

Document:-  
**A/CN.4/SR.1848**

**Summary record of the 1848th 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:-  
**1984, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

52. Lastly, he understood it to be the majority view that consideration of articles 36 to 42 should be continued at the next session. That being so, he would prepare a further report taking account of the comments and proposals made at the current session and the debate in the Sixth Committee at the next session of the General Assembly.

53. Mr. USHAKOV said it was essential for the Commission to complete the first reading of the draft articles at the current session; otherwise it would not be able to start the second reading until 1986, since the draft had to be sent to Governments for their comments in the meantime. It would be regrettable if the Commission did not manage to complete a set of draft articles during the term of office of its present members.

54. Sir Ian SINCLAIR said he had some sympathy with Mr. Ushakov's view that it was highly desirable for the Commission, if at all possible, to complete the second reading of the draft during its present term of office. However, many members of the Commission had spoken on the articles still outstanding in a very tentative manner and had reserved their positions. In any event, the Drafting Committee was most unlikely to complete its work on the draft articles at the current session, so that in practice matters would not be delayed by deferring consideration of articles 36 to 42 until the next session.

55. Mr. McCAFFREY agreed. Although the Drafting Committee was working very hard on the draft articles and had devoted only one of its meetings so far to another topic, it was unlikely to reach article 36 by the end of the session. Postponing completion of the first reading of the draft articles until the next session would not materially retard the Commission's work.

56. Since a discussion in the Sixth Committee concerning the Commission's debate on draft article 36 would be extremely useful, he wondered what arrangements would be made for appropriate presentation of that debate in the Commission's report to the General Assembly.

57. The CHAIRMAN said that the report on the work of the session would be prepared and submitted to the Commission for approval in the usual way. Concluding the discussion on item 4 of the agenda, he noted that consideration of the item had not been completed at the current session and that consideration of articles 36 to 42 on first reading would be resumed at the next session.

*The meeting rose at 6.05 p.m.*

## 1848th MEETING

*Tuesday, 26 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Lacleta Muñoz,

Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/373, <sup>1</sup> A/CN.4/378, <sup>2</sup> A/CN.4/383 and Add.1, <sup>3</sup> A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)**

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR

FIFTH REPORT OF THE SPECIAL RAPPORTEUR *and*  
ARTICLES 1 TO 5

1. Mr. QUENTIN-BAXTER (Special Rapporteur), introducing his fifth report on the topic (A/CN.4/383 and Add.1), said that he was very much aware of the large volume of work still to be done in the remaining four weeks of the session and therefore proposed to confine his presentation of the topic to reasonable limits. He also fully recognized that the topic overlapped to some extent with that of the law of the non-navigational uses of international watercourses. Both topics were essentially concerned with reconciling the rights of one State with those of another State. In a world that was becoming progressively smaller and more crowded, the need to evolve more subtle methods of regulating problems which involved a State's freedom of action, as well as its right to be free from the harmful effects of action by other States, was assuming increasing importance.

2. Before introducing his fifth report, he drew attention to the survey of State practice relevant to the topic which had been prepared by the Secretariat (ST/LEG/15). That document was now available only in English, but it would be translated for publication, possibly in the *Yearbook* of the Commission. However, the Legal Counsel had indicated in the Enlarged Bureau and in the Planning Group that, if the Commission so wished, arrangements for the translation of the survey could be made immediately. In his view, the Commission should avail itself of that offer, so that, if the treatment of the topic were to run its allotted course, all the relevant materials might be available to all members. He also drew attention to the document containing replies received from a number of international organizations in response to the questionnaire he had prepared with the assistance of the Secretariat (A/CN.4/378), which provided valuable information on the role of international organizations in the field under consideration.

3. The following five draft articles, submitted in his fifth report, corresponded to section 1 of the schematic outline annexed to the fourth report (A/CN.4/373) and modified in accordance with paragraph 63 of that report.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

## CHAPTER I

## GENERAL PROVISIONS

*Article 1. Scope of the present articles*

The present articles apply with respect to activities and situations which are within the territory or control of a State and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.

