

Document:-
A/CN.4/SR.1972

Summary record of the 1972nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

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1972nd MEETING

Friday, 20 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

later: Mr. Alexander YANKOV

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Laclea Muñoz, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (concluded) (A/CN.4/396,¹ A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

ARTICLE 28 (Restriction of immunities) (concluded)

1. Mr. SUCHARITKUL (Special Rapporteur) thanked members for their co-operation over the past 10 years. Twenty-seven of the draft articles had been adopted, and only one remained. He hoped that the Commission could take a decision that would make it possible to transmit the draft articles to Governments in accordance with the Commission's statute.

2. A new draft of article 28 had been prepared by several members on the basis of Sir Ian Sinclair's proposal (1971st meeting, para. 68), and that was encouraging. Speaking as a member of the Commission, he was glad to be able to say that any one of the proposed versions of article 28 would be acceptable to him.

3. Mr. REUTER said that, after informal consultations, he and several other members of the Commission wished to propose a new text for article 28 which largely reproduced the first two paragraphs of the text proposed by Sir Ian Sinclair. That text read:

"Article 28

"1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

"2. However, discrimination shall not be regarded as taking place:

"(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

"(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles."

Since the informal group which had drafted the text had not chosen a title, members of the Commission might perhaps make suggestions.

4. Mr. USHAKOV said that he could accept the text read out by Mr. Reuter.

5. Mr. EL RASHEED MOHAMED AHMED said that he had been authorized by Chief Akinjide and Mr. Koroma to say that they joined him in accepting the text just read out by Mr. Reuter. Adopting that text would be an appropriate way to conclude the Commission's work on State immunity and to express gratitude to the Special Rapporteur.

6. Sir Ian SINCLAIR said that he had no objection to the new text, which was largely based on his own proposal. He would like to put on record, however, that deleting paragraph 3 of his draft meant that the Commission would have to concentrate more closely on the concluding phrase of article 6, which had been placed in square brackets. Any restrictive application pursuant to article 28 would have to take into account the "relevant rules of general international law".

7. Mr. USHAKOV said that the rules of general international law referred to in the last phrase of article 6 related not to the principle of immunity, but to exceptions to that principle. Hence the comment made by Sir Ian Sinclair was not valid.

8. Mr. DÍAZ GONZÁLEZ said that, although he would certainly have preferred article 28 to be deleted, he had no objection to the new compromise text.

9. Mr. RAZAFINDRALAMBO, speaking also on behalf of Mr. Mahiou, said that he would join the majority of the members of the Commission who were in favour of the new draft article 28, even though he had some reservations about paragraph 2 (a). It was to be feared that the provisions of that subparagraph might be applied in a manner prejudicial to third world countries, which always appeared as plaintiffs in the courts of industrialized investor countries.

10. Mr. LACLETA MUÑOZ said that he supported the text read out by Mr. Reuter.

11. Mr. BALANDA said that he would support the general opinion, even though he thought that paragraph 2 (a) could not be interpreted as implicitly authorizing States parties to evade their obligations by violating any provision of the future convention on jurisdictional immunities.

12. Mr. FRANCIS said that he endorsed the points made by Mr. Razafindralambo and Mr. Balanda; if paragraph 3 of Sir Ian Sinclair's text had been retained, paragraph 2 (a) would have been made much tighter.

13. The CHAIRMAN, noting that there was general agreement, suggested that the Commission should provisionally adopt the text of article 28 submitted by the informal group of members.

It was so agreed.

14. The CHAIRMAN invited the Commission to decide on the title of article 28.

¹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

15. Sir Ian SINCLAIR proposed that the title should be "Non-discrimination", which was the title of article 49 of the Convention on Special Missions.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Sir Ian Sinclair's proposal for the title of article 28.

It was so agreed.

Article 28 was adopted.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

17. The CHAIRMAN, noting that the first reading of the draft articles on jurisdictional immunities of States and their property had been completed, suggested that the Commission should adopt the whole set of draft articles as amended during the discussions, on the understanding that the comments made by members of the commission would be reflected in the summary records.

