

Document:-  
**A/CN.4/SR.1801**

**Summary record of the 1801st meeting**

Topic:  
**Cooperation with other bodies**

Extract from the Yearbook of the International Law Commission:-  
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Some members had taken the view that the topic should not be further discussed for want of any basis in general international law or because of existing difficulties.

He himself continued to hold that view and still believed that there were no rules of international law establishing the liability of States for injurious consequences arising out of acts not prohibited by international law.

37. In the case of certain specific activities, such as hazardous activities that could be expected to have harmful consequences, States concluded special agreements of universal, regional or bilateral character, such as the agreement establishing State responsibility for lawful activities conducted in outer space which were likely to have consequences on Earth.<sup>14</sup>

38. On the other hand, it was impossible to stipulate an obligation to make reparation for the injurious consequences of any lawful activity necessary for the development of industry or agriculture or to combat some natural scourge. Moreover, the acting State was usually the first to suffer the injurious consequences of its own action; but even in such a case, there was no certainty that it would be prepared to pay damage to neighbouring States which had also suffered the consequences of that action. He also had some doubts about the usefulness of the term “transboundary harm”, for if the question was being studied by the Commission, the “harm” was obviously international.

39. Either a treaty prohibited a certain activity and a State party which ignored the prohibition incurred international liability, or there was no obligation on the State, in which case, as things stood at present, the State was in no way bound to make reparation to a neighbouring State which suffered the injurious consequences of its activities.

40. Mr. KOROMA congratulated the Special Rapporteur on his very useful report (A/CN.4/373), which provided further proof of his command of the topic. In the earlier discussions he had thought that the dichotomy in the Commission and in the Sixth Committee of the General Assembly was conceptual, because the Special Rapporteur had taken as his earlier point of departure the “duty of care” towards other States. Later, however, the Special Rapporteur had been persuaded that such a general duty did not exist, or at least that the concept was not common to all legal systems. He had therefore adopted instead (A/CN.4/360, paras. 19–23) the “criterion of foreseeability”: if the harm or injury to a neighbouring State could be foreseen, a duty existed for the acting State. For the time being, that proposition should have sufficed.

41. Listening now to the Special Rapporteur and to Mr. Ushakov, however, he realized that the differences within the Commission were essentially a matter of policy and were not merely conceptual. Mr. Ushakov had maintained that no general liability arose for States under public international law in respect of transboundary harm caused by activities not prohibited by international law.

He, for one, could accept that thesis, but he drew attention to a discrepancy between the French and English versions of the title of the topic. The English title spoke of “acts not prohibited by international law”, whereas the French version used the term *activités*. As pointed out by Mr. Ushakov, “activities” that were not forbidden by international law could not give rise to liability. The position was not the same for “acts”. To take the example of activities in outer space, which were of course lawful, it was only when a particular act caused harm that the State would be held liable. He urged that the terminology used, particularly in the title of the topic, should be carefully reviewed in the light of those comments.

42. It could not be denied that there was a wealth of State practice and an impressive body of international legislation on acts which caused harm to other States, on the resulting duty of care and on the obligation to make reparation and, where appropriate, take steps to prevent the recurrence of such acts. Those ideas should constitute the point of departure for the study of the topic.

43. The Special Rapporteur had endeavoured to elaborate on the content of the duty not to cause harm to another State. That duty could be cast in preventive form, or in the form of reparation or compensation. He agreed with the Special Rapporteur that the topic should be confined to physical injury and should not extend to economic injury for the time being. In a great many cases, however, physical injury would have economic consequences; for instance, pollution of a river by an upper riparian State would lead to economic losses for farmers in a lower riparian State.

*The meeting rose at 6.10 p.m.*

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## 1801st MEETING

*Tuesday, 12 July 1983, at 10 a.m.*

*Chairman: Mr. Laurel B. FRANCIS*

*Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Tazafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.*

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<sup>14</sup> Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, vol. 961, p. 187).

cluded) (A/CN.4/360,<sup>1</sup> A/CN.4/373,<sup>2</sup> A/CN.4/L.352, sect. C)

[Agenda item 6]

FOURTH REPORT OF THE  
SPECIAL RAPPORTEUR (concluded)

1. Mr. SUCHARITKUL, after congratulating the Special Rapporteur for clarifying the concept of international liability, said that the kind of liability in question differed from State responsibility for internationally wrongful acts in that one of its essential features was that the acts from which the injurious consequences arose were not wrongful. It was thus clear from the report (A/CN.4/373) that acts such as those dealt with in part 1, chapter V, of the draft articles on State responsibility (Circumstances precluding wrongfulness)<sup>3</sup> could in fact engage the international responsibility of the State performing them. Another difference between the two concepts was that, in the case of State responsibility, as understood by Mr. Riphagen, it was necessary to prove the "act of the State" (part 1, chapter II, of the draft).<sup>4</sup> In the case under consideration, the Special Rapporteur proposed that the State should be held internationally liable for all injurious consequences arising out of activities carried out in its territory or under its control, in order to take account of modern conditions of interdependence and the growing need for co-operation.