*Article 2. Use of terms*

In the present articles:

## 1. "Territory or control"

(a) in relation to a coastal State, extends to maritime areas in so far as the legal régime of any such area vests jurisdiction in that State in respect of any matter;

(b) in relation to a State of registry, or flag-State, of any ship, aircraft or space object, extends to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State;

(c) in relation to the use or enjoyment of any area beyond the limits of national jurisdiction, extends to any matter in respect of which a right is exercised or an interest is asserted;

2. "Source State" means a State within the territory or control of which an activity or situation occurs;

3. "Affected State" means a State within the territory or control of which the use or enjoyment of any area is or may be affected;

4. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a source State, and which affect the use or enjoyment of any area within the territory or control of an affected State;

5. "Transboundary loss or injury" means transboundary effects constituting a loss or injury.

*Article 3. Relationship between the present articles and other international agreements*

To the extent that activities or situations within the scope of the present articles are governed by any other international agreement, whether it entered into force before or after the entry into force of the present articles, the present articles shall, in relations between States parties to that other international agreement, apply subject to that other international agreement.

*Article 4. Absence of effect upon other rules of international law*

The fact that the present articles do not specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission of the source State is without prejudice to the operation of any other rule of international law.

*Article 5. Cases not within the scope of the present articles*

The fact that the present articles do not apply to the obligations and rights of international organizations, in respect to activities or situations which either are within their control or affect the use or enjoyment of areas within which they may exercise any right or assert any interest, shall not affect:

(a) the application to international organizations of any of the rules which are set forth in the present articles in reference to source States or affected States, and to which international organizations are subject under international law independently of the present articles;

(b) the application of the present articles to the relations of States as between themselves.

4. In the fifth report, he had tried to provide as careful and complete a statement as possible of the considera-

tions he had had in mind during the preparation of the five articles in chapter I (General provisions) of the draft, making only limited use of the vast amount of State practice that could have been cited.

5. His main concern in drafting the articles had been the preparation of a scope clause. That was a situation that might be unprecedented in the Commission's history. Most topics dealt with earlier had been so clearly defined from the outset that the preparation of a scope clause had presented few problems. In the case under consideration, the scope clause itself represented the crystallized result of a discussion spreading over a period of five years. Virtually the whole of the fifth report was related to the scope clause. Draft article 2, in so far as it contributed anything new, simply explained the meaning of the term "territory or control" as used in the scope clause. Draft article 3 was essential in connection with the scope clause. The draft articles would always serve as the background to other agreements. Their purpose was, above all, to encourage the development of State practice and to promote other agreements.

6. Draft article 4 dealt with the relationship between the draft articles and other rules of international law. The draft articles were not concerned with the wrongfulness of causing harm to another State, but rather with methods of regulating the rights of the parties without resort to the question of wrongfulness. At the same time, the draft articles should not be seen as interfering in any way with other rules that did specify the wrongfulness of certain acts. Sometimes, for example in cases of violation of State sovereignty, such rules were precise and clear-cut. Such precision was, however, only rarely possible in the present context. One such rare case had occurred when the city of Chicago had, for reasons of its own convenience, proposed to lower the level of Lake Michigan, a step whose physical consequences would have been unacceptable to Canada. The federal department concerned had conceded that the proposed action would not have been lawful and the scheme had accordingly been dropped. That was, however, an example of an extreme situation; in general, the proposing State, while willing to recognize the other State's interests, was not necessarily prepared to accept the latter's right of veto. If possible, an agreement was reached between the parties and that new agreement would always have priority over the more general provisions contained in the draft articles.

7. In the process of negotiation between States—a process in which neither party should be allowed a positive advantage—the draft articles under consideration could be helpful in two ways. First, they could prescribe certain procedural requirements which would, when accepted by both sides, usually make substantive problems appear less difficult. Secondly, they could establish certain criteria or, in other words, a common scale of values which would either mitigate the need for joint decisions or obviate such decisions altogether by providing the degree of assurance that an affected State might reasonably require.

8. Turning to the draft articles themselves, which were to be considered in relation to the schematic outline, he pointed out that the scope clause (art.1) was composed of

three elements: the first was that of a political boundary; the second, that of a physical consequence entailing some crossing of that boundary; and the third, that of the transboundary effect of the physical consequence.

