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A/CN.4/SR.1632

Summary record of the 1632nd 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:-

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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 fortuitious 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

application of reprisals or self-defence constituted a wrongful act entailing international responsibility, there were also cases in which its lawful application could have injurious consequences entailing compensation. Research into State practice in those matters was required.

9. He agreed with the Special Rapporteur that any general study of the topic would have to include the navigational and non-navigational uses of international watercourses. In order to reduce the immense burden of research and delicate analysis that such an undertaking would involve, use could be made of the research done by the Special Rapporteur on the non-navigational uses of international watercourses.

10. Another area relevant to the study of the topic was that of State servitudes. That term had been accepted by writers of international law and by State practice and adjudication, for example, in the *North Atlantic Fisheries* case of 1910. A more adequate term at the present time might be "restrictions on sovereignty". In the case of servitudes under internal civil law and international law, the maxim *sic utere tuo ut alienum non laedas* found its application in the corollary *servitas civiliter est exercenda*, which required a State to exercise its right under an international servitude in a civil way, without harming the interests of the State charged with the servitude or the interests of third States. State practice might furnish examples in which the use of a servitude by a State, while lawful, had produced injurious consequences entailing liability.

11. Mr. SCHWEBEL congratulated the Special Rapporteur on the insight and lucidity with which he had drafted his preliminary report. He was largely in agreement with the Special Rapporteur's approach, and had been struck by the extent to which he had dealt with the principle *sic utere tuo ut alienum non laedas*, the draft UNEP principles on shared natural resources (*ibid.*, para. 5), the *Lake Lanoux* arbitration, the *North Sea Continental Shelf* cases and the *Corfu Channel* case, all of which were sources he himself had referred to in addressing the law of the non-navigational uses of international watercourses. Although his own topic was to be distinguished from the topic under consideration in that it contained some prescriptions the violation of which constituted acts prohibited by international law, the prescriptions of international watercourses might turn out to be very close to being a particular, detailed segment of the very broad field of the topic assigned to Mr. Quentin-Baxter.

12. He believed that that topic might be unduly confined if, at the outset, the Special Rapporteur were to narrow it to environmental, physical questions. By way of illustration he suggested a hypothetical example which was not limited to physical environment, but might arguably be pertinent. State A, a large developed country, had considerable room for growth in terms of population and otherwise, partly because it had promoted family planning measures. Its immediate neighbours, States B and C, had achieved considerable development which, however, had been outpaced by excessive population growth, family planning not being generally pursued for religious and other reasons. As a result of that situation, persistent and massive movements of population took place from States B and C into State A. That movement was illegal under the municipal law of State A, which had the right, under international law, to limit the entry of aliens. But State A was a dynamic democracy of liberal tradition and was not disposed to use force to prevent immigration which violated its law. As matters stood at present, States B and C were not violating international law by permitting their populations to explode, nor was it certain that they were acting unlawfully in not preventing millions of their nationals from leaving their territory for that of State A. It might therefore be argued that such a case, although not an environmental case in the normal usage of that term, raised questions of international liability for injurious consequences arising out of acts not prohibited by international law.

13. Paragraph 37 of the report referred to an *ex gratia* payment made by the United States of America to certain Japanese fishermen who had suffered as a result of a nuclear test—an illustration related to the Special Rapporteur's environmental themes. But *ex gratia* payments had also been made by States to foreign nationals or to foreign States in other than environmental contexts, and it might therefore be wise to look carefully into such cases to see what States might have regarded as their international liability for injurious consequences arising out of acts not prohibited by international law.

14. An illustration was provided by the war claims of the inhabitants of a former Japanese-mandated territory of the South Pacific islands. Claims for compensation had been made for death, physical injury and property losses caused by war-time acts, but the United States had admitted no measure of international responsibility for those injurious consequences of acts not prohibited by international law, as it took the view that it had acted lawfully in repelling aggression against it and, in doing so, attacking Japanese bases and troop concentrations which Japan, in violation of its mandatory obligations, had located in those islands. That civilian inhabitants of the islands had incidentally suffered was considered highly regrettable, but under the law of war there was no liability on the part of the United States. Nevertheless, in order to dispose of the problem in what it regarded as an equitable fashion, the United States had joined with Japan in an *ex gratia* payment designed to meet the claims and had set up a claims commission to process the claims and award payments.

