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Summary record of the 1852nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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developed. A report on facts could not be advisory; the facts would have to be accepted by the parties. It might even be desirable to make the assessment of the consequences of those facts more binding. Moreover, section 2, paragraph 8, considerably weakened the procedure by stating that failure to take any step required by the rules contained in the section did not in itself give rise to any right of action. Since the draft did not provide for the establishment of a tribunal, it might well be asked what right of action was meant. Must it be concluded that, in that case, States would be deprived of a remedy available to them under general international law?

58. According to section 3, paragraph 1, if the fact-finding procedure gave rise to difficulties or if the report of the fact-finding machinery so recommended, the States concerned had a duty to enter into negotiations with a view to determining whether a régime was necessary and what form it should take. That duty to negotiate, which the Commission had already encountered in its work on the topic of international watercourses, was justified. However, paragraph 4 of section 3, which again deprived States of any right of action, put that general duty seriously in doubt.

59. The provisions relating to the prevention of harm, taken as a whole, might therefore be more binding. As the Commission had found when studying the topic of international watercourses, prevention was important, because many disputes arose before the dangerous activities were actually carried out. At that stage, the disputes were minor ones, but they could in time produce irreversible situations, especially if large investments had been made in infrastructure or interests had been created. The reason why the Special Rapporteur had not wished to impose any real obligations on States was clearly that the topic did not come under the régime of international liability so long as no harm had been done. Nevertheless, as the Commission had modified the nature and scope of the topic, it could consider introducing real obligations into section 3. In fact, the only rule which seemed to come close to international liability was the rule stated in section 4, paragraph 2, that "Reparation shall be made by the acting State to the affected State in respect of any such loss or injury". That was an elementary principle of international relations, which the Special Rapporteur subordinated to the "shared expectations" of the States concerned. That expression would have to be precisely defined, but the fact remained that that was the principle on which the whole draft should be based, even if it meant engaging in progressive development of international law.

60. Not having had time to study the fifth report (A/CN.4/383 and Add.1) with all the attention it deserved, he would only say that it might be better not to refer draft articles 1 to 5 to the Drafting Committee until the Commission had been able to study them together with the succeeding articles. Article 1, which affected the whole draft, considerably restricted its scope by confining it to physical consequences. That limitation not only had the effect of dividing the topic into two, but also raised the problem of defining physical consequences. Was it to be inferred that economic injury, or injury of a social nature, must be left out of account?

61. In conclusion he expressed the hope that the Commission, together with the Special Rapporteur, would succeed in drafting a set of articles that would meet the international community's expectations, now that the need to study the topic had been established.

The meeting rose at 1.05 p.m.

1852nd MEETING

Monday, 2 July 1984, at 3 p.m.

Chairman: Mr. Sompong SUCHARITKUL

later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, 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. Ushakov.

Tribute to the memory of Mr. Erik Castrén, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Erik Castrén, who had been a distinguished member of the Commission from 1962 to 1971.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Erik Castrén.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/373, [1] A/CN.4/378, [2] A/CN.4/383 and Add.1, [3] 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)

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

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[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] *Idem*.

ARTICLE 5 (Cases not within the scope of the present articles) [4] *(continued)*

2. Mr. EL RASHEED MOHAMED AHMED stressed the great difficulty of the topic and congratulated the Special Rapporteur on his success in the arduous task of delimiting its frontiers with a fair degree of certainty. At the thirty-fourth session, he had supported the proposal by Mr. Reuter that the aim of the study should be to establish a framework agreement. [5] That line of thought appeared to be gaining ground and had been supported by a number of members. The Special Rapporteur himself, after a careful analysis and evaluation of State practice, had arrived at the following conclusion in his fourth report:

> ... Again, it has often enough been said that, while States continue to give attention to the need to prevent transboundary losses and injuries, they have signally failed to develop a sense of obligation to make good the losses and injuries that have not been prevented. ... (A/CN.4/373, para. 46.)

That approach was both wise and practical. States were simply not prepared to subject themselves to legal obligations predicated on inchoate principles of law, however equitable or logical those principles might be. Accordingly, the thrust of the subject was to reduce the need for reliance on general principles of prohibition, so as not to restrict the free exercise of national sovereignty.