9. In that connection, it should be noted that the definition of the term "territory or control" (art. 2, para. 1) was not intended to be comprehensive, but merely gave three relevant indications. The reason he had provided such a partial definition was that modern rules relating to territory and control in maritime areas were so complex. State practice very clearly recognized the situation of ships in passage—and, by analogy, that of scheduled aircraft in authorized overflight and that of space objects—as a transboundary one. That was not, of course, true of ships in passage in every case without exception; but if, as was usually the case, the coastal State, in observing the rules of the right of passage, allowed a ship in passage to proceed upon its course, then that ship remained under the control of its flag-State, and was in a transboundary relationship with the coastal State. Without wishing in any way to interfere with existing rules determining the extent of territorial authority and extraterritorial controls, he had merely wished to indicate that, in cases of continuous passage or overflight, it was proper and in accordance with the general practice of States to treat the situation as a transboundary one even if the ship, aircraft or space object in passage was within the territory of the coastal State.

10. The object of article 2, paragraph 1 (a), defining the term "territory or control", was to draw attention to the point that the coastal State in a maritime area had jurisdiction which was territorial in origin, but which was limited to specific purposes. Paragraph 1 (b) dealt with the obverse situation in terms of the State of registry, or flag-State; while paragraph 1 (c) made the point that all high seas situations were transboundary ones in the sense that States were the controllers of their own ships, aircraft and space objects on or above the high seas or in outer space and were responsible for the activities of persons within their control which affected areas or persons under the control of other States. In that connection, he drew attention to article 139 of the 1982 United Nations Convention on the Law of the Sea.<sup>4</sup>

11. In preparing draft article 1, it had been his intention to accept the existing law on territory or control and to use an open-ended definition so that the draft articles might remain responsive to future developments in general law.

12. The second element of the scope clause, that of a physical activity, was consequent upon the Commission's earlier decision to confine the topic under consideration to matters arising from a physical activity giving rise to a physical consequence. As indicated in the fifth report (A/CN.4/383 and Add.1, para. 18), the activities and situations dealt with had to have a physical quality and the consequence had to flow from that quality, not from an intervening policy decision. Thus the stockpiling

of weapons did not entail the consequence that the weapons would be put to a belligerent use and would therefore not, on that ground, be covered by the draft articles. On the other hand, in so far as the stockpiling of certain weapons could involve a danger of accident or misappropriation, it entailed an inherent risk of disastrous misadventure and it would come within the scope of the draft articles. The element of a physical activity was central to the whole scheme. Every other element was open to adjustment by mutual agreement between the parties, but the element of a physical activity leading to physical consequences was essential.

13. As pointed out in the fifth report (*ibid.*, para. 19), the chain of causation of the physical consequence was not interrupted by human intervention or failing. It was also noted (*ibid.*, para. 20) that there was nothing to prevent States, if they so wished, from establishing régimes operating on the analogy of a physical activity giving rise to a transboundary consequence even where no such consequence existed. For example, the growing and manufacture of opiates was not an activity that had transboundary effects, but, in practice, States found it convenient to treat it as a problem with transboundary implications. In short, the element of a physical consequence was a vital and rigorous one and it could not be bypassed; no one turning to the draft articles could insist on applying them to a matter having no demonstrable physical consequences. States might, however, find it useful, in the interests of mutual co-operation, to treat matters as having a physical consequence and transboundary effect even if they were not technically within the scope of the draft articles.

14. That left the largest element of all, namely the effect on use or enjoyment of areas within the territory or control of any other State. It was easy enough to envisage circumstances in which, in the view of any ordinary sensible person, the physical consequence itself measured the effect. For instance, if a space object landed in a heavily populated area, rather than in some icy waste, the effects would be correspondingly large. But there was the added question of evaluating the physical consequence in terms of its effect upon use or enjoyment. Throughout the topic, it would be found that States were less and less disposed to talk in terms of absolutes. There was probably no such thing as complete freedom from pollution and, even if there were, it would probably come at a price that no one could afford. Consequently, in any agreements that they reached with one another in matters pertaining to pollution, States were always considering costs and benefits and not merely an ideal state of freedom from pollution; they were placing their own values on how much it mattered to them to put up with an agreed level of pollution in a particular watercourse, air corridor or maritime area. Use and enjoyment therefore always involved priorities and States might find it necessary to indicate what mattered to each of them most in given areas.

15. The scope clause referred both to activities and to situations, but the focus of the draft articles was on activities, by which he meant something which was done within the territory or control of the source State and

<sup>4</sup> See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

which had a physical consequence with transboundary effects. Yet he believed it was also essential, at the outset of the work on the topic, to consider any particular activity in the wider context of activities and situations. In most cases, activities involved an initiative of the source State, which was then required to consider its effect upon other people. There were, however, occasions when an affected State might need to take an initiative, not necessarily to complain of a known activity within another State, but perhaps, in more general terms, to alert that other State to a problem in the territory of the affected State which it believed arose from a situation in the territory of the other State and to seek the co-operation of that other State in finding out how it could be stopped.