15. The topic under consideration, like that of international watercourses, was not an East–West topic or a North–South topic; nor did the fact that

most technological advances over the last few centuries had sprung from private ingenuity and free enterprise suggest that international liability for injurious consequences arising out of acts not prohibited by international law was to be imposed especially on the developed States of the West. Not only was it far from clear that the topic should be restricted to the impact of technology on the environment, but advances in technology, and uses and abuses of technology, were not the monopoly of Western forms of social and economic organization. After all, it was the Soviet Union that had launched the first *sputnik*. It was a developing State that was responsible for the most extensive oil spill in history. Consideration should be given to the question whether States that laid claim to the transfer of technology which they had not created should not perhaps share the burden, risk and costs of that technology. It must also be remembered that States that had not created a technology might benefit from it, quite apart from its transfer. The Special Rapporteur might wish to consider—or reconsider—such fundamental equitable aspects of the topic.

16. Those reflections were not intended to depreciate the principle that the innocent victims of an activity involving some danger should not be left to bear their loss, even if the actor's conduct was not wrongful. However, his remarks might be relevant to the essential definition of innocence, and they suggested that the actors in question were to be found the world over.

17. Referring to paragraph 33 of the report, in which the Special Rapporteur had stated that the United States had not explicitly abandoned the Harmon doctrine until 1960, he informed the Commission that that doctrine had been expressly repudiated by authorized spokesmen of the United States Government in 1945, at hearings before the Committee on Foreign Relations on a treaty with Mexico relating to the utilization of the waters of certain rivers.

18. Lastly, he subscribed to the Special Rapporteur's description of the nub of his perceptions, as it appeared in paragraph 60 of the report.

19. Mr. THIAM congratulated the Special Rapporteur on his very full report, which combined the search for legal rules for the settlement of possible disputes with a constant determination to situate the topic within the realities of contemporary life. The report was also animated by a desire not to hamper beneficial activities, while ensuring that any damage they might cause could be compensated.

20. He had no suggestion to offer regarding the title. It was certainly very long, but it would be difficult to reduce to a simple formula. It had been suggested that it might perhaps be better not to mention acts, since there were cases in which a State could be liable by omission. But where that was the case—for example, if a State did not control or regulate private activities in its territory which caused damage to a third State—it was rather a matter of responsibility for an internationally wrongful act.

21. The question arose, what was the basis of the liability under study: was it an absolute liability of the State in all cases, in virtue of which it was required to make reparation for any damage caused, or was it some other form of liability based, for example, on lack of due care? In his view, liability arising from lack of care, or a fault in conduct, did not fall within the scope of the topic under consideration, but within that of responsibility for a wrongful act. If a State was free to engage in dangerous activities, it had a corresponding obligation to compensate for any damage caused by such activities. Hence there was an absolute liability, since the obligation to compensate arose in all the cases, even those based on lack of care. The Special Rapporteur himself had said that when liability was based on lack of care, a different basis, such as equity, was sought for the obligation to compensate. There was a question, therefore, as to what the extent of compensation might be and to what extent the topic under consideration might overlap with that of responsibility for a wrongful act.

22. He did not think it was necessary to seek a formula to absolve developing countries from any liability they might incur for injurious acts, as Mr. Sucharitkul had suggested (1631st meeting). He wondered, indeed, how far a State which claimed to be developing, and which engaged in nuclear activities, could invoke its status as a developing country to justify the application of a special regime with respect to liability for the injurious consequences of such activities. On the other hand, he thought that if a developed country engaged in activities that might have injurious consequences for other developed countries, the latter countries should exercise due care by taking the necessary protective measures.

23. Mr. REUTER congratulated the Special Rapporteur on his learning and industry, his meticulousness and his empirical approach to the topic, which showed his determination to keep in contact with reality and avoid premature syntheses. He also congratulated him on his courage in tackling a subject which perhaps did not exist—or at least not yet.