3. The major question remained, however, whether there could be an obligation without fault. It was evident from the discussion in the Sixth Committee of the General Assembly that no one was prepared to go so far. There had, however, been a tendency on the part of the majority to endorse the aim pursued by the Special Rapporteur, which was to devise a scheme whereby States could find reasonable solutions to the problems that might arise. The Special Rapporteur had very appropriately pointed out:

> The first aim of the present topic is to induce States that foresee a problem of transboundary harm to establish a régime consisting of a network of simple rules that yield reasonably clear answers; those simple rules may be rules of specific prohibition or rules of authorization subject to specific guarantees. The second aim of the present topic is to provide a method of settlement that is reasonably fair, and that does not frighten States, when there is no applicable or agreed régime. ... (*Ibid.*, para. 69.)

The first of those aims was predicated upon the general duty to co-operate—a well-established principle of international law embodied in Article 1 (3) of the United Nations Charter.

4. Attention had been drawn to the doctrine of abuse of right and, albeit with certain misgivings, he shared the view that that doctrine deserved consideration. Principles of internal law, like that of abuse of right, could perhaps throw some light on the scope of the present topic. In refuting the principle of strict liability, the Special Rapporteur had stated that, in his opinion, the most fundamental reason was

> ... the need to avoid even the appearance of putting the principle of strict liability on the same level as the responsibility of States for wrongful acts or omissions. Nothing should be allowed to threaten the unity of international law. ... (*Ibid.*, para. 66.)

Notwithstanding that remark, the principle of abuse of right would appear to be relevant in clarifying the concept of the duty to make good whatever wrong had been caused to a neighbour as a consequence of the unreasonable use of property by its owner.

5. As propounded by Islamic jurists, the doctrine of abuse of right was slightly different from the European law concept. Under Islamic law, an owner was not allowed to use his property in such a way as to injure or annoy a neighbour. The term used in Arabic was not the equivalent of "abuse of right" but indicated rather the exercise of a person's right in a stubborn or excessive manner. At the thirty-fourth session, he had had occasion to refer to a residual principle of Islamic law which indicated the pattern of behaviour that an individual was expected to observe. [6] The doctrine relating to the excessive use of a right was a corollary to that principle.

6. Mr. Balanda (1851st meeting) had suggested exploring the whole domain of law to see whether there were any rules which might be useful in delineating the present topic. As he himself had pointed out, such rules could be of value, even if only in identifying methods for solving problems.

7. Referring to the draft articles, he noted that the Special Rapporteur had emphasized the physical consequences of transboundary effects. He was not at all certain that the term "physical" was wide enough to comprise all the damage or injury that could be caused; he thought the term "material" would be more appropriate. He also had doubts as to how evidence could be established to prove the claim of the affected State. If the source State alleged that the chain of causation had been interrupted by human activity, it was difficult to see how that fact could be proved, or how the allegation could be refuted.

8. As to the suggestion that the word "situations" should be replaced by "occurrences", he found the first term preferable, because it was broader than the second. The term "occurrences" would not be broad enough to cover the case of transboundary harm caused by pests such as locusts or flies, to take the example given by Mr. Reuter (1849th meeting). With regard to the expression "territory or control", the argument had been advanced by Mr. Balanda that control might not be feasible in a country like Zaire. But that argument could be double-edged, because countries like Zaire and Sudan were more likely to be affected States than source States. One only had to think of outer-space activities such as those which had led to the *Cosmos 954* satellite case (see A/CN.4/373, para. 29) or of a nuclear-powered vessel sailing in the waters of one of those countries. The fears expressed by Mr. Balanda were not without reason, but the Special Rapporteur had given an assurance that the definition was open-ended and responsive to change.

[4] For the texts, see 1848th meeting, para. 3.

[5] *Yearbook ... 1982*, vol. I, p. 285, 1743rd meeting, para. 46.

[6] *Ibid.*, p. 284, para. 44.

9. Mr. DÍAZ GONZÁLEZ associated himself with the congratulations addressed to the Special Rapporteur, who had first endeavoured to find a foundation for the topic proposed by the General Assembly and to build a framework suitable for the elaboration of rules conforming to the Assembly's directives. He had then gradually delimited the topic until, in his third report and again in his fourth report (A/CN.4/373), he had submitted a schematic outline, which had been supplemented by his fifth report (A/CN.4/383 and Add.1), which contained draft articles. In his fourth report, which the Commission had not been able to examine at the previous session, the Special Rapporteur had asked the Commission to decide, in 1984 at the latest, whether the study of the topic was to be continued or abandoned (A/CN.4/373, para. 59).

