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Summary record of the 2015th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1987, vol. I

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had been said during the debate that, if the articles were not referred to the Drafting Committee, the General Assembly might come to the conclusion that the new composition of the Commission was hindering progress in its work on the topic. Anyone would think that work on the 13-year-old topic had proceeded apace in the Commission as formerly composed. However, in its new composition, the Commission had already succeeded in working out some 10 draft articles. The General Assembly would more likely be surprised at a method of work which involved referring articles to the Drafting Committee even though there were divergent views on questions of principle. If the majority insisted on such a referral he would not disrupt the consensus, but he asked the Commission to bear in mind that further work on the articles could not be regarded merely as an editing exercise. It would therefore be necessary to recognize the right to use square brackets if it proved impossible to reach agreement on a text. In conclusion, he requested the secretariat to compile an exhaustive list of the proposals and observations made during the discussion in plenary, so as to allow the Drafting Committee to take into account the views of all members of the Commission.

40. Mr. MAHIU said that he endorsed the Special Rapporteur's conclusions and the proposal to refer draft articles 11 to 15 to the Drafting Committee. As he recalled, the Drafting Committee had not always been asked to deal solely with articles on which the Commission was unanimous. Actually, draft articles 1 to 9 had given rise to even more divergent views than draft articles 11 to 15, but had none the less been referred to the Drafting Committee. It was difficult to know which solution was best. Sometimes the Drafting Committee was able to bridge certain differences, but in other cases that was done by the Commission itself. Yet the Commission had sometimes reopened the debate on questions which had been settled in the Drafting Committee. In his view, the practice followed so far had none the less proved positive and constructive.

41. Mr. FRANCIS said that problems did not disappear simply by being discussed in plenary. The Drafting Committee was a more flexible body and nearly always found it possible to solve a particular problem. Articles 11 to 15 should therefore be referred to the Drafting Committee, since that was the place where agreement was most likely to be secured.

42. Mr. KOROMA said that the time had come to review the Commission's methods of work. It was not necessary for each and every article before the Commission to be referred to the Drafting Committee. Indeed, he understood that that had not been the case in the past. Mr. Al-Baharna had made a constructive proposal: the Special Rapporteur should be requested to re-draft articles 11 to 15 before their referral to the Drafting Committee.

43. Mr. McCAFFREY (Special Rapporteur) said that the articles submitted in his third report (A/CN.4/406 and Add.1 and 2) were revised versions of those submitted in his second report (A/CN.4/399 and Add.1 and 2), and had been redrafted in the light of the comments made in the Commission and the Sixth Committee of the General Assembly. It was, however, standard

practice for special rapporteurs to submit a number of redrafts in the Drafting Committee and he would no doubt do so in the case of articles 11 to 15.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 11 to 15 to the Drafting Committee, on the understanding that the Committee would take into account all the proposals made in plenary, including those made by the Special Rapporteur, as well as any written comments by members who did not sit on the Drafting Committee.

It was so agreed.

45. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.45 a.m.

2015th MEETING

Tuesday, 16 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,¹ A/CN.4/402,² A/CN.4/405,³ A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2')

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 6

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/405), as well as draft articles 1 to 6 contained therein, which read:

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

² Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1987, 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.

Article 1. Scope of the present articles

The present articles shall apply with respect to activities or situations which occur within the territory or control of a State and which give rise or may give rise to a physical consequence adversely affecting persons or objects and the use or enjoyment of areas within the territory or control of another State.

Article 2. Use of terms

For the purposes of the present articles:

1. "Situation" means a situation arising as a consequence of a human activity which gives rise or may give rise to transboundary injury.

2. The expression "within the territory or control":

(a) in relation to a coastal State, extends to maritime areas whose legal régime vests jurisdiction in that State in respect of any matter;

(b) in relation to a flag-State, State of registry or State of registration of any ship, aircraft or space object, respectively, extends to the ships, aircraft and space objects of that State even when they exercise rights of passage or overflight through a maritime area or airspace constituting the territory of or within the control of any other State;

(c) applies beyond national jurisdictions, with the same effects as above, thus extending to any matter in respect of which a right is exercised or an interest is asserted.

3. "State of origin" means a State within the territory or control of which an activity or situation such as those specified in article 1 occurs.

4. "Affected State" means a State within the territory or control of which persons or objects or the use or enjoyment of areas are or may be affected.

5. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a State of origin and which affect persons or objects or the use or enjoyment of areas within the territory or control of an affected State.

