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Summary record of the 2016th meeting

Topic:
<multiple topics>

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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. Roucounas, 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.

Appointment of two new Special Rapporteurs

2. The CHAIRMAN said that, at its meeting the previous day, the Enlarged Bureau had agreed to recommend the Commission to appoint two new Special Rapporteurs: Mr. Arangio-Ruiz for the topic of State responsibility (agenda item 2) and Mr. Ogiso for the topic of jurisdictional immunities of States and their property (agenda item 3). If there were no objections, he would take it that the Commission agreed to appoint those two members as Special Rapporteurs for those topics.

It was so agreed.

3. The CHAIRMAN warmly congratulated Mr. Arangio-Ruiz and Mr. Ogiso on their appointment and assured them of the steadfast support of all members of the Commission. Their appointment would help the Commission to plan for the remainder of its five-year term of office, and he felt sure that the special rapporteurs for the various topics would usefully consult each other to that end.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (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[4])

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)[5] (*continued*)

4. Mr. REUTER said that, in order to appreciate the effort made by the Special Rapporteur in studying the present topic, it must be borne in mind that the Commission had never really accepted the topic, and that it had doubts not only about the particular solutions contemplated, but also, and especially, about how the subject was to be tackled and related to other topics in its programme of work. The Special Rapporteur had made no secret of the difficulties and had accordingly put a number of questions to the Commission. He would not try to answer them, but would only submit a few reflections for the attention of the Special Rapporteur.

5. There were perhaps two ways of considering the topic, the first and most logical probably being to approach it through the main problems it raised. The second way would be through the draft articles submitted by the Special Rapporteur. Having taken part in the Commission's discussions on the subject from the beginning, he would prefer to comment on the texts proposed before taking up the general problems raised by the topic.

6. Personally, he was prepared to accept the substance of the six draft articles. Moreover, it was not in the texts of the articles themselves that the Special Rapporteur had encountered the greatest problems, which he had discussed in his comments and in introducing his third report (A/CN.4/405). Nevertheless, he wondered whether most of those problems were really matters of drafting.

7. In draft article 1, he welcomed the use in all languages of the expression "physical consequence", which at least appeared to exclude for the time being any legal connotation; but the meaning of the word "situations" might be open to question, since it denoted something having a certain duration. That question deserved more careful examination; perhaps the Special Rapporteur would provide some clarification and other members of the Commission would comment on it. In article 1, the Special Rapporteur had also been faced with the problem of how to designate areas that were not strictly speaking part of the national territory, but over which a State exercised jurisdiction. He had used the term "control", which implied complete mastery by the State, and if he was contemplating areas other than the territorial sea and airspace, that would mean that the State exercised "control" over the exclusive economic zone or areas that were under lawful occupation, which would be an encroachment on the status of those areas. That was probably not what the Special Rapporteur intended.

8. The terminology used in draft article 2 did not always belong to the same philosophy in English as in French. For example, the expression "transboundary injury" in paragraph 1, which had purely physical connotations, had been rendered in French as *dommage transfrontière*, which had legal connotations. Paragraph 2 (*c*) referred both to a "right" and to an "interest". It had been said in regard to the draft articles on the law of the non-navigational uses of international watercourses that the interests in question were legally protected interests, which meant that they were comparable to rights. Was that so in the present case, or did the "interest" cover a more flexible notion? He regretted that there was no further mention in paragraph 3 of the physical origin of the activity.

9. He would not comment further on the terminology used in the draft articles, but pass on to the basic questions. The Commission was now working on three draft conventions which touched on responsibility, and another of which certain aspects were linked with responsibility. In each case it encountered important problems of terminology which were difficult to solve,

[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.

[5] For the texts, see 2015th meeting, para. 1.

for it was drafting texts concerned not with "common law" or French law, but with international law, and it must not make *renvois* to national laws. It was thus obliged to choose its vocabulary in a somewhat arbitrary manner. The time had come for the Commission to make that choice and to draw up a sort of glossary for use by all the special rapporteurs.

10. The Commission had followed Mr. Ago in part 1 of the draft articles on State responsibility[6] and been convinced that injury was not a condition for international responsibility; that had had the obvious merit of introducing the concept of crime into the draft. Crime was not the only element, however, and injury played a large part in that field; but part 1 of those draft articles had not dealt with the fundamental legal problem of causality, which arose again now in draft article 3, subparagraph (*b*). If the Commission established a system of causal liability, would that liability be transmitted indirectly? The Special Rapporteur would have to take a position on that point in the part of his report dealing with liability in general. One example would be the case of an international crime committed against a State which left destitute one of its nationals who had creditors abroad. A causality was thus transmitted to the creditors, who could not recover what was owing to them. Had the State of which the creditors were nationals any grounds for invoking international responsibility?