10. The Special Rapporteur had, however, finally proceeded on the assumption that his fourth report had been approved, and he had submitted a fifth report containing draft articles based on the first part of the schematic outline. There appeared to be no objection to that procedure, especially as in the meantime the Secretariat had published an important study (ST/LEG/15) which reviewed, almost exhaustively, all the agreements, resolutions and other relevant instruments relating to the topic as now defined by the Special Rapporteur. As stated in that study (*ibid.*, para. 12), the topic related to "activities concerning the physical use and management of the environment". As the Special Rapporteur was, in effect, proposing a new topic, it would be advisable for the Commission to ask the General Assembly whether the title should not be amended to read: "Liability of States for transboundary physical damage caused by acts not prohibited by international law".

11. The fifth report dealt entirely with the environment and, in the Special Rapporteur's view, the draft articles which the Commission was to prepare could probably contain only residual rules in relation to those already embodied in international agreements. The Commission would have to take care that its work on the topic did not duplicate that on the non-navigational uses of international watercourses. In its study, the Secretariat indicated the degrees of liability and specified that the rules to be drafted would not be legal rules, but principles derived, for instance, from General Assembly resolutions, the Stockholm rules or decisions adopted by UNEP concerning the environment and habitat. Most members of the Commission who had spoken on the fourth report had not mentioned the decision which the Special Rapporteur had requested the Commission to take during the current session. Personally, he was in favour of continuing the study of the topic, which was bound to arouse great interest, especially as it was now delimited.

12. In the schematic outline, the Special Rapporteur had used the expression "shared expectations", which required clarification. The draft articles were necessarily very provisional. Article 1, which defined the scope of the draft articles, stated in the Spanish version that they applied to activities and situations *que se verifiquen* (which occur) within the territory or control of a State. That expression contained an idea of verification which had no equivalent in the original English text. Moreover, the idea of "situations" was rather too broad. With regard to the words "activities and situations... which give rise or may give rise to a physical consequence", it should be noted that, for an activity or a situation to cause damage, it must be such that its physical consequences could be determined. Hence one could not speak of a hypothetical physical consequence. In relations between States there were harmful non-physical activities which were lawful. For instance, a State could lawfully raise *ad libitum* its customs duties on imports of products from the third world, to the point of bringing ruin on a particular developing country.

13. On the other draft articles he had no comment to make, except that article 5 was probably premature. While he hoped that the Special Rapporteur would be able to submit concrete proposals to the Commission at its next session, he still believed that, before continuing the study of the topic, the Commission should complete its work on State responsibility and on the law of the non-navigational uses of international watercourses.

14. Mr. LACLETA MUÑOZ said that he was among those who had never questioned the value and importance of the topic and considered that it would contribute to the progressive development of international law. True, it was not easy to identify in international law problems which had long arisen in internal law. The topic comprised activities which were not prohibited by international law, but which involved identifiable risks and damage. In dealing with the subject, there was some danger of becoming absorbed in the prevention of damage; but as soon as prevention machinery was established, non-compliance with the rules in force constituted a wrongful act generating responsibility, which produced a situation falling within another topic being studied by the Commission, namely State responsibility. If there were a general obligation not to cause damage, all damage would be unlawful and the study of the topic would serve no purpose. In Spain, the former highway code had not established the causal responsibility of a driver, but in order that an innocent victim should not be deprived of compensation, it had provided that every driver must always be in control of his vehicle. It was probably a step forward to consider that, in international law, all acts causing damage were not wrongful acts.

15. With regard to the expression "activities and situations" used in draft article 1, he wondered whether what was harmful was the concrete act or the activity in the course of which it was performed. It was true that the terminology was not the same in French as in Spanish, even in the title of the topic. It was possible to conceive of an act or an activity which was not wrongful but caused damage, or of activities which were not prohibited but, if continued without interruption, had injurious consequences that appeared later. That was probably the case to which the word "situations" applied.

16. In view of the complexity of the topic and the need to establish the existence of a transboundary consequence, it was very difficult to define the terms appearing in draft article 2. The expression "territory or control" was defined, in relation to a coastal State, as ex-

tending to "maritime areas in so far as the legal régime of any such area vests jurisdiction in that State". Rather than referring to "maritime areas" it would be better to speak of "maritime zones", in so far as the coastal State was competent in certain matters; for the contemporary law of the sea gave the coastal State differing degrees of jurisdiction over various maritime zones.