16. There were other circumstances in which existing law placed a duty upon a State to take some account of the interests of its neighbour, even in relation to a situation that had no elements of activity in it. For example, if a forest fire was raging in a border area, it would amount to no more than minimal compliance with an international obligation to give a warning of the danger to persons across the border. Very often such an obligation was provided for in a boundary treaty, but even if it were not, a State had a duty to do what was reasonably possible to warn a neighbouring State of a danger which arose in its own territory, but which might be far more serious for the neighbouring State. The same applied to water. A State might have reason to fear the behaviour of a river or a body of water within a neighbouring State without necessarily making any accusation that the trouble was due to an activity of that neighbouring State. It might be that a river was apt to change its channel and that, if something was not done about it in the neighbouring State, it could one day inundate a large city across the border. In such cases, the danger complained of might itself prove to be the consequence of a past activity. In human affairs, there always had to be a starting-point and boundary and river treaties invariably favoured the *status quo*. Sometimes, therefore, it was not so easy to draw a dividing line between activities and situations. It was very much a part of the practice of States, for instance, when considering the conservation of a stock of fish on the high seas, to speak not so much in terms of the activities of individual States that affected the fish stock, but rather in terms of the situation in relation to that stock and, on that basis, to demand consultations that might lead to identification and regulation of activities.

17. In his view, therefore, the importance of the word "situation" in the scope clause stemmed not from the fact that, in the final analysis, duties of reparation would be based upon situations—for he had found nothing in State practice to justify such a result—but rather from the fact that, in the early stages which were so important to the resolution of actual or potential disputes, there should be complete equality. The draft articles would not assign penalties to source States that failed to respond to requests for information or to meet requests to establish fact-finding machinery or régimes. The consequences of any such failure, if unreasonable, would be to leave the source State with an unsettled obligation for any losses, injuries or adverse effects caused by the position that it

had taken. On the other hand, given perfect equality, it would seem essential to allow the affected State the opportunity to take the initiative by apprising the other State of its concern about a particular situation which it believed arose partly or wholly in the territory of the other State and to seek the co-operation of that State in its redress.

18. Article 5, unlike articles 3 and 4, was not essential to the main thrust of the draft, but it was needed to take account of the fact that there were established cases, particularly in the treaties on outer space and in the 1982 United Nations Convention on the Law of the Sea,<sup>5</sup> in which it was contemplated that international organizations could be in control of activities that had physical consequences and transboundary effects.

19. Lastly, the provisions of the 1982 United Nations Convention on the Law of the Sea relating to the protection and preservation of the marine environment (part XII) pointed clearly to the principles on which it was proposed that the draft articles should be formulated and, in particular, to the notion that responsibility and liability were not just an accrued debt because someone had behaved wrongly, but were, on the contrary, an indication of the pattern of conduct which was expected of States and which, if observed in good faith, could prevent the point of wrongfulness from being reached.

20. Mr. MALEK said that the Commission had been dealing with the topic under consideration for many years and had been following the same methods of work as for other topics, but the question whether it should be discussed further had continued to be raised. In the Special Rapporteur's fourth report, which the Commission had not had time to consider at its previous session, it was stated that a few representatives in the Sixth Committee of the General Assembly had been sceptical about the value of the topic or its viability (A/CN.4/373, para. 10). Moreover, the Chairman of the Commission had stated in the Sixth Committee that the Commission's debate had shown that "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" (*ibid.*, para. 11). In the same report, the Special Rapporteur had requested the Commission to decide whether or not it should continue its consideration of the topic and had even referred to the possibility that the topic might be removed from the Commission's agenda (*ibid.*, para. 59).

