examples relating to matters other than environmental questions in which the injurious consequences of a lawful act of a State, while not rendering that act wrongful, entailed liability and called for compensation. One such matter was the treatment of aliens. The fourth of the Sørensen principles quoted in paragraph 29 of the report was still valid in positive international law; it was the basis of dozens of treaties concluded between States whose citizens had been expropriated since the Second World War, and it had been applied by many of the socialist States of Eastern Europe. That principle could be described, not only as the expression of an international standard, but as a rule of international law.

8. Other areas of international law in which the basic principle was applied were referred to in paragraph 30 of the report. To the circumstances listed, he would add reprisals and self-defence. While the excessive