2. In that connection, he drew attention to the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>5</sup> the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations<sup>6</sup> and the Bandung Declaration of 1955,<sup>7</sup> which emphasized, *inter alia*, the principle of good-neighbourliness. Similarly, on 8 August 1967, the member countries of ASEAN had declared themselves

*Conscious* that in an increasingly interdependent world, the cherished ideals of peace, freedom, social justice and economic well-being are best attained by fostering good understanding, good-neighbourliness and meaningful co-operation among the countries of the region already bound together by ties of history and culture.<sup>8</sup>

3. The Convention on International Liability for Damage Caused by Space Objects<sup>9</sup> provided an interesting example of a special régime establishing not

only the absolute liability of the launching State, but also a joint and several liability. Also of interest was a study by Mrs. Koh on straits in international navigation,<sup>10</sup> in which it was pointed out that the *Corfu Channel* case<sup>11</sup> had laid down that a State had not only the right, but also a duty to ensure the safety of navigation in a straits régime. In that case, the ICJ had held that such obligations were based on certain general and well-recognized principles, namely elementary considerations of humanity, the principles of the freedom of maritime communication and every State's obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States. The Court had also held that a duty was placed on States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction.

4. Examples of international liability abounded in the practice of States. The *Fukuryu Maru* case (1954),<sup>12</sup> mentioned by the Special Rapporteur (*ibid.*, para. 34), showed the mobility of the dividing line between lawful acts and acts prohibited by international law; that mobility corresponded to the development of international law. He also had in mind the *Showa Maru* case (1975),<sup>13</sup> in which a Japanese tanker of 237,698 tons had struck a rock in the Straits of Malacca and released more than 3,000 tons of oil into the waters of Indonesia, Malaysia and Singapore, which had claimed reparation to cover the cost of cleaning operations and the losses suffered by their fisheries. That case had led to the adoption of rules on navigation in the Straits of Malacca and Singapore, which limited the size of vessels to under 250,000 tons and required them to follow the route determined by the Council on Safety of Navigation and Control of Marine Pollution of the three coastal countries and approved by IMCO.<sup>14</sup>

5. It should also be noted that bilateral agreements delimiting the continental shelf always contained a safeguard clause providing that the parties could not exploit oil or mineral deposits situated near the boundary line, since such exploitation by a State could have physical and economic consequences for the neighbouring State.

6. While approving of the Special Rapporteur's report, he thought that it would be necessary to plan the next stages of the study in greater detail and concluded by emphasizing the importance of the progressive development of international law in that area, the duties of care, vigilance and prevention devolving on States, and their obligation to make reparation. The fact that there was an

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 33-34.

<sup>4</sup> *Ibid.*, p. 31.

<sup>5</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>6</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>7</sup> See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin No. 9* (Jakarta, 1955), p. 2.

<sup>8</sup> Third preambular paragraph of the "ASEAN Declaration", joint communiqué adopted at Bangkok on 8 August 1967 at the First Ministerial Meeting of ASEAN (M. Haas, ed., *Basic Documents of Asian Regional Organizations* (Dobbs Ferry (N.Y.), Oceana Publications, 1974), vol. IV, p. 1269).

<sup>9</sup> See 1800th meeting, footnote 14.

<sup>10</sup> Koh Kheng-lian, *Contemporary Issues Relating to Straits Used for International Navigation*, thesis submitted to the *Institut universitaire de hautes études internationales*, Geneva, 1980.

<sup>11</sup> Judgment of 9 April 1949, Merits, *I.C.J. Reports 1949*, p. 4.

<sup>12</sup> M.M. Whiteman, ed., *Digest of International Law* (Washington, D.C.), vol. 8 (1967), p. 764.

<sup>13</sup> Koh, *op cit.*, pp. 87 and 89-92.

<sup>14</sup> IMCO, resolution A.357(X) of 14 November 1977, annex V: "Rules for Vessels Navigating through the Straits of Malacca and Singapore" (*Resolutions and other Decisions of the Tenth Session of the Assembly, 7-17 November 1977* (London, 1978)).

obligation to make reparation, however, did not mean that a State could exercise its sovereign rights over its territory so as to cause harm to its neighbours.