17. In the next subparagraph, the expression "right of continuous passage or overflight" was not satisfactory, because in the contemporary law of the sea the expression "right of continuous passage" had a very specific meaning. It would be better to refer in that subparagraph to "ships, aircraft and space objects ... in the maritime territory or airspace of any other State". It might also be asked whether, if their presence in the maritime territory or airspace was not lawful, all the acts performed would be wrongful.

18. Draft articles 3 to 5 did not call for any comment at present. Such provisions seemed to be premature, since they generally appeared at the end of draft articles.

Mr. Barboza, Second Vice-Chairman, took the Chair.

19. Mr. RAZAFINDRALAMBO said that, in view of the exceptional importance of the topic, it was regrettable that the discussion had been held rather hastily and that some of the documents had so far been distributed only in English—in particular, the excellent Secretariat study (ST/LEG/15). Moreover, as the French version of the Special Rapporteur's fifth report had been distributed late, his comments on it could only be of a preliminary character.

20. The work of the Special Rapporteur and the Secretariat showed the richness and scope of the practical applications of the principles of the international liability of States, and justified the encouragement given to the Special Rapporteur and the efforts he had made to produce a schematic outline and viable provisions. In studying acts which were not at present prohibited but were about to be so, the Special Rapporteur was running two risks: either, as a result of over-strict application of the inductive method, he might encroach upon fields already covered by conventions on matters that were related, but specific, or came within subjects entrusted to Mr. Riphagen or Mr. Evensen as Special Rapporteurs; or he might see his subject of study shrink because acts hitherto considered lawful became unlawful as a result of the progress of science and technology.

21. Of course, the Special Rapporteur wished to codify the whole of the régime of State liability. Although he recognized that, outside the régime of responsibility for wrongful acts, there was only the régime of strict liability, the Special Rapporteur did not wish to adopt the latter régime in order to conform to the views of the majority of members of the Sixth Committee of the General Assembly. The régime he proposed was based on the practice of States in regard to transboundary damage and consisted in giving effect to the duty to avoid, minimize or repair transboundary loss or injury—that was to say, the obligation to co-operate—emphasizing the link between prevention and reparation.

22. The Special Rapporteur had kept to transboundary problems concerning the physical environment and had left aside the delicate problems that arose in the economic sphere, in particular loss or injury due to economic causes. In his fourth report (A/CN.4/373, para. 14), he said that the loser in a race "must attribute his loss to his own lack of prowess", although there were "rules of fair play that have to be observed even in the running of races". That wording seemed to refer to economic pressures; and the economic element could not be left entirely out of account even in regard to the physical use of territory when it had harmful economic consequences. In that connection he referred to the 1964 Finnish-Soviet Agreement concerning Frontier Watercourses, mentioned in the fifth report of the Special Rapporteur (A/CN.4/383 and Add.1, para. 24), and to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, mentioned in the Secretariat study (ST/LEG/15, para. 51). In view of those limitations, it might be asked what attraction the draft articles would have for States in general and for developing countries in particular.

23. The obligation to co-operate had sometimes been regarded as a sort of procedural obligation which had no marked legal character. It might also be asked whether the topic lent itself to the statement of precise and binding legal rules, and whether the Commission should not confine itself to drafting model rules or even a code of conduct. Even the co-operation procedures suggested by the Special Rapporteur would probably not be found entirely satisfactory. In the sphere in question, co-operation could be interpreted by some developing countries as encouraging a tête-à-tête that was dangerous and in any case frustrating.

24. It was difficult to see how a balance could be established between the interests of the source State if it was industrialized, and those of the affected State if it was a developing country. If the source State was a developing country, two situations might arise. In the first, it was directly responsible for the acts complained of, but often had only used an imported technology that was insufficiently mastered or had been badly installed by the technology-exporting country or by an entity under its control. In the second situation, it was merely an undertaking situated in the territory of a developing country which had carried out the injurious activity; such undertakings were often companies formed with imported capital. Various considerations raised the problem of the liability of the State supplying the technology, especially if that State was itself operating on the territory of another State as in the case of the establishment of foreign bases. The fifth report (A/CN.4/383 and Add.1, para. 12) seemed to provide reassuring solutions to those problems.