6. "Transboundary injury" means the effects defined in paragraph 5 which constitute such injury.

Article 3. Various cases of transboundary effects

The requirement laid down in article 1 shall be met even where:

(a) the State of origin and the affected State have no common borders;

(b) the activity carried on within the territory or control of the State of origin produces effects in areas beyond national jurisdictions, in so far as such effects are in turn detrimental to persons or objects or the use or enjoyment of areas within the territory or control of the affected State.

Article 4. Liability

The State of origin shall have the obligations imposed on it by the present articles provided that it knew or had means of knowing that the activity in question was carried on within its territory or in areas within its control and that it created an appreciable risk of causing transboundary injury.

Article 5. Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply subject to that other international agreement.

Article 6. 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 injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

2. Mr. BARBOZA (Special Rapporteur) said that, for two reasons, he believed that the Commission should reopen the general debate on his first two reports;⁵ first, because the amount of time it had devoted to them at the previous session had been entirely insufficient and all members had not had an opportunity to state their views; and secondly, because the Commission's composition had changed a good deal since 1986. The Commission's replies to the questions that would be discussed again were all the more necessary because there was no general convention on the topic. Although there were, as he had indicated in his second report (A/CN.4/402, para. 50), various conventions which established a régime of liability for risk in the case of certain activities, there was no rule that the Commission could take as a model for the preparation of the draft.

3. The question of strict liability was a particularly thorny one. The previous Special Rapporteur, the late Robert Q. Quentin-Baxter, had referred to it as little as possible in his five reports, attempting instead to explain the obligation of reparation in the absence of a treaty régime on the basis, for example, of a somewhat hypertrophied concept of prevention and, secondarily only, in terms of the idea of strict liability. Mr. Quentin-Baxter had nevertheless recognized in his third report that:

At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss.⁶

In that connection, he himself wished to repeat that the Commission's problem was not whether it should base the draft on strict liability, which was only a legal technique and could not serve as a basis for anything. The Commission had been entrusted by the General Assembly with the task of preparing a draft on international liability arising out of acts which were not wrongful. But such liability was no more than strict liability, since there were only two types of liability, namely that arising out of wrongful acts and that arising out of lawful acts (which could also be described as "liability for risk", no-fault liability, etc.). The only thing the Commission could do was to elaborate a mechanism of strict liability which was adapted to international law and which would take account of the sovereignty of States by limiting the automatic application of that type of liability through the conditions under which it would come into play. In that connection, he noted that, in the report entitled *Our Common Future*,⁷ the World Commission on Environment and Development had formulated legal principles in which it had proposed solutions similar to those contained in the schematic outline.

4. In the summary records of the 1972nd and 1976th meetings,⁸ members would find his introduction to his first two reports and his summing-up of the brief discus-

⁵ Preliminary report, document A/CN.4/394, reproduced in *Yearbook . . . 1985*, vol. II (Part One); second report, document A/CN.4/402, reproduced in *Yearbook . . . 1986*, vol. II (Part One).

⁶ *Yearbook . . . 1982*, vol. II (Part One), p. 60, document A/CN.4/360, para. 41.

⁷ Oxford University Press, 1987.

⁸ *Yearbook . . . 1986*, vol. I, pp. 196-200, paras. 23-55, and pp. 215-217, paras. 1-23, respectively.

sion the Commission had devoted to them at its previous session. He would therefore refer again only to certain points on which he particularly needed to know members' views. He especially wished to know what they thought of the first three principles contained in section 5 of the schematic outline, namely: (1) that the articles must ensure to each State as much freedom of choice within its territory as was compatible with the rights and interests of other States; (2) that the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; (3) that, in so far as might be consistent with those two principles, an innocent victim should not be left to bear his loss or injury. The fourth principle was less important because it was of a procedural nature and derived from the first three. Members of the Commission might, of course, also propose additional principles.

5. He also looked forward to hearing members' comments on his analysis in his second report of the obligations deriving from the schematic outline (A/CN.4/402, paras. 14-28, 34-41 and 62-67), and especially on his theory of obligations of prevention under régimes of strict liability (*ibid.*, paras. 64-67).

6. The question of machinery was also quite important and he could not see how the principles of section 5 of the schematic outline could be implemented if provision were not made for negotiation, third-party fact-finding or compulsory settlement procedures, since it was clear that different ways of assessing facts and their implications were at the heart of most disputes and that the success of negotiations would probably depend on whether such disputes could be settled.