It was so agreed.

The draft articles on jurisdictional immunities of States and their property were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

18. Mr. REUTER speaking also on behalf of many other members of the Commission, proposed the following draft resolution:

"The International Law Commission,

"Having adopted provisionally the draft articles on jurisdictional immunities of States and their property,

"Desires to express to the Special Rapporteur, Mr. Sompong Sucharitkul, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on jurisdictional immunities of States and their property."

19. The CHAIRMAN invited the Commission to adopt that draft resolution.

The draft resolution was adopted.

20. Mr. SUCHARITKUL expressed his deep gratitude to the members of the Commission, and in particular to Mr. Reuter. What he had learned with the Commission he would cherish for the rest of his life. He believed that the measure of a man's greatness was not his ability to create or destroy, but his capacity to endure the hardship and suffering so often visited upon human beings.

21. The CHAIRMAN said that Mr. Sucharitkul had performed a task of great historical significance. His merit was all the greater because the topic entrusted to him, being at the confluence of public international law, private international law and other legal disciplines, was extremely complex and delicate. His wisdom and level-headedness, and the spirit of conciliation and compromise that he had displayed throughout the work, had enabled him to achieve remarkable results.

Mr. Yankov took the Chair.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,² A/CN.4/394,³ A/CN.4/402,⁴ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁵)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

22. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the topic (A/CN.4/402).

23. Mr. BARBOZA (Special Rapporteur) said that, in his preliminary report (A/CN.4/394), he had begun with a review of the work that had been done thus far, and had noted that the discussion of the topic had been divided into two stages: one before and one after the submission of the schematic outline.

24. During the first stage, when basic problems had been discussed, the previous Special Rapporteur's main concern had been to dissociate his topic from that of State responsibility for wrongful acts. That had been essential, because the question of prevention also seemed to be part of the topic of State responsibility. He had not found it satisfactory to base the whole draft on strict liability, partly because he had not thought that such liability really had a basis in international law and partly because, if he had followed that course, he would have had to leave aside obligations of due care.

25. In order to find a broader legal foundation for the two components of prevention and reparation, the previous Special Rapporteur had adopted the principle reflected in the maxim *sic utere tuo ut alienum non laedas*. Since that principle was very general, it had had to be adapted to the two objectives of minimizing the possibility of loss or damage and, where necessary, providing means of redress without restricting the freedom of States to undertake, in their territory, activities which might be useful.

26. The previous Special Rapporteur had used two means of separating the present topic from that of State responsibility: he had confined it to the realm of primary rules and treated obligations of prevention as consisting only in the duty to take account of the interests of other States.

27. After the submission of the schematic outline, the previous Special Rapporteur had, with the approval of the Commission and the General Assembly, undertaken to define the content of the topic. The survey of State practice with regard to transboundary loss or injury arising out of acts not prohibited by international law, prepared by the Secretariat (A/CN.4/384), had shown

² Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

³ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

⁴ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁵ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

that there was abundant State practice and had confirmed that, despite all the difficulties encountered, work on the topic should continue. In his fifth report, the previous Special Rapporteur had submitted five draft articles,⁶ but it had not been possible to refer them to the Drafting Committee.

28. In his own preliminary report, after reviewing the work done so far, he had said that what he intended to do in the immediate future was to avoid reopening the general discussion and work on the basis of the raw material provided by the schematic outline, by making comments and proposing changes he considered necessary in the light of State practice.

29. He had also said that he intended to give detailed consideration to such questions as causality, shared expectations, the incomplete obligations of prevention envisaged in the schematic outline, the duty to make reparation and the role of international organizations, which had all been commented on during the discussions, and to leave open the question of the final scope of the topic. He had also indicated that he intended to re-examine the five draft articles submitted by the previous Special Rapporteur.