11. Draft article 4 raised the problem of imputability or, as it would be better to say, "attribution", which was an unequivocal term. The attribution of an act to an entity raised a serious problem which also involved causality. In that connection, he was concerned to note that problems of pollution were dealt with at the same time as disturbances caused by a violent phenomenon. For whereas in the case of a nuclear accident the cause was simple and direct, it was much less so in the case of pollution of a river, for instance. On the assumption that water was never pure, the pollution of water meant exceeding a limit. While a new activity might suffice to make pollution reach or exceed that limit, the fact remained that other activities had contributed to the pollution of the river in question. How were all those activities to be treated which had also been the cause of the event—in that case, of pollution—though at a time when it had had no legal consequences? Could that case really be treated in the same way as cases in which the physical cause took the form of a single act?

12. He understood and accepted the Special Rapporteur's idea of preparing some rather general draft articles relating to only one of the possible cases of liability without a wrongful act, namely the case of the "dangerous object"—a notion familiar to the French courts, which had had to pronounce, for example, on the "dangerous" character of a motor car stolen from its owner, which had been the cause of an accident. After noting in passing that the sphere of liability and that of legal construction had only a very small part in written law, he raised the question whether the draft articles should give a definition of a dangerous object or include a list of dangerous objects. He had no fixed opinion on that question, but knew that Governments would probably never accept a text that did not contain provisions enumerating dangerous objects. Liability without fault was an audacious concept for contemporary international law and presupposed unquestioned solidarity between States. Without being able to give a precise answer to the question put by the Special Rapporteur on that point, he believed that the Commission should make some kind of reservation according to which the future convention would apply only to clearly defined activities.

13. As he had already said, he had no objection to the idea of limiting the scope of the draft articles to "dangerous objects", but he thought it would be an illusion to believe that the Commission could always avoid the wrongful act. That view was borne out by the 1972 Convention on International Liability for Damage Caused by Space Objects and by the regional conventions on civil liability relating to nuclear energy. Moreover, the Special Rapporteur seemed to be aware of that fact. In conclusion, he hoped that the special rapporteurs, while retaining their freedom of action, would keep in touch with one another and act in concert, for the Commission often met with the same questions in the different reports submitted to it.

14. Mr. THIAM said that the delimitation of the scope of the topic caused him all the more concern because the study of the topic would be useful only in so far as did not duplicate the work on State responsibility. But a reading of the Special Rapporteur's third report (A/CN.4/405) was far from dissipating his doubts on that point. In speaking of "situations", for example, the Special Rapporteur appeared to be extending the scope of the topic. If, in the case referred to by the Special Rapporteur (*ibid.*, para. 26 (*b*)), a State must show that it had taken all the measures expected of it in a particular situation, that meant that it was bound by certain obligations; consequently, one came back to the question of responsibility for a wrongful act. Similarly, a situation due to a natural disaster could be assimilated to a case of *force majeure* and liability could then not be invoked.

15. Turning from the basis of liability to the subject that could be held liable, he drew attention to the distinction made by the Special Rapporteur (*ibid.*, para. 33) between State activities and the activities of private persons, who could not be made liable. If a State had authorized a private company to carry on certain activities, would it not be liable for damage caused by those activities? It would be difficult to answer that question in the negative if the State had not taken all the necessary precautions or placed the company concerned under an obligation to take those precautions.

16. He also noted that the Special Rapporteur made a distinction between "effects" and "injury", a distinction which did not seem justified and was not recognized in all legal systems. In codifying international law, reference should not be made to notions that were not recognized by all legal systems. With regard to injury itself, the Special Rapporteur gave the impression that full reparation might not be made if the State suffering the injury also benefited, to some extent, from the acts causing it. The Special Rapporteur even gave

[6] *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

the impression that it would be more practical to establish some sort of scale of compensation. Should the Commission go so far in analysing injury? Was it not rather for a judge to assess damage according to the circumstances? Questions of fact were within the judge's province. Admittedly there was a "tariff system" for damages in some legal systems; he was thinking in particular of accidents at work where account was taken of the fact that the enterprise benefited both the employer and the employee and that it was not in the interests of either of them that it should come to an end. But could it be considered that that was so in the present instance and that a State which suffered injury through the acts of a neighbouring State must suffer the consequences of only partial reparation of the damage, merely because the acts were not wrongful? Generally speaking, he believed that, in the field of liability, the aim was to repair the damage as fully as possible.