7. He would also like to know the Commission's thoughts on the limitation of strict liability, either through the introduction of exceptions such as those referred to in the second report (*ibid.*, paras. 59-61), or in the case where, for example, the State of origin and the affected State had "shared expectations" (*ibid.*, paras. 55-57).

8. Introducing his third report (A/CN.4/405), he said that, of the six draft articles it contained, articles 1, 2, 5 and 6 were roughly the same as articles 1 to 4 as submitted by Mr. Quentin-Baxter in his fifth report,⁹ which corresponded to section 1 of the schematic outline. He had not reproduced the content of the former article 5, relating to the role of international organizations, which would be considered at a later stage for the reasons explained in his third report (*ibid.*, paras. 72-75), and had proposed two new articles, namely article 3 (Various cases of transboundary effects) and article 4 (Liability).

9. In order to understand article 1 on the scope of the draft, reference should be made to the passage of Mr. Quentin-Baxter's fifth report dealing with articles 1 and 2 which he had proposed¹⁰ and which corresponded to the first two articles of the text now under consideration.

10. A first approach to the idea of dangerous activities, which were characteristic of the topic under consideration, had been made in the second report (A/CN.4/402), in section C of chapter I, relating to the scope of the topic, and in section A of chapter III, relating to activities. He wished to make it clear from the start that the new draft article 1 referred not to "dangerous activities", but rather to activities "which give rise or may give rise" to transboundary injury. Article 2 on the use of terms might, of course, include a more precise definition of what constituted a "dangerous activity" for the purposes of the draft articles. At the previous session, moreover, some members of the Commission had proposed that a list should be drawn up of the activities to which the text would apply. He had not followed that suggestion because he considered that, if the Commission drew up such a list, it would not be complying with its mandate, since it would not be considering the consequences of all lawful activities as the General Assembly had requested it to do, but rather the consequences of only some of them, and also because the adoption of such a list would have the disadvantage of not including dangerous activities that might emerge as a result of technological advances. He had also not proposed a definition of such activities in article 2, because it would be almost impossible and perhaps even inadvisable to do so; he had preferred to indicate the main characteristics of those activities in his comments on article 1, since, on first examination, it was not difficult to determine which activities might involve risks and since the schematic outline also recommended that experts should be consulted on the possible transboundary effects of new activities.

11. In his view, what characterized the activities covered by the draft articles was that they involved an appreciable risk, either *a priori* because of the type of products used, or *a posteriori* as in the case of agricultural pesticides that might ultimately prove to be dangerous, since the transboundary nature of the injury implied that the effects of an activity were felt some distance away. Consequently, activities which might be considered dangerous at the internal level could be excluded from the scope of the draft. In addition to being appreciable, the risk was relative because it depended mainly on the geographical location of the activity in question and on other factors, such as prevailing winds. The risk was also generally foreseeable, in that it could be predicted more or less statistically. He had not tried to make the definition more precise, but members of the Commission might do so if they wished, although it might not be possible to go much further, if only because of the general nature of the mandate from the General Assembly.

12. Paragraph 16 of the third report (A/CN.4/405) went to the very heart of the topic. Without going into the question of fault in respect of international liability—since, in the case of lawful activities, international liability would assume only a link of causality between conduct and injurious effects—it might be said that any dangerous activity involved a kind of "original sin", which consisted in creating a risk in the hope of deriving some benefit from it. What would happen when an activity whose dangerous nature could not have

⁹ *Yearbook . . . 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

¹⁰ *Ibid.*, pp. 156 *et seq.*, paras. 3-34.

been foreseen nevertheless caused transboundary injury? In such a case, the internal law of some States provided that the injured party should receive compensation. He did not believe that that solution could be transposed to international law, for, as things now stood, no such compensation would be possible.

13. Another problem was whether activities that caused pollution came within the scope of the draft articles. In that connection, he referred members to the relevant passages of the second report (A/CN.4/402, paras. 30-31 and footnotes 32 and 33). The conclusion (*ibid.*, para. 31) that, as long as an activity had not been prohibited—and, it should also be stated, as long as it was not governed by a special treaty régime—it was covered by the draft articles might have to be reconsidered. For the sake of methodological purity, he himself now had some doubts about characterizing as “dangerous” an activity which involved not a risk, but the certainty of appreciable harm, and about whether such an activity should not rather be characterized as “harmful”. He also thought that the attitude of a State which authorized or engaged in that type of activity constituted wrongful rather than dangerous conduct. It was true that, in the absence of a specific rule, such conduct could not be penalized, except perhaps under the general principle *sic utere tuo ut alienum non laedas*, but he was not sure that the régime of liability for risk should apply to conduct which could not be characterized as dangerous. He did, however, think that the conclusion (*ibid.*, para. 30) that accidental pollution came within the scope of the draft articles was still valid.