7. Mr. NI congratulated the Special Rapporteur on his remarkable fourth report (A/CN.4/373), which was the result of painstaking research into what had aptly been called a “twilight zone” of international law. The Special Rapporteur was not pessimistic; he was trying to strike a balance between one State’s right to freedom of action and another State’s right to freedom from transboundary harm. The Special Rapporteur was not prepared either to accept the simple formula of strict liability or to allow the victim to remain without hope of remedy; he had therefore proposed the theory of apportionment of damages, whereby, with due regard for the various factors involved, the liability of the source State could be diminished, with the affected State sustaining a substantial part of the loss.

8. It was pointed out in the report (*ibid.*, para. 65) that the source State’s ultimate liability might depend upon the whole course of its conduct—an approach which suggested that justice was being administered on the basis of equity. The Special Rapporteur also stated that failure to consult, or to provide proper regulation, was only one of the elements to be taken into account in the event of transboundary harm being caused (*ibid.*, para. 19).

9. The topic was a novel and unprecedented one, in that a State could incur liability for an act or omission not prohibited by international law. Rapid scientific and technological progress had created situations in which a legitimate activity conducted in one State could result in injury to another State or its citizens. The acting State could not, of course, be held liable for the consequences of an activity that was lawful. But at the same time, a State which enjoyed exclusive authority over its territory had the correlative duty not to do harm to other members of the international community. The traditional answer to that problem was either to impute wrongfulness to the acting State or to impose the theory of strict liability. Neither of those solutions, however, could overcome the theoretical and practical difficulties involved.

10. The Special Rapporteur had put forward his theory of the “continuum of prevention and reparation”. He had thus included the concept of prevention, notwithstanding the fact that, in the 1982 debate in the Sixth Committee of the General Assembly, it had been maintained that prevention was outside the scope of the present topic, which concerned only reparation (A/CN.4/L.352, paras. 143–145). The Special Rapporteur had countered that criticism by stating in section 5, paragraph 2, of his schematic outline that “adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation” (A/CN.4/373, annex).

11. The Special Rapporteur had stressed that the division between sections 3 and 4 of the schematic outline was a division not between prevention and reparation, but between the steps that should be taken when States foresaw a need to construct a régime of prevention and reparation and those that must be taken “when a physical transboundary loss or injury has occurred and the

obligations of the source State have not been predetermined by any applicable or accepted régime”; and he had added: “The policy of the schematic outline is to reflect and encourage the growing practice of States to regulate these matters in advance . . .” (*ibid.*, para. 50).

12. In analysing the *Trail Smelter* case,<sup>15</sup> the Special Rapporteur had pointed out (*ibid.*, para. 47) that the assessment of compensation had been a minor part of the tribunal’s work, its attention having been mainly devoted to discussing the means by which future loss or injury could be avoided, consistently with the continued economic viability of the smelting enterprise. A balance had thus been struck between the interest of continuing a useful activity and the protection of the neighbouring State from transboundary harm. As pointed out in the Sixth Committee debate, the elaboration of a preventive régime and of a régime of reparation were complementary, not competing objectives.<sup>16</sup>

13. Seen in that perspective, the concept of prevention was not an isolated legal norm to be imposed on any beneficial activity as a legal obligation whose breach entailed responsibility on grounds of wrongfulness. There was a duty to avoid or minimize loss or injury; only when all efforts to avoid injury had failed did the duty of reparation arise. The State’s freedom of action regarding useful activities thus remained uncurtailed, but not at the expense of the interests of other States. In the progressive development of international law, by stressing the general and common interest it would be possible to achieve stability and to give true meaning to the notion of interdependence.

14. The topic required imagination; it was not without viability or practical utility. It was important to the interests of all States, particularly developing countries, because they lacked the techniques to detect or monitor harmful transboundary effects, and because certain activities were carried out by contractors or multilateral agencies. Those countries should therefore be protected from the adverse effects of ill-planned or inconsiderate industrial development by a neighbouring State.

15. As to the scope of the topic, he believed that as it was rather new in the process of legal development, it would not be advisable to start on too ambitious a plan. He agreed with the Special Rapporteur that the central aim should be “to analyse the growing volume and variety of State practice” (*ibid.*, para. 12) and that nowhere was the tendency to accumulate experience for regulating international conduct, more evident than in “conventional régimes relating to physical uses of territory” (*ibid.*, para. 16). Accordingly, as the then Chairman of the Commission had said in the Sixth Committee in 1982, the draft articles on the present topic could be limited to

<sup>15</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>16</sup> See “Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly” (A/CN.4/L.399), para. 149.

transboundary problems pertaining to the physical environment (*ibid.*, para. 11).

16. With regard to the final form the Commission's work should take, the traditional approach was to assume that a convention was being drafted, without excluding the possibility of the subject being treated by means of guidelines, directives or rules of conduct. A decision on that question could be deferred until a later stage, when the materials on State practice, treaties and national laws had been fully analysed. Having made those preliminary and tentative observations, he would speak again on the topic at a later stage in the discussion.