24. It was, indeed, open to question whether there could really be liability without a wrongful act. In his opinion, nothing was less certain; for both international law and internal law were loath to venture into that field, and many of the cases cited as cases of liability without a wrongful act were in fact cases of liability for a wrongful act. The concept of liability without a wrongful act was really only a means of solving a problem that was impossible to solve for lack of proof, by dispensing the injured party from the requirement of providing proof when that was impossible. As soon as proof became possible, one left the dangerous ground of liability without a wrongful act and re-entered that of responsibility for a wrongful act. Cases of liability for the injurious consequences of

pollution were not, contrary to what might be said, cases of liability without a wrongful act. In pollution, as in other matters, it was necessary to fix thresholds which must not be exceeded, and when the rule fixing them was broken there would be responsibility for a wrongful act.

25. In the *Lake Lanoux* arbitration cited by the Special Rapporteur, the Spanish Government had tried to show that the works planned by France were wrongful in that they made the restoration to Spain of a certain quantity of water dependent on the political will of a State, which infringed the sovereignty of Spain. But if the Spanish Government had invoked the risk of a disaster caused by the bursting of the dam, the arbitral award might have been different, because there might be a rule of international law concerning that kind of risk.

26. Cases of liability without a wrongful act were thus much fewer than was supposed. But even admitting that there were such cases and that the subject existed, that presupposed the existence of general rules for all cases of liability. It might therefore be asked what those general rules were, which led to the question raised by Mr. Thiam, of the principle of the liability contemplated. The reply to that question was not clear.

27. If the Commission were to proceed as in the case of the draft on State responsibility for internationally wrongful acts, the first question to be settled would be that of the act of the State. In the present case, it was no longer the wrongful act of the State that entailed liability, but it was not just any act of the State. Nor was it the magnitude of the risk. It was therefore necessary to determine what act of the State entailed liability without fault. The Special Rapporteur had not answered that question. He might find it easier to do so if he limited the topic to liability for technical risks, for example.

28. Attribution of an act to the State also raised a problem, since it was open to question whether the rules governing such attribution were the same for no-fault liability as they were in the case of responsibility for a wrongful act. It might even be doubted whether the rules on attribution to a State were the same for all cases of no-fault liability.

29. But the essential element of the topic under consideration was damage. Hence it was clear that if the topic was to be approached in its general form, it would be necessary to propose general rules concerning damage, though in doing so there would be some danger of encroaching on the second part of the draft articles on State responsibility. The damage in question was obviously not the moral damage resulting from an internationally wrongful act. In that connexion, he pointed out that the theory stated in article 19 of the draft articles on State responsibility[1] evaded the problem of damage as a constituent element of international responsibility.

30. In conclusion, he emphasized that if the Commission asked the Special Rapporteur to draft primary rules, it would be accepting the postulate that there were general rules on no-fault liability and that they were common to all cases of such liability. He strongly doubted, however, whether at the present time there were any general primary rules applicable to all cases of no-fault liability, for his impression was that every case was distinct. If that impression was correct, the topic did not exist, and the Special Rapporteur was right in proposing that the Commission should refrain from constructing abstract theories and make a thorough study of a number of specific cases in an attempt to deduce general rules. He approved of that method, though he thought it might still be too early to change the title of the topic.

31. Mr. TSURUOKA said that he shared the views expressed by Sir Francis Vallat (1631st meeting) concerning the notion of environment to be taken into account in studying the topic under consideration. It followed from the title of the topic that there must be damage if there was to be liability. While compensation for damage was essential, it was even more important to avert the possible injurious consequences of acts not prohibited by international law—but in doing so, care must be taken not to impede the progress of such activities.

32. As other members had emphasized, the Commission's efforts should be centred mainly on the environment, which was the pre-eminent area for collaboration. Such collaboration could take various forms, depending on whether it was between North and South, between East and West, or between developing and industrialized countries. It might be of a legal nature, particularly if it consisted in negotiations for the compensation of victims or for the harmonization of national laws. Public and private international law might also be brought into closer accord. Technical progress, which made States interdependent, made collaboration, in every sense of the word, a real necessity.