14. With regard to “situations”, the comments contained in the third report (A/CN.4/405, paras. 24-30) were quite different from the earlier ones. There, too, he had endeavoured to purify the methodology of the draft. Obviously there had been certain problems with some of the situations to which the former article 1 had referred, namely situations that were not the consequence of a human activity (forest fires, floods, epidemics, etc.). It had seemed to him that, in such cases, an act or, more likely, an omission by a State would not justify the application of a régime of liability for risk and that, ultimately, such an act or omission would be excusable if the State provided evidence that it had done everything it reasonably could to avoid injury—something that, in a strict régime of strict liability or liability for risk, would not constitute a ground for exoneration. The other “situations”, which were the consequence of a human activity involving a general risk, did come within the scope of the topic because the risk was created by an activity—such as the construction of a dam—which, although it might not in itself be dangerous, nevertheless contributed to the creation of a dangerous situation. A few changes had been made in that regard: he had specified that the effects had to be “adverse” and that they had to be adverse for “persons or objects”, as he explained in the report (*ibid.*, paras. 41-43).

15. Again for the sake of methodological consistency, he was of the opinion that the draft articles should apply only to dangerous activities: paragraph 32 of the second report should therefore be read in the light of paragraphs 31-36 of the third report.

16. Article 2 was also slightly different from the earlier text. Paragraph 1 reflected what he had just said with regard to situations. Paragraph 2 had largely the same content as the three subparagraphs of paragraph 1 of the former article 2. Subparagraph (a) was almost identical to the first subparagraph of the former text, except that, in the Spanish text, the words *a cualquier cuestión* had been replaced by *a cualquier materia*. Subparagraph (b) referred to ships, aircraft and space objects which caused transboundary injury and were regarded as being within the territory or control of a flag-State, a State of registry or a State of registration, even when (*aun cuando*) they exercised rights of passage or overflight through an area over which the affected State had some jurisdiction. The earlier wording (“while exercising a right of continuous passage or overflight”) might have meant that such a situation would be excluded when it occurred in an area that was not within the jurisdiction of any State. It might be advisable to add the word “navigation” between the words “rights of passage” and the words “or overflight”, since the article also applied to the exclusive economic zone. Subparagraph (c) referred to the situation of two ships on the high seas, both of which exercised rights or asserted interests beyond national jurisdictions. Since ships, like aircraft and space objects, were regarded as being within the territory or control of a flag-State, a State of registry or a State of registration, any adverse effect by one on the other would be a transboundary effect.

17. In his comments on article 2 (*ibid.*, paras. 54-59), he had attempted a first approach to the concept of injury for the purposes of the draft articles and had tried to distinguish it from injury arising out of wrongful acts. The main distinction lay in the different types of conduct giving rise to injury: under the present draft articles, the conduct was lawful and injury was the result not of failure to fulfil an obligation, but of the occurrence of a risk. Since the activity in question would imply some benefit—for the affected State as well, in some cases—the injury would be the result of a disruption of the balance of the various factors and interests at stake. The amount of compensation would be calculated so as to redress the balance and that explained why, in most cases, it would be lower than the actual cost of the injury.

18. The absence of compulsory jurisdiction gave rise to the need to negotiate in order to assess the complex factors involved (in principle, those referred to in section 6 of the schematic outline). The task would obviously be easier if the parties had agreed to apply a particular régime to the activities in question.

19. In order to distinguish between the injury referred to in the draft articles and that resulting from a wrongful act, account also had to be taken of the two complementary concepts of “appreciable injury” and the “threshold” of injury. Below the threshold, there was no injury within the meaning of the draft articles, but merely an unpleasantness which the State had to bear for reasons of good-neighbourliness and also because, with modern technology, a State might not only be affected by, but also cause, an injury. In his comments (*ibid.*, para. 60 (b)), he had recognized that the combination of appreciable injury and the threshold

of injury was not characteristic exclusively of liability for risk, since it was also to be found in the law of the non-navigational uses of international watercourses, in which liability was none the less the result of failure to fulfil an obligation. He had also referred to the question of the inclusion of injury caused by polluting activities, which had already been discussed. Finally he had referred to injury caused by an unforeseeable event (*ibid.*, para. 60 (c)).