17. Mr. BENNOUNA said that the topic under consideration belonged largely to the future, and the reflections it provoked might have repercussions in other spheres. It could, indeed, be seen that a continuum extended between responsibility for wrongful acts and liability for acts which were not prohibited, and that any attempt to distinguish one from the other was artificial and arbitrary, for things took a different and more generalized form in practice; it would thus be for the courts to judge on a pragmatic basis, according to the circumstances of each case. Practice would probably take little notice of theoretical distinctions made by the Commission. But it must also be recognized that the topic was not purely theoretical and that technical developments would undoubtedly lend it increasing current interest. The question that arose was whether it could be dealt with on the basis of general principles.

18. During the Third United Nations Conference on the Law of the Sea, there had been long discussion in the Third Committee on the question of liability for risk, in order to decide whether the concept of strict liability should be introduced into the draft convention. The question was already far advanced in maritime law. Liability for risk presupposed the solidarity of users, the definition of dangerous activities, the institution of a system of prevention and the establishment of a guarantee fund to which all States engaged in dangerous activities would contribute. That kind of mechanism already existed in various fields.

19. The Commission had undertaken to draw up a draft convention of a general nature, and the difficulties were thus even greater. The Special Rapporteur, who was aware of the difficulties, intended to study dangerous activities and to provide for prevention machinery; but that meant providing for the intervention of third parties at various stages in the conduct of those activities. Everyone knew how reluctant States were to give their general consent to intervention by third parties, in other words fact-finding missions and supervision exercised by third parties over activities that were not prohibited. Personally, he was not opposed to the intervention of third parties or to prevention mechanisms including inquiries, expert reports, conciliation, etc., but he believed that that kind of obligation would be difficult for States to accept.

20. The draft articles submitted by the Special Rapporteur unfortunately did not enlighten the Commission on the scope and the basis of liability. If the Commission decided to adopt the concept of liability for risk, it would necessarily have to draw up a list of dangerous activities. But was it really possible to draw up such a list and secure its acceptance? The question could also be approached from the point of view of abuse of rights. A State had rights which it could exercise in its territory and in areas over which it had jurisdiction; but those rights were accompanied by obligations, including the obligation not to abuse them. It would then be necessary to specify what was meant by abuse and to define the consequences. Whichever approach was adopted, the Commission would have to demarcate the present topic and that of liability for fault and determine what belonged to one type of liability and what belonged to the other.

21. That being so, even if the Commission settled that question, it could not avoid dealing with the different technical problems raised by liability, including causality and attribution. He considered it essential to identify the link between a physical act, an injurious event and its possible author, especially as the Special Rapporteur had rightly pointed out that he was not dealing only with the situation of adjacent States, but with acts whose consequences had effects beyond neighbouring States. Everyone remembered the 1986 nuclear disaster which had had repercussions outside the continent in which it had occurred.

22. Mr. GRAEFRATH said that the Special Rapporteur's excellent third report (A/CN.4/405) summarized much of the earlier material and responded to many of the suggestions made during the Commission's debate at the previous session and in the Sixth Committee of the General Assembly. Since the report contained general provisions rather than substantive articles, it provided an opportunity for making some general remarks on the topic under consideration.

23. There was a wealth of legal literature which gave the impression that the principle of strict liability existed in international law. That fact, however, had simply strengthened the conviction of States that no such general principle of strict liability for injurious consequences arising out of lawful acts had been established in international law. State practice showed that that form of liability remained an exception; it was nowhere a general technique of damage allocation. The strict liability principle was applied only when States specifically agreed on it.

24. Despite the philosophical principles often invoked in support of that form of liability, the Commission itself had never attempted to formulate a general rule or principle of strict liability. It had confined itself from the outset to certain activities, and had not dealt with injurious consequences in general, but only with "physical consequences" adversely affecting other States, whatever that might mean.

25. It had often been said that the liability concept could be logically derived from the general principles of international law, and especially from the principle of the sovereign equality of States. Legal rules, however, were not the result of pure logic: they had to be agreed

to by States. Thus the existence of the principle of sovereign equality did not make it unnecessary for States to agree on the rules governing the freedom of the high seas, for example. On the contrary, detailed provisions were needed to regulate in a just and equitable manner the exercise by States of their sovereign rights in that sphere. That example showed how necessary and how difficult it was to draft sufficiently specific rules based on the general principle of sovereign equality when divergent interests had to be reconciled. That was an ongoing process: scientific and technological advances would always create new problems and require the formulation of new rules to adjust the application of general principles to new situations. That process could not be replaced by logic or by reference to legal maxims such as *sic utere tuo . . .* or moral postulates such as "the innocent victim should not be left to bear the burden of his loss", which might sound reasonable, but did not create legal rules.