21. He personally stressed once again that, if the Commission wanted to maintain the distinguished scientific reputation it had gained in its field, it could not recommend the suspension of work on a topic on which it, the General Assembly and the Secretariat had carried out extensive and fruitful research. There was, moreover, no need to take the decision proposed by the Special Rapporteur, since nearly all members of the Commission appeared to be in favour of continuing the work on the topic under consideration. When he himself had first spoken on the topic at the Commission's thirty-fourth session, in 1982, he had expressed doubts whether

<sup>5</sup> Annex IX of the Convention (see footnote 4 above).

the topic would be of any value in the distant future, since the activities to which it related were, sooner or later, likely to be prohibited.<sup>6</sup> He now realized that the Commission had to study the current situation, which required immediate attention, and not think too much about the future, which was uncertain. In view of continuing scientific developments and constant technological advances, there would always be human activities that were not prohibited. The importance of the topic and the need to discuss it further were, in his view, becoming increasingly obvious. The Special Rapporteur's firm belief in the growing importance of the topic had been demonstrated in the five excellent reports he had prepared with unswerving determination to find appropriate solutions to the problems encountered. The topic dealt with a *de facto* situation that might, if left alone, lead to conduct by one State that was harmful to another. It was thus to be feared that such a situation would offer a scientifically and technologically developed State all the elements it needed in order seriously to harm the vital interests of a neighbouring State and, at the same time, to claim the right to invoke the legitimacy of its actions.

22. In any case, eleven years after the topic had been identified by the Commission, six years after it had been described by a working group and placed on the active agenda, and after five reports had been submitted by the Special Rapporteur, it would be most unusual for the Commission to decide not to discuss the topic further. For the past two years, the Commission had even had before it a schematic outline relating to the various aspects of the topic and five draft articles of a general nature had been submitted to it at its current session. After indirectly taking the initiative of including the topic on its agenda and discussing it with a great deal of enthusiasm for many years, the Commission could not suddenly inform the General Assembly that it had decided not to continue its study. The topic had, of course, been included in the Commission's programme of work as a separate item in 1974, but it could not be dissociated from the topic of State responsibility, which had been included in the list drawn up by the Commission itself in 1949. The two topics were based on the same legal concept and the topic under consideration had commanded attention ever since the Commission had been dealing with the question of State responsibility for internationally wrongful acts.

23. At its twenty-second session, in 1970, the Commission had laid down a number of criteria as a guide for its future work on the topic of State responsibility.<sup>7</sup> It had stated that it intended to confine its study of international responsibility, for the time being, to the responsibility of States; that it would first proceed to examine the question of the responsibility of States for internationally wrongful acts; and that it intended to consider separately the question of responsibility arising from certain lawful acts, such as space and nuclear activities, as soon as its programme of work permitted. Members of the Commission and representatives in the Sixth Committee of

the General Assembly had expressed the view that the study of State responsibility had to cover responsibility for lawful acts. Some had been of the opinion that the two aspects of the question must be dealt with at the same time, while others had considered that they should be treated separately. In the course of the work on State responsibility, the need to consider the question of international liability had become increasingly apparent. In view of the progress it had made in its work on State responsibility for internationally wrongful acts, the Commission had decided at its twenty-ninth session, in 1977, to place the topic of international liability on its active programme.<sup>8</sup>

24. In the report it had submitted to the Commission in 1978,<sup>9</sup> the Working Group set up for the general consideration of the scope and nature of the topic under discussion had pointed out that the variety and volume of State practice in the fast-growing field of the law relating to international liability for acts not prohibited by international law warranted and indeed demanded a systematic study of the topic, which was suitable for codification and progressive development in accordance with the Commission's usual working methods. There was no doubt that the work already carried out and, in particular, the five reports prepared by the Special Rapporteur could be used to give States appropriate guidelines for the solution of the problems that arose in that connection, whether judicially, by arbitration or by formal agreement. The schematic outline (A/CN.4/373, annex) gave a fairly clear idea of the various aspects of the topic and of the way in which they should be approached and discussed.

25. One of the main problems to which the topic gave rise was that opinions continued to differ with regard to the substance of the concept on which the topic was based. Until the relatively recent conclusion of the *Trail Smelter* arbitration case,<sup>10</sup> neither of the two States concerned, namely Canada and the United States of America, had appeared to adopt the same approach to the concept as that followed in the work so far carried out by the Commission. As the Special Rapporteur had noted in his second report,<sup>11</sup> Canada had, at least at the outset, argued that it could have disclaimed international responsibility, since the case did not, in its opinion, come within any of the ordinary categories of international arbitration. The United States had held that it was entitled to insist that an agency operating outside its borders which was causing air pollution within its territory should desist from doing so. Canada had thus refused to recognize that it was liable under international law for the transboundary harm caused by the activities of a smelter located in its territory. The United States had considered that such damage was, quite simply, wrongful. The conclusions reached by the arbitral tribunal had been entirely different from what the parties had ex-

<sup>6</sup> *Yearbook ... 1982*, vol. I, p. 242, 1739th meeting, para. 2.