20. Article 3 was new. Subparagraph (a) should not give rise to any problems, for its inclusion was necessary so that the scope of the draft would not be too narrow. Subparagraph (b) dealt with a question on which few precedents existed. Some concern had been expressed in the Commission and in the Sixth Committee of the General Assembly about harmful effects occurring in areas beyond national jurisdictions. The question was an interesting but difficult one, particularly when it came to determining who would have a right of action in such cases, since, by definition, those areas were not within the jurisdiction of any State. The solution might be to set up a United Nations authority—a possibility that should not be ruled out if pollution continued to occur so frequently in all parts of the world. The draft articles were, however, not the right place in which to recommend such a solution. For the time being, article 3, subparagraph (b), and article 2, paragraph 2 (c), gave the affected State a limited right of action when its territory or an area beyond national jurisdictions in which it had a specific interest was affected by transboundary injury originating within the territory or control of another State, the terms “territory or control” being used within the meaning of article 2, paragraph 2. The Commission’s reaction would determine the fate of that provision, whose implementation might possibly involve participation by international organizations.

21. Article 4, which was very important, meant, in a sense, that a stand had been taken, for neither the schematic outline nor the five original articles had used the word “liability”, although the statement of principles in section 5 of the schematic outline did give some idea of the type of liability envisaged. He was submitting that article primarily in order to find out what the Commission thought of it. Two conditions were needed to engage such liability: first, the State of origin had to know or have means of knowing that the activity in question was being carried on within its territory or in areas within its control; and secondly, it had to know or have means of knowing that such activity created an “appreciable” risk of causing transboundary injury. As explained in the third report (*ibid.*, para. 66), the first condition met the concerns expressed with regard to developing countries, some of which had vast expanses of territory but no means of knowing what was going on in that territory, and it applied particularly to the exclusive economic zone. In that connection, he noted that the provision was based on the judgment of the ICJ in the *Corfu Channel* case, but it was not as strict for the State of origin because it did not make it an obligation for that State to know everything that was happening in its territory as a prerequisite for exclusive territorial jurisdiction. It was also based on the arbitral award in the *Trail Smelter* case concerning liability for transboundary injury caused by smoke emissions. It had

often been held that those two decisions applied to cases of State responsibility for wrongful acts. In addition to the arguments he put forward in his report (*ibid.*, paras. 67-68), he noted that, in the *Trail Smelter* case, the State of origin had been declared liable for transboundary injury even though all the necessary precautions had been taken—a typical case of liability for risk. With regard to the *Corfu Channel* decision, there was no reason why the presumption that the State had knowledge of everything that was happening in its own territory should be limited to responsibility for wrongful acts; it was, rather, linked to the general obligation not to cause injury to others.

22. The second condition related to what, as had been seen, constituted the basis for liability, namely knowledge of an “appreciable” risk. While it limited liability by requiring knowledge, it also established a presumption of knowledge, since the State possessed means of knowing. The word “appreciable” made it clear that the risk involved was neither concealed nor difficult to deduce from the nature of the means used for the activity in question. It could be a small risk of a major disaster, as well as a great risk of less important or cumulative injury. What counted was the possibility of perceiving or deducing the risk, for without such a possibility there could be no liability within the meaning of the draft articles.

23. The CHAIRMAN thanked the Special Rapporteur for his informative introduction to his third report (A/CN.4/405).

24. Mr. KOROMA congratulated the Special Rapporteur on his comprehensive and lucid introduction to the topic. He noted that the word “liability” was not defined either in draft article 2 on the use of terms, or in draft article 4, which dealt with liability itself. It would be helpful, however, if such a definition could be furnished at the outset.

25. He also noted that the Special Rapporteur had stated that the basis of liability was knowledge, whereas he had always understood that it was the injury caused. Thus, in certain specific circumstances, liability would be incurred whether or not the State of origin had knowledge of the injury. He appreciated that the trend of the topic was away from absolute liability, but there was a body of recent international legislation on outer space activities, for example, which still provided for absolute liability. He also considered that a distinction should be made between injury originating in the territory of a State and injury caused by objects, such as oil tankers or space objects. Such a distinction would help to determine whether or not knowledge was necessary in order for liability to be incurred.

26. Mr. TOMUSCHAT expressed appreciation to the Special Rapporteur for his introduction, which had provided enlightenment on a number of crucial issues. It would assist members in preparing their statements if the Special Rapporteur could provide some indication of the future structure of the draft and of how he proposed to proceed. One central issue to be considered was the relationship between the many conventions on specific aspects of environmental pollution and the draft rules which the Commission was to elaborate. Did

the Special Rapporteur see those rules as a kind of general framework or would they apply solely where no other convention applied?