26. He fully agreed with the Special Rapporteur when he said that he "seriously doubts that this principle can be considered operative in general international law without a more specific norm, at a lower level of generality, which would make it operate" (*ibid.*, para. 67). He also agreed that there were two main ways of applying the principle of sovereign equality: either through rules prescribing a certain conduct or result, or through rules relating liability to the damage caused. On that point, the Special Rapporteur stated that "strict liability is simply a technique of law to achieve certain goals" (*ibid.*, para. 68). Precisely for that reason, he himself was convinced that strict liability could not be deduced from general principles. Since it was a legal technique and a means of achieving certain goals, it could become law only by virtue of an agreement between States to apply that particular technique to achieve those goals in certain circumstances.

27. Furthermore, since the same object could be achieved by different techniques, no legal consequence could be deduced from the object itself, and States must decide, as they constantly did, which technique to apply. When they wished to apply the technique of strict liability, they did so by concluding a treaty. Liability for lawful acts was neither a customary rule nor a general principle. It existed only to the extent that it was established by an international agreement.

28. There was accordingly no basis for asserting strict liability as a general rule of international law applicable to all transboundary harm, which would be tantamount to adopting the concept of "absolute liability". As pointed out by the Special Rapporteur, absolute liability was "difficult to accept at the present stage in the development of international law" (*ibid.*, para. 16).

29. With its work on the present topic, the Commission was attempting to develop rules of international law which States could use in their mutual relations in certain cases of transboundary damage caused by certain lawful acts. The Special Rapporteur had made it clear from the outset that no attempt was being made to impose strict or absolute liability, and that care was being taken to limit the field of application of the liability principle, so as to make it acceptable to States.

30. In addition the Commission should stand by the idea so well expressed by the previous Special Rapporteur that liability comprised two elements: rules directed at prevention and rules for minimizing, or compensating for, damage caused by lawful acts. The purpose of limiting the scope of liability could be achieved by two methods. One was the method of enumeration, which would consist in drawing up a list of all the dangerous activities in respect of which liability was considered the appropriate technique of damage allocation. That was more or less the method followed by States. They had singled out certain dangerous activities and had developed different formulas for implementing liability. With regard to nuclear activities and the transport of dangerous goods, some States had agreed to co-ordinate the civil liability of operators under internal law and had created compulsory insurance systems. States had also agreed to guarantee a certain amount of compensation over and above that to be paid by the operator. It had to be admitted, however, that even those treaties had been ratified by only a very few States. Moreover, IAEA was now working on proposals for harmonizing the two existing conventions on liability in the field of nuclear energy: the 1960 Paris Convention and the 1963 Vienna Convention.

31. The treaties to which he had referred were far from establishing the principle of the international liability of States; they merely co-ordinated the civil liability of operators. In other words, they co-ordinated rules of internal civil law relating to liability. The only international legal instrument that established strict liability for States was the 1972 Convention on International Liability for Damage Caused by Space Objects. Opinions were rather divided on whether that Convention could serve as a model for a multilateral instrument relating to claims brought by States against each other, for the Convention had remained an isolated case. State practice in the past 15 years had not producted a single other example of that kind, so it could be concluded that the 1972 Convention could not be generalized or used as a model.

32. When making preventive rules, State practice had preferred the method of enumeration, as could be seen from the many bilateral and multilateral treaties dealing with environmental problems. The other method, advocated by both Special Rapporteurs, would be to limit the scope of liability by laying down certain general criteria. That approach also created certain difficulties, however, and a reference to the dangerous activities to be covered by the criteria, at least in the commentary, could not be avoided. He noted from the Special Rapporteur's third report (*ibid.*, para. 37) that one of the three limitations or conditions by which it was suggested that the scope of the draft articles should be circumscribed was a physical consequence. The main purpose of that limitation was to exclude economic and social effects from the scope of liability, which was regrettable, since most of the adverse consequences affecting millions of people in the modern world were of an economic or social nature. The importance of economic and social consequences had been clearly recognized by R. Q. Quentin-Baxter, who had referred in his fourth report to two boundary lines, one forbidding "the abrupt adoption of a new system of obliga-

tion, based upon the principle of causality or strict liability", the other forbidding "the wholesale transfer of pioneering experience in the field of the physical uses of territory to the even less developed field of economic regulation".[7] It would be dangerous for the whole draft to omit either of those two boundary lines; hence he did not think that economic and social consequences could be excluded and strict liability established for the rest.