<sup>7</sup> *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66.

<sup>8</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 129, para. 108.

<sup>9</sup> *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

<sup>10</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>11</sup> *Yearbook ... 1981*, vol. II (Part One), pp. 108 *et seq.*, document A/CN.4/346 and Add.1 and 2, chap. II.

pected and it was on those conclusions that the Special Rapporteur had drawn in proposing his schematic outline.

26. The scope of the topic, which was another major problem, did not, according to the schematic outline, appear to be limited to a particular "activity", since the term "activity" had been defined as including "any human activity". In that connection, some members of the Commission had stressed that the scope of the topic should be defined specifically and that some important activities, such as economic and financial activities, should be listed as examples. In his own view, the scope of the topic should include any activity, conduct or situation that gave rise to loss or injury so that States would have adequate protection against the consequences of scientific and technological progress.

27. In the schematic outline, the Special Rapporteur had also attempted, rather concisely, to define the meaning of the term "loss or injury". In that connection, it had been suggested that that term should not be limited to its material aspect. In his third report, the Special Rapporteur had indicated that that term should include all kinds of loss or injury, whether material or non-material.<sup>12</sup> In his fourth report (A/CN.4/373, para. 63), however, he had stated that the scope of the topic would be confined to physical activities giving rise to physical transboundary harm, primarily because State practice was at present insufficiently developed in other areas. The limitation which the Special Rapporteur intended to place on the scope of the topic had been reflected in draft article 1, submitted together with four other draft articles, in his fifth report (A/CN.4/383 and Add.1). In view of the significance of those five draft articles, he himself would comment on them only after he had given them further thought.

28. Section 2, paragraphs 1 and 2, of the schematic outline dealt with the duty of the acting State to provide the affected State with all relevant and available information, which could, moreover, be requested by the affected State. Paragraph 3, which was not clear enough, at least in the French version, appeared to allow the acting State to withhold certain relevant information for reasons of national or industrial security. Such reasons would, however, not justify a failure to give the affected State a specific indication of the kinds and degrees of loss or injury to which it was being subjected. Paragraphs 4 to 7 provided that fact-finding machinery would be established when the acting State and the affected State did not agree on the effectiveness of the measures being taken to protect the affected State. Paragraph 7 also contained a provision on the costs of the fact-finding machinery, which must be shared "on an equitable basis". That provision might not fully take account of the particular situation of the affected State, which could suffer serious loss or injury, although no responsibility of any kind could be attributed to the acting State to make it halt the activity or situation in question. It would, moreover, be difficult to make the affected State

bear even a small share of the costs of the fact-finding machinery. In the *Trail Smelter* case, the arbitral tribunal had, of course, rejected the request by the United States for the reimbursement of the costs it had incurred in obtaining information about the problems to which the operation of the smelter had given rise in United States territory. The tribunal had referred not to a rule of existing law, but rather to the intentions of the parties, which it had established on the basis of the arbitration and the negotiations which had preceded it.

29. If the fact-finding procedure was unsuccessful, section 3 of the schematic outline required the acting State and the affected State to enter into negotiations at either one's request with a view to determining which régime might reconcile their diverging interests.

30. The obligations provided for in sections 2 and 3 of the schematic outline were not regarded as necessarily having to continue to be obligations. Section 2, paragraph 8, and section 3, paragraph 4, stated that failure to take any step required by the rules contained in those respective sections did not in itself give rise to any right of action. In his third report, the Special Rapporteur had questioned whether the courses of conduct prescribed in those two sections were requirements or recommendations, rules or guidelines.<sup>13</sup> Although he himself agreed with the Special Rapporteur that they should take the form of rules, he did not think that it should be indicated that failure to observe such rules would not engage the responsibility of the State for wrongfulness, as the Special Rapporteur had proposed in his third report.<sup>14</sup>

31. The non-compulsory nature of the rules being formulated in the context of the topic under consideration was, in fact, a matter of some concern. In his third report, the Special Rapporteur had pointed out that

... The distinctive feature of the present topic is that no deviation from the rules it prescribes will engage the responsibility of the State for wrongfulness except ultimate failure, in case of loss or injury, to make the reparation that may then be required. ...