17. Mr. McCAFFREY congratulated the Special Rapporteur on his scholarly report (A/CN.4/373), which showed complete command of the subject. He would not comment in detail on the report or on the many thought-provoking ideas in it but, to use the Special Rapporteur's own words, would treat it as "a very early report for the 1984 session" (*ibid.*, para. 75). He would accordingly make only a few tentative and preliminary remarks, intending to go into more detail at the next session, when he hoped that sufficient time would be allocated to the topic.

18. The Special Rapporteur was to be commended on his sensitivity to the views of the members of the Commission and of the Sixth Committee, and on his painstaking efforts to tailor the topic to suit the needs and perceptions of as many points of view as possible. As to its scope, the Special Rapporteur had noted the clear trend of majority opinion in 1982, both in the Commission and in the Sixth Committee, in favour of confining the topic to "physical activities giving rise to physical transboundary harm" and had added: "The essential reason for this change is that State practice is at present insufficiently developed in other areas." (*Ibid.*, para. 63.) He himself had always seen the subject in that light and he warmly supported that conclusion. He believed, however, that it did not involve any real change, but simply represented a refinement introduced on the basis of the Special Rapporteur's experience.

19. As he had pointed out at the previous session,<sup>17</sup> he found the English title somewhat confusing, particularly in an era of high technology. That title spoke of "acts" not prohibited by international law, whereas the French version used the more accurate term *activités*. The focus should be on activities which entailed a risk of transboundary harm. Those activities were not prohibited and the risk in question was accepted by society because the activities were beneficial. What was prohibited was rather the act of causing, or permitting the occurrence of, some substantial harm. Although the English title was something of a misnomer, he was not suggesting that it should be changed, but simply pointing out that it could lead to some conceptual difficulties concerning the nature of the topic.

20. There were, of course, situations in which the source State's responsibility was not engaged unless its

authorities had "the means of foreseeing that loss or injury was likely to be caused, as well as the duty to prevent its occurrence" (*ibid.*, para. 28 *in fine*). There were also situations in which the causing of transboundary harm was not wrongful, but in which there was nevertheless a duty to compensate for actual loss or injury. An illustration of that situation was provided by the second phase of the *Trail Smelter* arbitration,<sup>18</sup> which the Special Rapporteur had discussed in his report (*ibid.*, para. 47).

21. As he saw it, it was largely an academic issue whether one spoke of "wrongful" harm or of harm permitted subject to the duty to compensate. It was not entirely academic, however, because of the danger of emergence of a "smoke easement", subject to the duty to pay for it. Care should be taken to avoid that undesirable result. For the purposes of the present topic, the essential point was the correlative nature of State sovereignty. He was reminded of the comment by a professor of the law of tort, to the effect that one man's right to swing his fist ended where another man's nose began. John Donne had said that no man was an island, and that was equally true of States, which could not exist without relying on and affecting the interests of other States. The regulation of that increasing interdependence should be effected in such a way as to produce harmony among nations; that was indeed the challenge of the present topic.

22. He wholeheartedly endorsed the Special Rapporteur's "soft approach" (*ibid.*, para. 43), which was summarized as having a twofold aim: first, to induce States that foresaw a problem of transboundary harm to establish a régime consisting of a network of simple rules; second, to provide a method of settlement that was reasonably fair (*ibid.*, para. 69). In that connection, the Special Rapporteur had referred to the *Poplar River Project* case<sup>19</sup> as one in which the affected State had had to bear the whole burden of substantial physical transboundary harm. It should be noted, however, that Canada and the United States had set up a bipartite body, the Poplar River Bilateral Monitoring Committee, to monitor pollution levels continuously and to report annually to the two Governments concerned, or more often if required by circumstances. Accordingly, although the affected State did bear the whole burden of substantial transboundary harm, that harm was limited to certain agreed parameters.

23. The Special Rapporteur had asked for comments on section 2 of the schematic outline (*ibid.*, annex). He himself had nothing to add to his preliminary observations made at the previous session.<sup>20</sup> He only wished to point out that the *Poplar River Project* case was a specific application of section 2. It would seem desirable to co-ordinate and harmonize the procedures provided for in

<sup>17</sup> *Yearbook* . . . 1982, vol. I, p. 280, 1743rd meeting, para. 10.

<sup>18</sup> United Nations, *Reports of International Arbitral Awards*, vol. III . . . , pp. 1938 *et seq.*

<sup>19</sup> See *Digest of United States Practice in International Law 1976* (Washington (D.C.), U.S. Government Printing Office, 1977), pp. 590-594; *ibid.* 1978 (1980), pp. 1116-1121 and 1496-1498.