30. Except for the questions of causality and the role of international organizations, which he preferred to consider at a later stage, he had dealt with all those matters in his second report (A/CN.4402), which began with three preliminary questions. The first concerned the use of the terms "responsibility" and "liability" in English. He would not go into the complexities of common-law legal terminology, but it should be noted that, like the French term *responsabilité* and the Spanish term *responsabilidad*, those two terms referred both to the consequences of wrongfulness—secondary obligations—and to the obligations incumbent on any person living in society. Thus, if the Commission took account of both meanings of those terms, which included obligations of prevention, it would not be going beyond the scope of the topic.

31. The second question concerned the unity of the topic, which the previous Special Rapporteur had endeavoured to preserve by linking the concepts of prevention and reparation, so as to overcome that dichotomy. In order to strengthen the unity of the topic, he himself was proposing "injury" as a unifying agent. Injury which had already occurred, in the case of reparation, and potential injury, in the case of prevention, constituted the cement of the prevention-reparation continuum. Moreover, by emphasizing the concept of injury, the Commission would be moving further away from the sphere of State responsibility for wrongful acts, since, in part I of the draft articles on that topic, injury had not been taken into account in defining the conditions for the existence of an internationally wrongful act.

32. The third question concerned the scope of the topic. He had taken as a point of departure the idea put forward by the previous Special Rapporteur that the source State had a duty to avoid, minimize or repair any

"appreciable" or "tangible" physical transboundary loss or injury when it was possible to foresee a risk of such loss or injury associated with a specific activity; but he did not intend to disregard the possibility of revising or changing that idea, if necessary.

33. In his second report, which dealt only with the schematic outline as revised by the previous Special Rapporteur in his fourth report,⁷ he made a critical analysis of the dynamics of the outline, but left aside for the time being the factors set out in section 6, the matters dealt with in section 7, and the settlement of disputes. He did not refer to the five draft articles submitted later by his predecessor, and that explained why such important questions as whether the topic covered "situations" as well as "activities" were not discussed.

34. The schematic outline consisted of two parts. The first dealt with treaty régimes to govern hazardous activities, while the second related to the rights and obligations which arose when loss or injury occurred and no treaty régime existed.

35. Two obligations were provided for in the first part: the obligation of States to supply information on the kinds and degrees of loss or injury that might be caused by any hazardous activity carried out in their territory, and the obligation to propose remedial measures. The obligation to provide information differed from the obligation to propose remedial measures in that, although failure to fulfil the first could entail adverse procedural consequences—without prejudice to those provided for by general international law—the second did not give rise to any right of action. If the measures proposed did not satisfy the affected State, that second obligation became an obligation to enter into negotiations for the establishment of fact-finding and conciliation machinery, which also did not give rise to any right of action.

36. If the two States concerned were unable to establish fact-finding machinery, if such machinery was ineffective or if it so recommended, the obligation would then become an obligation to enter into negotiations to determine whether a régime should be established between those two States and, if so, what form it should take. Those were combined obligations: they would lead to the establishment of a régime and contribute to prevention, because they would allow the affected State to take measures unilaterally for that purpose and because such a régime would promote prevention.

37. In addition to those obligations, there appeared to be a pure obligation of prevention. Since the compulsory nature of prevention was not entirely clear from the wording of section 2, paragraph 8, of the schematic outline, which was identical with that of section 3, paragraph 4, it could and should be explained when draft articles came to be formulated. The source State was under an obligation to keep the hazardous activity under review and to take any measures it deemed necessary and feasible to safeguard the interests of the affected State. The schematic outline did not contain any indication of a possible right of action in respect of that obligation.

⁶ For the texts of draft articles 1 to 5 submitted by the previous Special Rapporteur, see *Yearbook ... 1984*, vol. II (Part Two), p. 77, para. 237.

⁷ See footnote 5 above.

38. The second part of the schematic outline dealt with reparation for injury in the absence of a treaty régime. It provided for an obligation of reparation, so that, subject to certain conditions, an innocent victim would not be left to bear his loss or injury. Reparation was subject to two conditions, namely shared expectations and actual negotiation, during which a number of factors had to be taken into account in determining the amount of compensation.