33. As far as the method of work was concerned, he thought the Special Rapporteur should keep in close and constant touch with Mr. Riphagen, the Special Rapporteur for the study of State responsibility for internationally wrongful acts. It appeared that certain principles could already be derived from the case-law and conventions cited by Mr. Sucharitkul. As in the case of the law of the non-navigational uses of international waterways, it should be possible to draft a framework agreement which States could take as a basis for concluding regional agreements, or agreements to which the parties might, for example, be States having reached a similar level of development.

34. Japan, which was one of the most highly polluted countries in the world, had obtained encouraging

[1] *Yearbook ... 1979*, vol. II (Part Two), p. 91, document A/34/10, chap. III, sect. B.1.

results over the past decade in its campaign against the injurious consequences of certain activities. Formerly, those activities had not been considered wrongful, but they had gradually come to be so treated, by recourse to such notions as abuse of right, liability without fault and an increased requirement of due care. In addition, the Japanese courts had applied the rules of procedure to the advantage of the injured party; evidence brought by the injured party had been judged more easily admissible than evidence for the adverse party. In medical matters, statistics had often been considered sufficient, without strict proof of a causal connexion. In his view, that attitude of the Japanese courts deserved attention, since it provided a way of remedying the injurious consequences arising out of lawful activities.

35. Lastly, he emphasized that the topic under consideration was both new and old. The Commission had always refrained from deciding whether it was carrying out codification or progressive development of international law on a particular matter. In view of the rapid evolution taking place in the international community, however, it was to be hoped that in the present case the Commission would try not to confine itself to pure codification.

36. As far as the notion of shared resources was concerned, the Commission should use it only with the greatest caution.

37. Mr. DÍAZ GONZÁLEZ associated himself with previous speakers in congratulating the Special Rapporteur on his report. He believed that its value lay above all in showing that the topic, under its existing title, did not have an evident, solid basis, since it might be expected to disappear with the progressive development of international law. It could be foreseen that acts which were currently permitted to States, in the sense that they were not prohibited by international law even though they had injurious consequences, would eventually be governed by rules as codification developed.

38. It seemed to him that the first part of the preliminary report had a certain importance for English-speaking countries with a common-law background, as it dealt with differences in terminology. But in countries which had inherited a civil law system, the differentiation outlined in the report was of lesser importance, since the concepts of responsibility and obligation had a well-defined legal content.

39. The principle put forward by the Special Rapporteur, that all that was not prohibited by law was permitted, must be regarded as relative to some extent. For instance, since the Second World War the rule *nulla poena sine lege* was no longer absolute, for at the Nuremberg trials an offence had been created specially to condemn war criminals.

40. The development of technology had shown that the utilization of certain resources, even when carried out in accordance with the principle of State sovereignty and when not prohibited by law, might cause harm to another State and involve acts which gave rise to liability. It should also be borne in mind that harm arising from an act committed by a State and not prohibited by law could not always be subsequently compensated. Furthermore, it was, as the Special Rapporteur had pointed out, very difficult to draw the line between a lawful act and an act not prohibited by law which had harmful consequences. He believed that the nub of the question lay not so much in liability without fault as in compensation for harm done.

41. It was important to ask where the topic led to. If the Commission was going to establish rules governing acts committed by a State that were wrongful, such acts would no longer be acts not prohibited by international law, but would become regulated acts which were wrongful under the rules governing them. It seemed to him that the topic as such was too wide, and he could not see any basis on which the Commission could found the regulation of acts not prohibited by international law which gave rise to the liability of a State.

42. The same doubts could be expressed with regard to primary and secondary rules. It seemed to him that, so long as there was no primary rule establishing an obligation, there could be no secondary rule giving rise to responsibility. In general, his first thoughts on the topic led him to express concern at any attempt to establish rules governing the injurious consequences of acts not prohibited by international law, because the topic, as it stood, did not seem to be sufficiently tangible or real.

The meeting rose at 4.55 p.m.

1633rd MEETING

Tuesday, 15 July 1980, at 10.15 a.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. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

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

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. QUENTIN-BAXTER (Special Rapporteur),