Co-operation with other bodies (concluded)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

27. The CHAIRMAN invited Mr. MacLean, Observer for the Inter-American Juridical Committee, to address the Commission.

28. Mr. MACLEAN (Observer for the Inter-American Juridical Committee) said that the Commission performed on a world-wide scale similar functions to those performed by the Inter-American Juridical Committee for the region of the Americas and the two bodies had a long tradition of co-operation, as was shown by the annual visits of the Chairman of the Commission to the Committee. At a time when social, political, scientific and technical changes were rapid, violent and confused, the Commission and the Committee were performing a necessary task governed by reason.

29. Being convinced that it was possible to establish peace and justice and to secure the co-existence of different cultures and different political, economic and legal systems, the Committee had worked on many subjects, notably the following: international judicial co-operation in criminal cases; the serving of criminal sentences abroad; measures of economic coercion; interpretation and development of the principles of the Charter of OAS, as amended by the 1985 Cartagena Protocol,¹¹ with a view to strengthening relations between the States members of OAS; international legal problems relating to multilateral guarantees of foreign private investments; trends in international law; environmental law; improvement of the administration of justice in the Americas; expulsion and international law; returning of minors as between States; directives concerning extradition in drug-trafficking cases; and the draft additional protocol to the 1969 American Convention on Human Rights.¹² During the past year, however, the Committee had given most attention to two matters of crucial importance for life on the American continent: the first, which was the subject of two draft conventions, comprised certain aspects of international criminal law relating to one of the great scourges of modern times, namely international crimes; and the second was measures of economic coercion.

30. With regard to international criminal law, he noted that the American continent, like other regions of the world, had been suffering for several decades from a new form of crime. The traffic in narcotics and terrorism had become so widespread that crime was no longer a purely national concern. No country, however powerful, and still less a small country, could fight

alone against those scourges. The unexpected growth of the drug traffic, corruption and related crimes had forced States to take measures which they would not have thought of taking a few years ago. But those measures had proved insufficient, as had the judicial machinery established by the First International Conference of American States (1889-1890). For the contribution of INTERPOL, and the process of extradition of criminals, had brought a decline in co-operation between States themselves. Quite often the evidence of a crime was in one country and the *corpus delicti* in another, while the ramifications of the crime extended to three or four more countries. For instance, drugs were produced in one country, refined in another and consumed in a third. Unfortunately, a paradox had to be faced. If, for instance, a Costa Rican trader contracted a small commercial debt to a Peruvian and his creditor wished to recover the sum due to him, the Peruvian legal authorities could apply to their Costa Rican counterparts to take the necessary measures; on the other hand, if it was a question of finding a drug trafficker who had hidden the fruits of his crime in a company or a foreign bank account, there was at present no means of ensuring judicial co-operation between States—not because States were opposed to it, but because the technical-legal machinery was lacking.

31. In view of that situation, the Inter-American Juridical Committee had undertaken, a few years previously, a study of the question of international co-operation in criminal cases and had just completed a draft convention on mutual judicial assistance in such cases, which comprised 39 articles divided into five chapters. Although that draft convention covered all offences coming under criminal law, the Committee had been mainly concerned to combat the offence most frequently committed on the American continent, namely trafficking in narcotic drugs.

32. The draft convention provided for co-operation between judicial systems only in the case of offences that were punishable in all the States parties. The request for co-operation could, however, be refused in certain cases: if a prosecution for the offence in question was already in progress before a court of the party receiving the request; or if the request for mutual assistance related to an offence which the party receiving the request considered to be of a political nature, to be related to a political offence, or to be an ordinary offence prosecuted for political reasons, or to be a tax offence—although there seemed to be no reason to exclude co-operation in the case of tax offences, as had been shown by the discussion to which that exception had given rise. A State could also refuse the request for co-operation if it had good reason to believe that an inquiry had been opened with a view to prosecuting a person or group of persons for reasons of sex, nationality, religion or ideology; if the person prosecuted had already served a sentence or been amnestied or pardoned in respect of the offence prompting the request for assistance, or had been acquitted, or if the charge had been dismissed; if the request was made by an *ad hoc* court; or if the party receiving the request considered that to grant it might be prejudicial to public order.

* Resumed from the 2012th meeting.