<sup>20</sup> *Yearbook* . . . 1982, vol. I, p. 281, 1743rd meeting, paras. 19-20.

section 2 of the schematic outline with those specified in the draft articles prepared by the Special Rapporteur on the law of the non-navigational uses of international watercourses (A/CN.4/367). The rules set out in connection with that topic constituted a specific practical application to international watercourses of the general rules laid down in section 2. He hoped the Commission would co-ordinate its work on the two topics, bearing in mind that one was an application of the other to a particular problem.

24. In section 2 of the schematic outline, he noted the statement in paragraph 8 that: "Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action." That statement was qualified to some extent by the terms of section 5, paragraph 4, which established a presumption in favour of the affected State in the event of the acting State not making the appropriate information available to it. In the body of his report (A/CN.4/373, para. 65), the Special Rapporteur had, moreover, stated that:

No penalty attaches to the failure or refusal to provide information, except the normal consequence that the source State's ultimate liability may depend upon the whole course of its conduct . . .

That approach seemed largely based on equity.

25. On the subject of documentation, he supported the Special Rapporteur's request that the materials assembled by the Secretariat should be made more widely available and that the third part of the Secretariat's work, presented only as a collection of documents, should be put into the form of an analytical study (*ibid.*, para. 58).

26. Lastly, he wished to record his satisfaction at the fact that the notes to the fourth report had been appropriately placed at the foot of each page to which they applied. In view of the large number of notes, it would have been most inconvenient to readers if the notes had been relegated to the end of the report, as had unfortunately been done in other cases.

27. Mr. FLITAN warmly congratulated the Special Rapporteur, who had not become the advocate of his subject but had tried to present it as objectively as possible, so that the Commission and the Sixth Committee of the General Assembly could draw their own conclusions and decide whether or not the study should be continued. His own view was that the Special Rapporteur could usefully continue his work, which supplemented that of Mr. Thiam and Mr. Riphagen.

28. For reasons of justice and equity, it was incumbent upon a State engaging in activities that caused harm to a neighbouring State to assume responsibility for the consequences by making reparation. It was inconceivable that such a State should be exempt from all liability. To appreciate the value of the Special Rapporteur's study, it was sufficient to note the growing number of conventions concluded on the topic, the mere fact that it had been placed on the Commission's agenda and the views of the great majority of the members of the Sixth Committee. Moreover, with a view to progress in science and technology, States were more and more often engaging in activities which could have injurious consequences for their neighbours.

29. The subject did not divide countries according to their attachment to the East or the West, but rather on a North-South alignment. It was the industrialized countries that were in the best position to undertake advanced activities likely to have injurious consequences whereas the developing countries suffered the consequences.

30. Moreover, as international life became more complicated, it was no longer possible to conceive that States incurred responsibility only if they committed internationally wrongful acts or failed to fulfil their international obligations. Consequently, the Commission should introduce some progressive development. The Special Rapporteur had, indeed, invited the members of the Commission to abandon their habitual view of international law as laying down only prohibitory rules.

31. The Special Rapporteur should not break off his study. Proceeding with great caution, he should take as his starting-point the activities governed by conventions, adopt a more practical viewpoint, draw upon the documentation prepared by the Secretariat, place more emphasis on the concept of good-neighbourliness and avoid entering the area of strict liability—a concept which went too far in the present state of affairs.

32. Mr. NJENGA congratulated the Special Rapporteur on his enlightening report (A/CN.4/373). He wished to place on record his view that, during its thirty-sixth session, the Commission should allocate sufficient time and priority to ensure adequate discussion of the fourth report, together with the further report which the Special Rapporteur had proposed to submit on the development of section 2 of the schematic outline and on the questions of scope and definitions referred to in section 1.

33. In his fourth report, the Special Rapporteur had clearly delineated the scope and parameters of his topic and distinguished it both from State responsibility for wrongful acts and from the ultra-hazardous situations which engaged State responsibility, mainly through international conventions, on the so-called principle of strict liability. The area of transboundary harm, as defined in the report (*ibid.*, para. 3), was one in which State practice and emerging customary rules recognized the obligations of a State to take all practicable measures to prevent harm to its neighbours from lawful activities conducted within its territory, and the need to make the necessary reparation if serious harm was done. That was an aspect of law dictated by good-neighbourly relations, where the freedom of a State to conduct within its territory any activity not prohibited by international law was predicated on the equally important freedom of its neighbour not to have unreasonable harm inflicted upon it. Those two freedoms—in some respects conflicting—called for a high degree of co-operation, which the Special Rapporteur had aptly described as "the continuum of prevention and reparation".