He had added that

... the whole of this topic, up to that final breakdown which at length engages the responsibility of the State for wrongfulness, deals with a conciliation procedure conducted by the parties themselves or by any person or institution to whom they agree to turn for help.<sup>15</sup>

The Special Rapporteur appeared to be suggesting that the topic had distinctive characteristics that set it apart from other topics, but that was not, in fact, the case. The Commission's work on a particular topic had never been confined to the establishment of a "conciliation procedure" that would be made available to States.

32. As it now stood, section 5, which might well contain the most important provisions in the entire schematic outline, did not give the affected State adequate protection. Its aim was to give the acting State freedom of choice in relation to activities within its territory and in relation to the way in which such activities would be

<sup>12</sup> *Yearbook ... 1982*, vol. II (Part One), p. 59, document A/CN.4/360, para. 34.

<sup>13</sup> *Ibid.*, p. 58, para. 32.

<sup>14</sup> *Ibid.*, pp. 58-59, para. 33.

<sup>15</sup> *Ibid.*, p. 58, para. 31.

carried out. Paragraph 2 of that section was intended to specify the limits of such freedom of choice. It did not require the acting State either to ensure that the activities in question did not give rise, in the territory of the affected State, to loss or injury of a particular kind or degree or, if that was not possible, to halt such activities. If loss or injury did occur, he did not see how mere measures of reparation would be enough, particularly since such measures would have to be determined with due regard to the importance of the activities in question and their economic viability. It would therefore be necessary to take account of and expand upon the idea expressed by the Special Rapporteur in his third report:

... the underlying purpose of this topic is not merely to requite, or even to avoid, losses and injuries: it is to enable States to harmonize their aims and activities so that the benefit one State chooses to pursue does not entail the loss or injury another has to suffer. ...<sup>16</sup>

Particular emphasis always had to be placed on the right of States not to have to suffer transboundary harm of a serious nature. In that connection, he drew attention to article 9 of the draft articles on the law of the non-navigational uses of international watercourses,<sup>17</sup> which prohibited activities with regard to an international watercourse that might cause appreciable harm to other watercourse States.

33. The Commission thus appeared to be applying different rules to two topics that covered the same situation. In the first case, it had affirmed that appreciable harm was wrongful, while, in the second, it was considering the possibility of stating that transboundary injury, however extensive, would not be wrongful if the acting or source State had done everything in its power to prevent such injury. He was certain that the members of the Commission were aware of that difference in treatment, for which there was absolutely no justification. The Commission had to ensure that the rules it was formulating would not enable one State to benefit at another's expense.

34. Mr. REUTER said that, although the topic under consideration was similar to the others with which the Commission was dealing, it involved some risks. When the Commission had undertaken to study the topic, it might have had some doubts about the results it could achieve; but now a definite shape—a schematic outline and five draft articles—was finally beginning to emerge from the raw material entrusted to the Commission by the General Assembly. It was to the Special Rapporteur's credit that he had attempted to pin-point the elements of the topic that still had to be identified. The best encouragement the Commission could give the Special Rapporteur would be to express its satisfaction with the progress being made.

35. Despite the risks involved in the work in which it was engaged, the Commission must not have any doubts about the usefulness of the topic, if only because progress could not be stopped and the traditional rules of international responsibility for wrongfulness were no

longer responsive to needs. Even if the Commission never managed to agree on a full set of draft articles, it would have been right to deal with the topic under consideration.

36. One of the problems to which the topic gave rise was that, in dealing with no-fault liability, the Commission would have to formulate rules and would inevitably have to discuss the question of responsibility for wrongfulness. That was one reason why the Special Rapporteur had placed so much emphasis on procedures, as opposed to rules of substance. At one point or another, the Commission would, however, have to enunciate such rules. Although the Special Rapporteur for the topic of State responsibility was dealing with abstract and general concepts of responsibility and with secondary rules, the Commission must not be afraid to lay down primary rules for no-fault liability. He also did not think that there was any problem in dealing at the same time with the law of the non-navigational uses of international watercourses and with the topic under consideration. He could therefore not agree with Mr. Malek's view that the decisions to be taken with regard to international watercourses would contradict the views expressed by the Special Rapporteur with regard to international liability. The main point was that progress should be made on both studies.

37. He commended the Special Rapporteur for having followed the method of proposing draft articles, which would enable the Commission to see where it was going. As to the first two draft articles, which were designed to define the scope of the topic, he said that he found draft article 2 particularly satisfactory and that he supported the Special Rapporteur's idea of setting aside a number of situations involving human economic activities that might give rise to loss or injury.