25. Referring to the draft articles under consideration he noted that, unlike article 3 of part 1 of the draft on State responsibility,[7] draft article 1 did not mention omissions. It would probably be too bold to assume that the term "activities" included omissions, as did the term

[7] *Yearbook ... 1980*, vol. II (Part Two), p. 30.

"conduct" used in article 3 of part 1 of the draft on State responsibility. Moreover, certain practices mentioned in the Secretariat study (ST/LEG/15, para. 22) related to inactivity. As to the term "situations", if, as indicated in the fifth report (A/CN.4/383 and Add.1, para. 31), it referred to the existence of a state of affairs, it seemed preferable to terms such as "events" or "occurrences", which excluded the case of a pre-existing state of affairs. In the French text of draft article 1, it would be better to refer to situations *qui existent* rather than to situations *qui se produisent*. The French expression *conséquence matérielle* did not perhaps fully render the idea of a physical link, physical event or physical cause, which was the basis of the proposed régime; the English expression "physical consequence" seemed to convey that idea better.

26. He would comment later on the terms defined in draft article 2. Draft articles 3 to 5 appeared to be acceptable as to substance, but would require careful study. The principle stated in article 3 that the draft articles would apply in relations between States parties to another international agreement was not in conformity with the Special Rapporteur's statement in the fifth report, namely that the draft articles could not "take the place of the more specific agreements which it is their main objective to promote" (*ibid.*, para. 48). Perhaps it would be advisable to amend the last part of article 3 to read as follows:

> "the present articles shall, in relations between States parties to that other international agreement, only apply subject to that other international agreement".

In draft article 4, the Special Rapporteur might specify in what way the fact that the articles did not specify circumstances in which the occurrence of transboundary loss or injury arose from a wrongful act or omission of the source State was without prejudice to the operation of any other rule of international law. In draft article 5, which referred to international organizations, subparagraph (*a*) was in conformity with subparagraph (*b*) of article 3 of the 1969 Vienna Convention on the Law of Treaties.

27. Mr. EVENSEN said that the difficulties experienced by the Commission stemmed from the manner in which the topic had been formulated, as was illustrated by the title itself. The Commission was concerned with injurious consequences arising out of "acts not prohibited by international law"; but international law had developed to a point where many of the acts causing damage or injury were already prohibited and consequently fell outside the topic.

28. It was quite clear that the law of international watercourses had developed to the point of establishing legal principles that required an international watercourse to be shared between watercourse States in a reasonable and equitable manner, based on good faith and good-neighbourly relations. He also firmly believed that the principle stated in draft article 9 submitted in his second report on the law of the non-navigational uses of international watercourses (A/CN.4/381) was a prevailing principle of international law. That article read:

> A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement. [8]

29. He therefore maintained that international watercourse law was not a topic which, in principle, came under the title of the present topic. Acts which caused appreciable harm to other watercourse States constituted violations of international law and clearly could not be classed as "acts not prohibited by international law". It would only weaken the established principles of watercourse law to try to subsume that law under the heading of the topic under study.

30. Another issue which had been taken up as pertaining to the present topic was pollution. But pollution which caused serious transboundary harm, or harm to the common heritage of mankind, was prohibited by international laws. That followed from the maxim *sic utere tuo ut alienum non laedas* and also from the 1972 United Nations Declaration on the Human Environment (Stockholm Declaration), which clearly took it for granted that "activities causing damage to the environment of other States or of areas beyond the limits of national jurisdiction" were not permissible under international law. An example was provided by Principle 21 of the Stockholm Declaration quoted by the Special Rapporteur (A/CN.4/383 and Add.1, para. 34). There were many multilateral and bilateral treaties which testified to that state of the law. For instance, in the 1982 United Nations Convention on the Law of the Sea, part XII dealt with protection and preservation of the marine environment; he believed that its provisions had become, or would become in the near future, basic principles of international law.