34. The Special Rapporteur had provided numerous examples from State practice where States had felt an obligation to make reparation for transboundary harm arising from acts clearly not prohibited by international

law and where there was no obligation arising from a specific agreement or convention. The *Trail Smelter* case<sup>21</sup> (*ibid.*, para. 47) was one such early example. In the case concerning the *Cosmos 954* satellite<sup>22</sup> (*ibid.*, para. 29), Canada could claim compensation under the Convention on International Liability for Damage Caused by Space Objects,<sup>23</sup> to which both the Soviet Union and Canada were parties. But no one would seriously argue that, if the object had fallen in a State not party to the Convention, that State would not have been entitled to a remedy. The *Fukuryu Maru* case<sup>24</sup> (*ibid.*, para. 34) showed the breadth of the transboundary concept, since the prompt offer of fair compensation by the United States indicated recognition of a legal obligation to compensate, although the act of the bomb test had not been wrongful. The *Poplar River Project* case<sup>25</sup> (*ibid.*, para. 36), on the other hand, showed the extent and limitation of liability that would be imposed. Canada had been allowed, without penalty, to draw upon the common reservoir of tolerable increase in air pollution levels, although it had significantly reduced the potential for increasing power generation in the neighbouring American State of Montana, which kept within predetermined quality standards.

35. Such examples showed that the topic under consideration was a legitimate one calling for both codification and progressive development. He could not subscribe to the thesis that there was no rule in general international law which prescribed liability for transboundary harm caused by activities not otherwise prohibited by international law, and that such rules existed only in specific conventions or agreements. Nor did he share the view that it was a subject on which meaningful discussions could be conducted only in regard to ultra-hazardous activities, likely damage from which could be foreseen and presumably provided for through specific agreements. The assertion that every State was free to subject its neighbours to unrestricted and unaccountable transboundary harm, so long as its acts were not prohibited by international law and there were no specific agreements to the contrary, was a return to the law of the jungle which could only benefit the major Powers at the expense of smaller States, particularly the developing countries. The argument that if there was a duty of care the question became one of State responsibility for prohibited acts was a circular one.

36. He asked the Special Rapporteur to clarify the statement in paragraph 63 of his report to the effect that the scope of the topic would be confined to physical activities giving rise to physical transboundary harm, as distinct from economic harm. If massive pollution from an accident at sea destroyed State fishery resources and brought commercial fishing to a halt, or ruined a country's

beaches and stopped tourism, surely the resultant economic damage must be taken into account.

37. He shared the frustration of the Special Rapporteur at the lack of collective commitment to the topic in the General Assembly. He hoped that, after a full debate in 1984, all members of the Commission would endeavour to give wholehearted support to the Special Rapporteur, if the Commission decided to continue its work on the topic.

38. Mr. LACLETA MUÑOZ said that he had not been able to study the Special Rapporteur's fourth report (A/CN.4/373) as it deserved because he had only received the Spanish version the previous day; he therefore preferred to regard it as a very early report for the 1984 session, as suggested in the document itself (*ibid.*, para. 75). Hence he would not comment on the many interesting ideas that the report appeared to contain until the next session. He wished, however, to reaffirm the position he had taken both in the Commission and in the Sixth Committee, namely that the study of the topic should be continued.

39. Mr. QUENTIN-BAXTER (Special Rapporteur) expressed his appreciation of the many important points made by speakers. Mr. Koroma and Mr. McCaffrey had put the case for preferring the French title, which referred to "activities", to the English title of the topic. There were difficulties with both versions. One point which might be made in favour of the English title was that international law prohibited only acts or omissions of States: it was not concerned with private activities as such. The title was admittedly long and awkward, but it had been argued that it created a useful superstructure within which all elements of the topic could be identified. However, if the Commission agreed that the proper scope of the topic was physical acts causing physical effects, it was clear that the subject as set out in the current title would not have been dealt with in its entirety. It would therefore be appropriate for the Drafting Committee to consider the question of amending the title when the scope of the topic had finally been settled.

40. In reply to the point about economic damage raised by Mr. Njenga, he would say that the economic element played a very large part in the topic, being particularly relevant to the assessment of compensation, as it had been in the *Fukuryu Maru* case in estimating the loss caused to Japanese fishermen by being deprived of their fishing grounds. Economic viability was also as relevant a factor as technical feasibility in assessing the balance of interests between the source State and the affected State in relation to the prevention of transboundary harm. What it was proposed to exclude from the scope of the topic was harm arising from acts having no physical dimension.