¹¹ See OAS, *Anuario Jurídico Interamericano 1985* (Washington D.C.), 1987, p. 113.

¹² United Nations, *Treaty Series*, vol. 1144, p. 123.

33. The mechanism provided for—the rogatory commission—had already been used for centuries in Europe and for 200 years in the Americas for the purposes of judicial co-operation in civil and commercial cases. By means of the rogatory commission, a judge in one country could request a judge in another country to take the necessary action to collect evidence. Witnesses or experts could be questioned by a judge in one country at the request of a judge in another, and in certain cases they could be sent to the country of the judge making the request and appear before him. During their stay abroad, witnesses, whether free or detained, who went to testify in legal proceedings could not be prosecuted for an offence committed previously. If proceedings were opened against them, they must first be returned to the country from which they had come and could only be brought back by extradition procedures.

34. The exchange of information was another important feature of the draft convention. The ramifications of the international network of drug traffickers and terrorists were so complicated that countries were not always aware of everything that concerned them. The draft convention therefore provided that, if a court in one country convicted a foreigner, it must immediately inform the country of which he was a national. But if the person concerned had been convicted of drug trafficking, traffic in persons or terrorism, the court must also transmit the information to all countries participating in the inter-American system.

35. The second draft convention, which the Inter-American Juridical Committee had completed in 1986, was also concerned with criminal law; it dealt with a humanitarian question, being concerned with the person of the offender. Very often, and particularly in drug-trafficking cases, it was young and inexperienced people used by traffickers to carry drugs from one country to another who fell into the hands of the police and found themselves in prison in a foreign country. Deprivation of liberty was always distressing, but it was even more so when suffered in unfamiliar surroundings. The draft convention therefore aimed to ensure that, under certain conditions, an offender sentenced to imprisonment in a country of which he was not a national could be allowed to serve his sentence in his own country.

36. In that matter, the Committee had been largely guided by work done in the United States of America and Canada. The United States had in fact concluded agreements on the subject with many Latin-American countries. Jurists, whose ideas were often too nationalistic and who were jealous of the sovereignty of their national courts, had been disconcerted at the idea that an offender could serve his term of imprisonment in a country other than that in which he had been convicted. But it must not be forgotten that all modern works on penal science and criminology urged the readaptation of the offender in spite of the difficulties involved. Some countries had obtained impressive results in that regard, whereas in others, unfortunately, the conditions of detention were an obstacle. It was the country of which the offender was a national that was most concerned with his re-education and rehabilitation, since it was to that country that he would return to live after being expelled from the country where he had served his sentence. Thus a country which convicted a foreigner

did not suffer the consequences of his inadequate readaptation. That being so, the interest of the offender's country of origin in his re-education was justified, and from a humanitarian point of view it was less distressing for the offender to serve his sentence in surroundings with which he was more familiar.

37. Those arguments, which were easily understandable at the intellectual level, were opposed by a distrust rooted in the idea of the sovereignty of the administration of justice. Hence the convention could be applied only with the consent of the offender himself, of the State in which he had been tried and was supposed to serve his sentence, and of the State that was to receive him. If any one of them opposed the transfer of the offender, he would remain in the country where he was imprisoned. The draft convention further provided that the offender must have been convicted for an act which also constituted an offence in the State where he was to serve his sentence. Once he had been transferred to that State, the modalities of application of the sentence would be determined by its laws (with possible remission of sentence by probation, etc.). Nevertheless, the country in which the conviction took place retained full jurisdiction with respect to review of the trial. In none of the countries of the American continent belonging to OAS did a criminal conviction have the force of *res judicata* and a trial could be reopened at any time for the court to hear new evidence and possibly acquit a convicted person. Thus the country in which the conviction had been pronounced retained that faculty and its power of pardon, amnesty and remission of sentence. The country to which the offender had been transferred could in no case increase the period of imprisonment to which he had been sentenced; on the other hand it could allow him the benefit of a general amnesty. The draft convention on the serving of criminal sentences abroad, which was intended to apply to the whole American continent, comprised 19 articles and also applied to minors and persons whose physical or mental condition constituted grounds for exemption from responsibility.