31. In his second report, he had prepared paragraph 1 of draft article 23 (Obligation to prevent pollution) in the belief that it, too, expressed prevailing principles of international law, albeit in a form suitable for a general framework agreement. That paragraph read:

> 1. No watercourse State may pollute or permit the pollution of the waters of an international watercourse which causes or may cause appreciable harm to the rights or interests of other watercourse States in regard to their equitable use of such waters or to other harmful effects within their territories. [9]

32. The *Trail Smelter* arbitration, [10] often mentioned in connection with the present topic, did not constitute a decision on an act or on activities permissible under international law. Its significance was just the opposite, for the tribunal had held that pollution of a magnitude that caused serious transboundary harm was prohibited by international law. The Special Rapporteur was not unaware of that fact, as could be seen from his fourth report (A/CN.4/373, para. 25). The same applied to weather modification activities, changes in the biosphere or in the general ecology of a region, in so far as they had harmful transboundary effects. Such activities could on

[8] See 1831st meeting, para. 1.

[9] *Ibid.*

[10] See 1848th meeting, footnote 10.

no account be regarded as permissible under international law.

33. Any modern regulation or progressive development of international law which stressed the interdependence of different regions and the need for closer co-operation to solve global and regional problems clearly fell outside the topic under study. To the extent that restrictions and regulations were established, the activities concerned were regulated by international law and any action in breach of such regulations would no longer be permissible. It was therefore necessary to determine the main direction which the Commission's work should take.

34. In his view, the main purpose of assigning the present topic to the Commission, despite its somewhat unclear contours, had been to request it to deal with certain problems arising out of developments now confronting the world. Those developments were: first, the modern technological revolution, especially that following the Second World War; secondly, the advent of the nuclear age; thirdly, the advent of the space age; and fourthly, perhaps, the new accessibility of the deep ocean floor.

35. Those main developments had placed the world in an entirely new situation, with highly promising, but equally ominous possibilities for the well-being and future of mankind. Some of those possibilities would come under the heading of extra-hazardous activities or pertain to the quagmire of an uncontrolled nuclear age. Questions relating to armaments would, however, fall outside a realistic conception of the Commission's task. The advent of the space age had had repercussions for mankind which would call for principles of co-operation and regulation of the common heritage.

36. Turning to the draft articles, he said that he had had some difficulty in evaluating their underlying principles, since their true meaning could be clarified only by the subsequent articles. The expression "territory or control", in article 1, was perhaps not adequate, and the definition of that expression in article 2 did not alleviate his concern. If the intention behind the phrase "affecting the use or enjoyment of areas within the territory or control of any other State" was to confine the activities to such areas, he feared that it could have unacceptable consequences. Under basic principles of international law, the expression "territory or control" would apply *inter alia* to the territorial sea, to the territorial airspace and to ships and aircraft. But what about the economic zone, the airspace above that zone, the high seas and their airspace and outer space in general? More generally, he wondered whether the draft articles themselves should apply only to the very restricted areas and objects described as being under the territory or control of the affected State. What about the high seas, including the 200-mile economic zone and the continental shelf used for purposes other than exploration for and exploitation of natural resources? And what about the Antarctic, the permanently frozen areas of the North Pole and outer space?

37. In article 2, paragraph 1 (*b*), the meaning of the expression "continuous passage or overflight" was difficult to grasp. If the intention was to refer to "innocent passage", then that was the term that should be used. He also had difficulty with the term "maritime territory". Did it mean the "maritime areas" referred to in subparagraph (*a*) or did it mean only the territorial sea? Further clarification was required. The provision relating to a "State of registry" was rather difficult to understand. If the implication was that vessels registered in a coastal State were subject to the legislation of that State, he thought the point was quite clear under general principles of international law. He therefore assumed that that provision had a different intention.

38. He suggested that discussion of articles 3 and 4 should be postponed. So far as article 3 was concerned, he doubted the wisdom of relegating the draft articles to the lowest rank in the hierarchy of conventions and agreements before their exact scope and content were known.

39. With regard to article 5, he wondered whether it was wise, at the present early stage, to decree that the draft articles did not apply to the rights and obligations of international organizations. That might run counter to clear trends in the modern law of nations, which accepted international organizations as subjects of international law in regard both to rights and to obligations. Indeed, many of the activities to be regulated by the draft articles would be activities conducted by international organizations rather than by individual States. An obvious example was the telecommunications satellites to be launched and operated by telecommunications unions. In addition, the functions and powers of organizations such as the European Economic Community were such that it would seem only natural to include them within the scope of the draft.