41. Although he disagreed with the conclusion reached by Mr. Ushakov (1800th meeting), he could agree with almost all his arguments. The need to preserve the freedom of the sovereign State to pursue its own interests was greatly in evidence throughout his report on the topic (A/CN.4/373). The same considerations applied in any national society in respect of the rights of individuals. The rights of other individuals or of the State could, if necessary, be safeguarded by rules of prohibition of every

<sup>21</sup> See footnote 15 above.

<sup>22</sup> See *International Legal Materials* (Washington, D.C.), vol. XVIII, No. 4 (1979), p. 899, at pp. 905-907.

<sup>23</sup> See 1800th meeting, footnote 14.

<sup>24</sup> See footnote 12 above.

<sup>25</sup> See footnote 19 above.

kind, but the more usual course was to declare that the citizen was free to do as he pleased up to the point when his freedom would diminish the freedoms of others. That line of reasoning lay behind his approach to the topic.

42. Mr. Ni had raised the question of the form which the draft articles on the topic should ultimately take. He agreed that it was too early to decide the matter. Mr. Ushakov had indicated unwillingness to agree to an obligation of reparation, as described in the fourth report. His own suggestion was that the Commission should look at State practice and construct rules or guidelines from it. A decision would ultimately have to be taken as to whether the rules or guidelines should be cast in a legally binding form. He was of the opinion that the answer should be in the affirmative, because that would reduce the area in which broad rules of prohibition would have to be relied upon. It was a matter of seeing how far it was possible to temper the need for broad prohibitory rules in international affairs. No forward commitment from States would be required. Indeed, a review of State practice was encouraging, since the degree of co-operation and the extent to which problems were avoided were large.

43. Mr. El Rasheed Mohamed Ahmed (1800th meeting) had wondered whether the approach was not too "soft", whereas Mr. McCaffrey had endorsed it. Experience suggested that better results were obtained in international affairs by a soft approach, since there was no method of obtaining agreement between parties who were in dispute about an unclear rule. Such parties might ultimately opt for a non-principled settlement, but that was in itself a soft approach. Generally speaking, reliance on the rule of co-operation and the avoidance of Government-to-Government confrontations proved more successful.

44. Mr. Flitan had asked whether there was not a strong North-South element in the topic. He had himself referred to the matter in his report (A/CN.4/373, para. 31). There was indeed a feeling that international law was made for rich and established States and that smaller States stood in need of new and undisputed rules of law, as well as procedures for implementing them. However, it was useful to see that not all the benefits were on one side. If developing countries feared the imposition of rigid rules that they were in no position to control, that attitude was paralleled by the fear of developed countries that rules might thwart the full use of their high technology. What was required was a basic honesty and fairness of approach which would persuade both sides that their common interests were safeguarded.

45. The main point was whether the conceptual struggle to banish the notion that international law must be prohibitory would succeed. Wrongfulness should be kept in its proper field, relating to State responsibility for harm caused by a wrongful act or omission of the State. In the present topic, the concept was that of harm arising from activities within the State's territory or control. There was no need to be concerned about attribution, since the State would not be held responsible for any harm that it did not have the possibility of foreseeing and providing for.

46. In conclusion, he welcomed the references by speakers to paragraph 58 of his report, which he took as indicating agreement with his suggestion that the materials in the third part of the Secretariat's study on State practice should be put in the form of an analytical study, and that the study as a whole should be made available to members of the Commission.

47. The CHAIRMAN said that the fourth report and the discussion on it had provided a preview of the debate to be held in 1984. He assumed that there was no objection to the suggestion made by the Special Rapporteur, in paragraph 58 of his report, that the materials in the third part of the Secretariat's study on State practice should be put in the form of an analytical study and that all elements of the study should be made widely available.

*It was so agreed.*

48. The CHAIRMAN said he further assumed that there was no objection to the suggestion made in paragraph 64 of the report that a questionnaire be sent to selected international organizations.

*It was so agreed.*

#### **Co-operation with other bodies (continued)\***

[Agenda item 9]

##### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

49. The CHAIRMAN invited Mr. Albanese, Observer for the European Committee on Legal Co-operation, to address the Commission.

50. Mr. ALBANESE (Observer for the European Committee on Legal Co-operation) said that in the Council of Europe the most important recent event connected with international law had been the establishment, in 1982, of a Committee of Experts on public international law. That committee had been instructed, first, to carry out an exchange of views and information on the attitudes of States members of the Council of Europe to the problems of public international law being studied by other international organizations, with a view to trying to reach a common approach; and secondly, to take up and study certain questions of public international law which were suitable for action at the European level.