38. In that connection, the Special Rapporteur and the Secretariat had considered the question of the international control of narcotic drugs, which should, of course, not be dealt with as part of the topic under consideration, but which had often been discussed in connection with studies relating to traditional responsibility. Until quite recently, a clear distinction had been drawn between producer countries and consumer countries, but it had not been possible to attribute responsibility for the drug problem to one or the other. Today, the situation was even more complex because, with few exceptions, producer countries had become consumers as well. What legal solution could be found to that problem and how could it be dealt with from the point of view of no-fault liability? In his view, the only answer lay in international solidarity, since no country could solve the problem on its own.

39. For the time being, it would therefore be preferable to confine the study of the topic under consideration to physical consequences, since there was still a great deal of uncertainty about the exact definition of the type of cases to be taken into account. In that connection, he said that he did not fully agree with Mr. Malek: the case in which a State deliberately carried out activities that impaired the quality of the water of an international watercourse by reducing its flow or changing its temperature

<sup>16</sup> *Ibid.*, p. 57, para. 24.

<sup>17</sup> See 1831st meeting, para. 1.

did not come within the scope of the current study, which related only to activities which were not intended to have harmful effects as such. He also pointed out that the dangerous nature of the activities in question had not been referred to in the definitions contained in the draft articles. Perhaps further consideration should be given to draft articles 1 and 2 to see whether greater precision was necessary and whether, for example, a distinction should be made between the disastrous consequences and the insidious effects of a particular activity. That was not the only distinction which the Commission would have to introduce. The problem of damage and, hence, of causality which was encountered in the context of responsibility for wrongfulness also arose in connection with the topic under consideration, and if the possibility of a disaster was taken into account, the Commission would have to decide whether bilateral relations alone could provide a solution or whether, in some cases, action by the international community as a whole was not required.

*The meeting rose at 1 p.m.*

## 1849th MEETING

*Wednesday, 27 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law** (*continued*) (A/CN.4/373,<sup>1</sup> A/CN.4/378,<sup>2</sup> A/CN.4/383 and Add.1,<sup>3</sup> A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR  
(*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

ARTICLE 5 (Cases not within the scope of the present articles)<sup>4</sup> (*continued*)

1. Mr. REUTER, reverting to the draft articles on which he had made some comments at the previous meeting, reiterated his satisfaction at the Special Rapporteur's decision to submit them. For while the Commission needed a well documented report by the Special Rapporteur to examine the topic entrusted to him, it also needed draft articles to clarify its thinking. He was not sure that, at the present stage in the work, the draft articles could usefully be examined by the Drafting Committee, but they had the great advantage of facilitating reflection.

2. The first two articles were intended to delimit the scope of the draft by defining the transboundary nature of the activities in question and certain elements relating to the material character of the situations which the Commission was to examine. While glad of that progress, he thought the particulars insufficient. It might be necessary to make a deeper analysis and inquire whether the problems arose in exactly the same way when the material consequences were abrupt and isolated in time as when they made themselves felt more slowly, gradually or continuously. The Special Rapporteur had chosen the broadest formula. Should the Commission adopt that solution? Should it introduce distinctions, or exclude particular cases? He could not give an opinion at present. But as the Special Rapporteur had observed, the situations and activities in question could be seen as being due to natural or to human action. If one were tempted to exclude from the scope of the draft situations and activities which pertained solely to man, because they came within the economic or moral sphere and were already subject to a multitude of primary rules, one found that the heart of the subject lay in situations involving human intervention and something which seemed to be beyond human control, namely situations created by advanced technology.

3. The Special Rapporteur had evoked situations which at first sight appeared to be facts of nature, such as forest fires. It was true that some might be due to malice, but generally they were natural disasters. Should such cases be included? There was also the case of the destroying swarms of locusts which attacked African countries. That kind of phenomenon, which had received attention from international organizations in the past, should not be excluded from the scope of the draft; but it called for special procedure. For instance, a riparian State on a river subject to periodic flooding might offer to collaborate with the other States concerned in dealing with the problem. The proposal might be accepted or refused, but a refusal might have legal consequences. Research should therefore be continued in order to determine what cases should be included and delimit the scope of the undertaking.

4. Articles 3 and 4 differed from the first two articles,

<sup>4</sup> For the texts, see 1848th meeting, para. 3.