40. Mr. QUENTIN-BAXTER (Special Rapporteur) said he was grateful for the words of encouragement offered by members, and also for their words of caution. He would derive profit from the debate, although it would be difficult for him to do full justice to it in his summing-up in the limited time available. Referring to Mr. Evensen's comments on the *Trail Smelter* arbitration, he pointed out that the finding as to wrongfulness had been based on an assessment of the technical and economic aspects of the situation and of the relative interests of the parties. The tribunal had also found that Canada's duties were not confined to repairing the harm that had occurred wrongfully, but extended to providing reparation for any future harm that might occur without a wrongful act on Canada's part. Such harm could have occurred, for example, because the standards which the tribunal had considered to be adequate could have proved, in practice, to be inadequate, or because those who had been engaged in the conduct of the enterprise might not have performed their duties skilfully enough to prevent accidental pollution. It was an important feature of that decision, and indeed of the topic before the Commission, that States should be encouraged as a matter of policy to do everything in their power to reduce the issues that remained at large to particular rules—if possible, to simple rules of what was right and what was wrong—or at least to provide criteria on the basis of which their representatives could reach a decision. By the same token, the

purpose of the topic was to encourage States to make agreements and the main focus of his work, therefore, like that of Mr. Evensen or of the work on succession of States in respect of matters other than treaties, was on the possibilities of such agreement.

41. As Mr. Ushakov (1849th meeting) had rightly pointed out, the enormous problems affecting the physical universe and man's relation to it could not be resolved by rules of liability, but called for agreement between States. In such areas, progress could be achieved only through agreements under which, either on a regional or on a global basis, States accepted some measure of responsibility not to do a particular thing or to take account of the relevant criteria. The issues involved were very much at large and could not be reduced to a precisely measured obligation of one State towards another. But it was quite a different matter to say that such issues did not fall within the realm of law.

42. One thing that had emerged fairly clearly in the debate was that lawyers, along with scientists, technologists and politicians, did have a role to play. If they failed to provide the means for progress, together with the practitioners of other disciplines, the role of law would tend to be a negative one. They had suffered to some extent from the conception that prevention and reparation were totally different matters, a view encouraged by certain aspects of the law of State responsibility and, in particular, by the need for attribution; as a description of the way in which States behaved, however, that conception was woefully inadequate. States attempted to perform their duties towards one another by preventing harm, in so far as possible, or else by repairing it; far from the obligation of reparation being bigger than the obligation of prevention, the opposite was usually the case. To take, for example, the case of the carriage of oil by sea, a certain amount could be done by insisting on certain minimum standards, but when the point was reached at which the technical and cost limitations produced a decreasing return for an increasing expenditure, industry and the States concerned found it expedient to adopt a régime that provided for a greater element of reparation to compensate for what was lacking in terms of perfection of prevention.

43. It had always seemed to him that conventional modes of legal thinking caused difficulty when it came to the principle of strict liability. Although it appeared to be a principle of the utmost rigour, it had in fact been used to provide the basis for a limitation of liability in many régimes, such as that governing the carriage of oil by sea. It therefore seemed entirely reasonable to make the application of the principle of liability extend backwards into the whole range of prevention and reparation, and also to stress that reparation was more than compensation: when possible, it meant putting things right and reverting to first principles as a guide to future conduct.

44. If the scope of the topic remained as broad as it was at present, very large areas would be covered and it should not be thought that it would be possible to make rules that could be applied precisely and mechanically. There was something to be said, however, for the power of ideas, for in law, as in philosophy or any other learned discipline, the manner of looking at things sometimes had more influence than the precise rule to be applied in a given situation.

45. His emphasis, therefore, had been on providing States with every encouragement to make agreements. But if they did not reach agreement, and if the matter was one that could be measured in terms of a specific obligation between two States, there should be a set of principles to settle the same kind of questions that the two States might have taken into account had they made an agreement. He did not think that that idea was lacking in legal quality. He was not prepared to be as categorical as Mr. Evensen in suggesting that transboundary harm attracted rules of prohibition. Indeed, it was one of his objectives that the areas with which he was concerned should not attract such rules. So far as possible he wished to preserve the right of each State to act freely, but also to be the judge of what was owed to other people. If it could not settle a matter by agreement it should at least be able to defend the position it had assumed unilaterally.

46. Applying those generalities to certain of the points raised, he explained that he had not provided that failure in a duty of notification would be a breach of an obligation, or that failure to establish a régime would involve a right of recourse by the other party, simply because it was necessary to consider what would be effective. In many cases States making agreements would provide, quite properly, for a mandatory duty to notify. What, however, was to be gained in a general context by making such conduct wrongful? And what would be the measure of compensation? The answer was that the ultimate gain would be quite small, but the obligation imposed upon the State would be quite large.