39. There were two types of shared expectation. They could derive from some prior understanding between the parties to the negotiation, from common principles, or from patterns of conduct defined at the bilateral, regional or international levels.

40. In view of the arguments that might be taken into account during negotiations relating to reparation, such reparation might be different from that made, for example, as a result of a wrongful act. In the latter case, it would be necessary either to restore the situation that had existed at the time the injury had occurred or to compensate the affected State. In the case of the negotiations under consideration, however, account would be taken of other elements, such as the reasonable nature of the conduct of the source State, the expenses it had incurred to prevent injury and the usefulness of the activity in question to the affected country. Such a system was, moreover, quite close to the practice of States, which often set a limit on the amounts of compensation, and to what was provided for *mutatis mutandis* in the internal law of some countries.

41. The most important principle was that enunciated in section 5, paragraph 1, which was based on Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration)⁸ and was intended to ensure that all human activities in the territory of a particular State were conducted with as much freedom as was compatible with the interests of other States. That principle was associated with two other principles: the principle of prevention—standards of prevention always being determined in the light of the means available to the source State and the importance and economic viability of the activity in question (sect. 5, para. 2)—and the principle of reparation (sect. 5, para. 3). There was also a principle relating primarily to legal procedure, which was based on a rule stated by the ICJ in the *Corfu Channel* case (merits).⁹ According to that principle, the affected State would be allowed liberal recourse to inferences of fact and circumstantial evidence or proof in order to establish whether the activity in question might give rise to loss or injury.

42. In his critical analysis of the schematic outline, he had noted that, whereas the English and Spanish titles of the topic referred to “acts”, the outline referred only to “activities” which might have injurious consequences. It was the latter term that should be adopted.

43. The activities in question were those which gave rise or might give rise to transboundary injury, whether

they were ultra-hazardous—with a low risk of catastrophic damage—or simply involved a high risk of minor damage. According to some writers, the topic did not cover activities which caused pollution, because States knew, or were in a position to know, the causes of such pollution, which was, moreover, prohibited beyond a certain threshold. Although he would not take a position in the matter, he must point out that activities which might accidentally cause serious pollution would come within the scope of the topic under consideration and that, in any event, the affected State would have two possible courses of action: either it could claim that the activity in question was wrongful and require that its effects should cease, or it could rely on the articles the Commission would prepare and require not only the establishment of a treaty régime between the parties concerned, but also compensation for the damage caused.

44. There were also some heterogeneous activities whose wrongfulness was precluded under articles 29, 31, 32 and 33 of part 1 of the draft articles on State responsibility.¹⁰ Although such activities were not wrongful, compensation had to be paid for any injury they might cause.

45. The obligations were complete obligations whose breach entailed consequences, and he had reached the conclusion that a right of action must not be ruled out. Otherwise, the affected State might not be in a position to take action, as it might be permitted to do under general international law, to compel the source State to perform its obligations.

46. Three possible approaches had been considered in the report. He had ruled out the first, which was to leave things as they were, and the second, which was to provide for sanctions, since it would oblige the Commission to venture into the realm of secondary rules. The third approach was to delete the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the schematic outline, concerning the absence of a right of action, and that was the solution he recommended.

47. Injury caused in the absence of a treaty régime gave rise to an obligation to negotiate with a view to making reparation (sect. 4, para. 1, *in fine*) and raised the question of the obligation of reparation and its justification. It had been recognized in earlier reports that, despite the objections to what was known as “strict liability” in international law, that liability formed the basis of the obligation of reparation, although efforts had been made to strengthen that obligation so that it would not derive exclusively from strict liability, and to base it on the quasi-contractual and quasi-customary aspects of “shared expectations”. Although the normative content of international liability might thus be diluted, as Gunther Handl had observed (see A/CN.4/402, para. 43, *in fine*), he did not see any other acceptable solution. With regard to the idea of mitigating the effects of strict liability, the purpose of the draft was to establish a general régime, not a régime that would be applicable to a particular activity. Strict liability was not monolithic: it involved different degrees of strictness, as was shown by various treaty

⁸ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁹ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at p. 18.