51. So far, the Committee of Experts had considered three matters under its first mandate. It had begun with two items on the agenda of the Sixth Committee of the General Assembly, namely the review of the multilateral treaty-making process and the law of treaties between States and international organizations or between international organizations. The first of those items had been examined on the basis of the questionnaire drawn up by

\* Resumed from the 1775th meeting.

the Secretary-General<sup>26</sup> and the replies of Governments.<sup>27</sup> The exchange of views had related not only to the significance of the initiative itself, but also to the contents of the replies and the suggestions to be formulated concerning future action. The second item had been examined in the light of the draft articles prepared by the Commission.<sup>28</sup> The committee had tackled questions such as the way in which the draft articles should be followed up, the participation of international organizations and their status, and the comments to be made on the various articles. The Committee of Experts had then proceeded to an exchange of views and information on the draft articles on succession of States in respect of State property, archives and debts, which had been adopted at the United Nations Conference held in Vienna from 1 March to 8 April 1983.<sup>29</sup> Generally speaking, the exchanges of views and information in the Committee of Experts seemed to have been useful, since anything which helped to unify the attitude of a group of States could only facilitate the work of the United Nations and contribute to the success of its activities.

52. Under its second mandate, the Committee of Experts had considered, among other questions of public international law suitable for action at the European level, that of a comparative study on the procedures followed by member States to express their consent to be bound by treaties and the internal procedures applicable, as well as the question of engagement in gainful occupation by members of the families of diplomatic and consular staff. The starting-point for the first question had been the finding that a number of the treaties drawn up within the Council of Europe had not been ratified by a sufficient number of States. It was true that the reasons for that situation were often political, but it was sometimes due to the fact that the internal procedures by which States expressed their consent to be bound by a treaty were long and complicated. The Committee of Experts had taken the view that the time had come to give States an opportunity of reviewing their internal procedures on the basis of a comparative study. It had prepared a questionnaire which had been sent to States and which should facilitate the drafting of such a study. Some experts had taken the view that, once the study was completed, it might be possible, in the Council of Europe, to express consent to be bound in a simplified way—opting out, provisional application, etc.—to provide for means of encouraging signature and ratification, and to exchange information continuously on the implementation of the conventions concluded in the Council of Europe.

53. The second question of public international law

suitable for European action was that of the privileges and immunities of members of the families of diplomatic and consular staff engaged in gainful occupation in the receiving State. Under article 57, paragraph 2 (c), of the 1963 Vienna Convention on Consular Relations, members of the family of a member of a consular post who carried on any private gainful occupation in the receiving State were not accorded privileges and immunities. That question was not dealt with in the 1961 Vienna Convention on Diplomatic Relations. Some people maintained that the preamble to that Convention and its article 42, which prohibited diplomatic agents from practising any professional or commercial activity for personal profit in the receiving State, also applied to members of their families. Moreover, the expression “forming part of his household” (article 37), which indicated economic dependence, would have the effect of excluding from privileges and immunities members of the family who were no longer in a position of economic dependence. That argument was not generally accepted, however, and therefore a study of the question was justified. It should be noted that the seriousness of the situation varied according to whether it involved immunity from criminal jurisdiction, immunity from civil jurisdiction or merely tax privileges. Several bilateral treaties had been concluded on the subject, but it appeared that a multilateral convention would be worth more than a large number of bilateral instruments.

54. The 1972 European Convention on State Immunity<sup>30</sup> now bound five States; it had been signed by four States, and others were considering ratifying or signing it. The Additional Protocol to that Convention, which contained provisions on a European procedure for the settlement of disputes, had been ratified by four States and signed by four others. There was also renewed interest by States in the 1967 European Convention on Consular Functions.<sup>31</sup> That Convention had been ratified by only one State, but it had been signed by seven.

55. In November 1982, the European Committee on Legal Co-operation had been honoured by the visit of Mr. Reuter, the Chairman of the Commission at its thirty-fourth session. The links between the Commission and the Committee were undoubtedly useful and should be further strengthened.

56. The CHAIRMAN, thanking Mr. Albanese for his statement, said that the work of the European Committee on Legal Co-operation and its assistance in the codification process were of great value to the Commission.

*The meeting rose at 1.05 p.m.*

<sup>26</sup> A/35/312 and Corr.1, sect. IV.

<sup>27</sup> See United Nations, *Review of the Multilateral Treaty-Making Process* (ST/LEG/SER.B/21) (to appear as a United Nations publication), Part Three.

<sup>28</sup> *Yearbook* . . . 1982, vol. II (Part Two), pp. 17 *et seq.*

<sup>29</sup> For the text of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, adopted on 8 April 1978, see A/CONF.117/14.

<sup>30</sup> See 1762nd meeting, footnote 7.

<sup>31</sup> Council of Europe, *European Convention on Consular Functions together with the Protocol concerning the Protection of Refugees, and the Protocol relating to Consular Functions in respect of Civil Aircraft*, European Treaty Series (Strasbourg), No. 61 (1967).