47. Mr. Malek (1848th meeting) had referred to the question of secrecy, which might arise if an atomic power plant in State A was to be sited near the border with State B, and State A informed State B that it could not provide detailed information because a matter of State secrecy was involved. While there could, of course, be an obligation not to invoke a requirement of secrecy, there was no reason to believe that States would accept such a limitation. Rather more important was the need to bear in mind that the rules should be considered in conjunction with the rules on State responsibility, for in the atomic power plant example he had cited, if some catastrophe did occur, the source State would certainly be unable to deny attribution so far as the decision on siting was concerned.

48. The Commission could exert most influence on the conduct of States by sheer persuasiveness, using procedures and principles. The alternative of claiming that there had been a wrongful act none the less remained, and it would not be affected by the draft articles. It was perhaps for that very reason that he had endeavoured meticulously to preserve a balance between the parties, and he was gratified to note that nearly all members had recognized that the word "activities" alone was inadequate. That was also the reason why he had not used

the expression "adverse effects". It would be well to recall Aesop's fable of the stork and the fox, the moral of which was that one State's beneficial effects were not necessarily another's. It was a matter of cardinal importance, and one that had been clearly stated by the arbitral tribunal in the *Lake Lanoux* case (A/CN.4/383 and Add.1, para. 22), that States were judges of their own situation. They were not required to accept somebody else's account of the situation. That was why he would suggest that the word "adverse" had no place in the scope clause and in the definition of transboundary effects. If, however, there was a discussion at an early stage in relation to a proposed activity, it was to be hoped that the parties would agree on what was and what was not beneficial.

49. With regard to scope, and specifically to the decision to confine the topic to cases in which there was a physical consequence, that was a rigorous limitation and one that permitted of no exception. Much had been sacrificed to it; for instance, questions such as misuse of drugs, problems of refugees and even product liability all fell outside the scope of the draft articles because of the requirement of a physical consequence. However, once that limitation had been accepted, as it had been by the majority, it was necessary to follow it through. That did not, however, preclude an assessment of the effects of an activity with due regard to economic, social and other relevant factors.

50. The sole purpose of the definition of "territory or control" was to relate the scope of the articles to existing law, and even to developing law, as it pertained to control over territory, ships, expeditions on the high seas and objects in outer space. The only possible policy element in the definition was the treatment of ships in passage or aircraft in authorized overflight as being in a transboundary situation *vis-à-vis* the State through whose territory they were travelling. All else was a matter of drafting.

51. So far as narrowing the scope of the draft articles was concerned, international law did not expect States to be omnipresent and to control every aspect of what happened in their territory. The draft articles certainly could not impose standards that States were not willing to apply in their own domestic affairs. It would, however, eventually be necessary to consider the point at which municipal law met international law.

52. With regard to articles 3 and 4, he agreed that, had there been a clear idea of the content of the subsequent articles, a radically different view could have been taken; but he considered that, at the present stage in the development of the draft, those two articles were essential. As to article 5, the role of international organizations under treaties was sufficiently evident to leave no doubt about the need to include some provision on that point.

53. Lastly, he suggested that, rather than referring the draft articles to the Drafting Committee, a small committee might be appointed to examine them and report back to the Commission.

The meeting rose at 6.10 p.m.

1853rd MEETING

Tuesday, 3 July 1984, at 10.05 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, 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. Thiam, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (A/CN.4/373, [1] A/CN.4/378, [2] A/CN.4/383 and Add.1, [3] 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 (*concluded*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

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

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

ARTICLE 5 (Cases not within the scope of the present articles) [4] (*concluded*)

1. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, in suggesting at the end of the previous meeting that a small committee should be appointed to consider draft articles 1 to 5, he had not intended that those provisions should be discussed further at the current session. He simply believed that draft articles which had not been fully considered by the Commission itself should not be referred to the General Assembly. His suggestion had, moreover, been purely tentative.

2. The CHAIRMAN suggested that the Commission should take note of the fact that draft articles 1 to 5 would not be referred to the Drafting Committee at the current session and that it should invite the Special Rapporteur to prepare further draft articles, which could be considered together with draft articles 1 to 5.

It was so agreed.

[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] *Idem*.

[4] For the texts, see 1848th meeting, para. 3.