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), p. 33.

régimes, such as the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy,¹¹ which provided for very strict liability by introducing the innovative concept of “channelling” and tracing liability back to the nuclear operator, and the 1972 Convention on International Liability for Damage Caused by Space Objects,¹² which provided for a lesser degree of strictness. The essential need was to design a régime of liability for risk that would be flexible enough to apply not to a particular activity, but to any of the activities in question.

48. Strict liability did have a basis in general international law and to say that it did not would mean that an activity which was not prohibited by international law and which was carried out within the territory of a State could cause transboundary damage without entailing any obligation to provide compensation. Such a position could be based only on a theory of sovereignty which did not take account of the interdependence that characterized the modern community of nations and would, moreover, be contrary to the principle of the sovereign equality of States, because it would overlook the other aspect of sovereignty, namely that a State was entitled to use its own territory without any outside interference. An activity which was socially useful, but which created a risk, had to take account of foreign interests if it was to be carried out freely.

49. Although there had been some criticism of the concept of “shared expectations”, they did have a role to play. In any event, they might be a factor that would be difficult to interpret and to prove if the burden of proof lay on the affected State. While there was no need to establish a category that would be difficult to define, an objective element might be found in the ideas contained in section 4, paragraph 4, of the schematic outline, such as the existence in the internal law of the States concerned of the principle of strict liability or the principle of reparation for injury. There he was referring simply to the principle embodied in the internal law of many countries, and not—for it was too early for that—to implementation rules. The absence of that principle in the internal law of the source State or the affected State might be claimed as an exception by the former.

50. Consideration might also be given to the possibility of providing for exceptions to the rule of reparation, by adopting either the concept of *force majeure* as such or a restricted form of *force majeure*, as in certain conventions under which *force majeure* applied to certain political situations or to a particular type of disaster. Another exception might be negligence on the part of the affected State or the fact that third parties acted with intent to harm. There was also the possibility of not allowing any exceptions when the source State had failed to fulfil its obligations to provide information or to negotiate. The Commission would have to choose between all those options, on the clear understanding that the aim was to establish a general régime which did not have to include strict liability in the narrow sense of the term. That concept would,

rather, have to be mitigated to protect it from undue automatism, which would alarm many countries.

51. He had already reached the conclusion that the only obligation of prevention was the one referred to in section 2, paragraph 8, and section 3, paragraph 4, which was the obligation to keep a hazardous activity under constant review and to take any measures necessary to prevent injury. That obligation involved a duty of care and it meant that States had to determine whether the methods of prevention used were reasonable and, in general, whether they met the standards of modern technology.

52. In a treaty régime, such as those governing certain activities involving risk, provision might be made for dual protection, as had been done in the régime established by the arbitral tribunal in the *Trail Smelter* case,¹³ in which rules and procedures had been laid down to reduce pollution to an acceptable level. The tribunal had stated that any failure to follow those rules and procedures would be a wrongful act and, at the same time, that reparation must be made in the event of pollution accidentally reaching a higher level than foreseen, in which case there would be strict liability.

53. Obligations of prevention might therefore be regarded as obligations of conduct combined with a régime of strict liability. But such a combination did not seem possible in a general régime such as that which he was trying to establish, for the primary effect of the obligation of due care, which would come into play only after injury had occurred, would be to aggravate the position of the source State with regard to compensation.

54. It had only been by way of example that he had compared that obligation with obligations to prevent a given result, which came into play under a régime of strict liability, where reparation must in principle be made in every case, since it was governed by a primary rule. But the obligations to provide information and to negotiate, which were not only of a preventive nature and which were autonomous, would not depend on the occurrence of injury, and their breach would constitute a wrongful act. They would, for all that, not be excluded from his study, for it was intended to deal with the injurious consequences of activities not prohibited by international law, which would include the consequences of acts that could not be dissociated from those activities and might be wrongful. An injury caused by a wrongful act would become an injurious consequence of a lawful activity from which that act was inseparable.