38. The third draft convention prepared by the Inter-American Juridical Committee concerned measures of economic coercion. While there had been only five cases of economic sanctions, representing a cost of about \$90 million, between 1930 and 1935, there had been 22 cases representing nearly \$5 billion between 1980 and 1985—hence the need to study the question. The doctrine condemning recourse to economic coercion was essentially American; it had first been expressed in concrete form in what had become article 19 of the OAS Charter,¹³ before being taken up in other multilateral instruments, including the Charter of Economic Rights and Duties of States.¹⁴ But the Inter-American Juridical Committee had wished to define economic coercion or make the concept more precise, considering that article 19 of the OAS Charter had a very wide scope. It had also come to the conclusion that all coercive measures, both economic and political, were prohibited by the Charter of the United Nations, the Charter of OAS and general international law, except in the specific cases provided for in the Charter of the United

¹³ See footnote 11 above.

¹⁴ General Assembly resolution 3281 (XXIX) of 12 December 1974.

Nations. It had considered that the text of article 19 of the OAS Charter was not satisfactory because it was open to subjective interpretation and had proposed that it should be amended to read:

“No State may use or encourage the use of coercive measures of an economic, political or other character in order to force the sovereign will of another State or obtain from it advantages of any kind.”

39. During the past year, the Inter-American Juridical Committee had adopted other resolutions of a more specific character on co-operation in criminal cases and a resolution on the improvement of the administration of justice in the Americas. It had also amended its rules of procedure.

40. Lastly, for the thirteenth year in succession, it had held a seminar on international law in which the most eminent jurists of the American continent and about 50 students had taken part. The Committee hoped that the Commission's representative would visit it in August, rather than at its January session, so that he could attend the international law seminar, thus enhancing the seminar's prestige and strengthening the Committee's links with the Commission.

41. The CHAIRMAN conveyed the Commission's warm appreciation to the Observer for the Inter-American Juridical Committee for his informative statement on the Committee's work. He thanked him for the invitation to the Commission and noted his request that the visit by the Commission's representative should take place in August, so that he could attend the Committee's deliberations at the time when its annual seminar on international law was being held.

42. He had been impressed by the Committee's responsiveness to current world problems, as well as by the number of draft conventions it had prepared and by the speed with which it had dealt with the many topics on its agenda. The Committee's record was indeed remarkable and he had been particularly struck by the fact that it had completed three very important draft conventions, two of them concerning international criminal law and the third economic matters. He sincerely congratulated the Inter-American Juridical Committee on its achievements and asked its Observer to convey to it a message of cordial greetings and encouragement from the Commission.

43. Mr. THIAM thanked the Inter-American Juridical Committee, through its Observer, for the warm welcome given him as representative of the Commission. The Committee was like the Commission in many ways, notably in the multiplicity of influences at work in it and the subjects in which it was interested.

44. Mr. FRANCIS, after thanking the Observer for the Inter-American Juridical Committee for his detailed account of the Committee's work in 1986, asked him to clarify the draft convention applicable to illicit drug trafficking by young couriers. His question related to the possibility of a young offender convicted in the courts of a foreign country being allowed to serve his sentence in his own country. The offence committed abroad by a young courier was simply the end-product of a much larger conspiracy and, that being so, his

country should be required not only to enforce the sentence of imprisonment, but also to go further and try to find the author of the crime. It was hardly necessary to add that drug trafficking had affected the whole of the region to which he belonged.

45. Mr. MACLEAN (Observer for the Inter-American Juridical Committee) said that the Committee had hardly begun to explore the many measures to be taken to combat the traffic in narcotic drugs. The few results it had obtained made it very modest when considering the task that remained to be accomplished in regard to the sufferings caused by drug addiction. Two of the draft conventions he had referred to in his statement met the concerns of Mr. Francis. First, if a minor was arrested in a narcotics case and tried in country A, that country could obtain the co-operation of INTERPOL and, under the draft convention on mutual judicial assistance in criminal cases, a judge in country A could request the co-operation of a judge in country B to make inquiries about the persons who had incited the minor to commit the crime with which he was charged. Secondly, the minor might not be sent to prison, but be put under some régime of supervised freedom. The second draft convention allowed a delinquent minor to serve his sentence in his own country, which then had every interest in seeing to his readaptation, since it was that country which would suffer the effects of an absence of re-education and any consequent recidivism.

46. The CHAIRMAN said that the meeting would rise to enable the Enlarged Bureau to meet.

The meeting rose at 12.40 p.m.

2016th MEETING

Wednesday, 17 June 1987, at 10.05 a.m.

Chairman: Mr. Stephen C. McCaffrey

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Visit by members of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Evensen and Mr. Sette-Camara, Judges of the International Court of Justice, and said that their presence bore witness to the close relations between the Court and the Commission. The Commission was greatly honoured by their visit.