55. It was entirely appropriate to follow the reasoning of the previous Special Rapporteur, who had been trying to separate international liability from State responsibility; but that was a distinction of a purely conceptual nature and there was no reason not to take account, in a future convention, of those two forms of responsibility, which were intended to prevent damage from occurring and, if it did, to mitigate the consequences as much as possible. The principles referred to in the schematic outline appeared to be well-founded and necessary to

¹¹ United Nations, *Treaty Series*, vol. 956, p. 251.

¹² *Ibid.*, vol. 961, p. 187.

¹³ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

the development of the study. When the study had reached a more advanced stage, however, other principles might have to be brought into play and those already taken into account might have to be reviewed.

The meeting rose at 11.25 a.m.

1973rd MEETING

Monday, 23 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

Organization of work of the session (concluded)*

[Agenda item 1]

1. The CHAIRMAN suggested that the meeting should be suspended to enable the Enlarged Bureau to meet and consider matters of importance for the continuation of the Commission's work.

The meeting was suspended at 10.05 a.m. and resumed at 11.50 a.m.

2. The CHAIRMAN informed members that the Commission would consider agenda item 7 (International liability for injurious consequences arising out of acts not prohibited by international law) until 25 June inclusive, after which it would consider item 6 (The law of the non-navigational uses of international water-courses) until 1 July inclusive. One further day would be allocated for the consideration of item 3 (Jurisdictional immunities of States and their property) and another for the consideration of item 4 (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁴)

[Agenda item 7]

* Resumed from the 1955th meeting.

¹ Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁴ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

3. Mr. USHAKOV congratulated the Special Rapporteur on his second report (A/CN.4/402), which contained valuable information on the general theory and development of contemporary international law. He nevertheless had some doubts as to the merits of the schematic outline proposed by the previous Special Rapporteur and adopted in some measure by the present Special Rapporteur. He feared that, if the Commission adopted the outline as the starting-point for its work, it would succeed neither in codifying the existing rules of general international law—which in the present case were to be found more in customary law than in treaty law—nor in legislating by proposing rules that had yet to come into being. The schematic outline was defective in two respects: it did not specify which activities would be covered by the draft articles and it made no distinction between injurious consequences of limited scope and those that affected all of mankind.

4. With regard to section 1 of the schematic outline, which related to scope and definitions, he wondered whether it was advisable to refer first to activities within the control of a State—and it would in any event be preferable to use the word “jurisdiction”—and, thereafter, to activities conducted on ships or aircraft. The main point in that regard was not to define, but to specify clearly, the activities to be covered. Given that any human activity had some harmful consequences, section 1 added nothing to the study of the topic, for its scope was too vast.

5. He would draw a distinction between activities which had minor consequences and were of concern only to the States adjacent to those on whose territory they were conducted, and activities whose consequences could have repercussions from one end of the Earth to the other. In the first case, even though it was open to question whether the source State should inform the neighbouring States of its intention to carry out an activity or of the technical aspects of the activity itself, it was comparatively easy to decide about which matters the first State should inform the others and, if need be, hold discussions with them, as was sometimes the practice with regard to the use of “shared resources”. An example had been provided by France and Spain in connection with Lake Lanoux.

6. In the second case, however, the question that arose concerned the obligation to inform and negotiate that would be incumbent on the source State. To which items would the information relate? Was all of mankind to engage in negotiations on a technical project? The really major problems with which mankind was now confronted were caused by air and marine pollution. Such pollution, which was also governed by such imponderable factors as winds, was not always limited to countries situated in any particular direction by reference to the source State, and could affect the entire planet. The problem was further aggravated by the fact that it was not always possible to foresee the consequences of a particular activity. The inventor of DDT, for example, had received the Nobel prize for the insecticide's benefits to the development of agriculture, but