33. The Special Rapporteur had introduced a further criterion in his third report (*ibid.*, para. 12), namely "appreciable risk", which he had dealt with specifically in article 4. That raised the question of the relationship between articles 1 and 4. It seemed to him—and he supported that approach—that the scope of the articles, as defined in article 1, was considerably narrowed by the provisions of article 4. It was possibly for that reason that the Special Rapporteur stated that it would be useful to include the adjective "appreciable" in article 4, since the description in article 1 was too broad and covered any type of risk (*ibid.*, para. 70). Why, therefore, had the criteria of appreciable risk and predictability laid down in article 4 not been included in article 1, which defined the scope of the draft? He agreed with the Special Rapporteur that the word "risk" was too broad, but was not sure that the expression "appreciable risk" was clear enough. In any event, determination of the matter could not be left to a settlement procedure that would come into operation only after damage had been caused.

34. Predictability within the meaning of article 4 comprised two elements: the State of origin must know that the activity was carried on in its territory, and it must know that the activity created an appreciable risk. That confirmed that the draft covered any activity—public or private—carried on in the territory of the State. It was not altogether clear from the Special Rapporteur's report, however, whether pollution of the environment was excluded (*ibid.*, paras. 59 (*a*) and 60 (*b*)). If it was, that should be indicated in the articles; if it was not, the commentary should be more explicit. He would also be grateful if the Special Rapporteur could provide some examples of injury caused by an unforeseeable event (*ibid.*, para. 60 (*c*)).

35. Article 4 placed knowledge and the means of knowing on the same footing. There were two possible consequences of that approach. On the one hand, if a State had the means of knowing, liability would be incurred even if the State did not know what it should have known, in which case the predictability criterion formulated in article 4 would have an aggravating effect. On the other hand, if a State did not have the means of knowing and so could not have known of the activity, the criterion would have an exonerating effect and State liability would be ruled out. The Special Rapporteur explained (*ibid.*, para. 66) that the words "or had means of knowing" could protect developing countries, since they often lacked the means to monitor activities taking place in very extensive regions. More often than not, however, developing countries did not have the means of knowing whether an activity was likely to entail appreciable risk, for they frequently lacked the skilled labour, technology and equipment necessary to monitor the modern chemical and other industries managed and controlled by foreign corporations. That was a far more important point, and raised the question whether a dangerous activity carried on by a corporation engendered the liability of the State of its nationality.

36. If it was accepted that the territorial State—the State in which the corporation was carrying on the dangerous activity—could not be held liable because it had no means of knowing, then the State of nationality of the corporation, which did have the means of knowing the risk, should be held liable for the damage caused, irrespective of whether it was the State where the corporation had its registered office or had been incorporated, or whether it was the State whose nationals held the majority of the shares. He wondered whether the point was really covered by paragraph 3 of article 2, which defined as the State of origin "a State within the territory or control of which an activity . . . occurs". Furthermore, since the Special Rapporteur considered that paragraph 3 of article 2 did not need further explanation (*ibid.*, para. 54), he would like to know whether, assuming that a territorial State had no means of knowing about and therefore could not control the dangerous activity, and assuming also that the State which controlled the activity of the corporation working in a foreign territory did have such means, the latter State could be held liable for the physical consequences suffered by another State. That would seem to be the normal interpretation, given that the words "territory or control" were quite often used in international instruments to refer to a State which was in a position to monitor the activities of a legal person or an object, on account of its territorial sovereignty or because it otherwise had control over those activities. That interpretation would also be in keeping with the expanded scope of the draft under paragraph 2 (*c*) of article 2, and with the maxim, so often quoted in the report, that the innocent victim should not be left to bear the burden of his loss.

37. He believed that it would be well to group together all the conditions relating to scope, which were scattered through the draft, in order to establish an indicative list of the dangerous activities and consequences that would eventually be covered by the criteria. Such a list would clarify the position, and might also assist States not only in dealing with the subject, but also in reconsidering their approach.

38. A further point concerning the scope of the draft related to article 2, paragraph 5, and article 3, according to which transboundary effects included effects on persons or objects within the territory or control of an affected State. It was clear from article 2, paragraph 2 (*c*), and article 3 that the words "within the territory or control" applied beyond national jurisdictions. Moreover, as the Special Rapporteur pointed out (*ibid.*, para. 52), the situation envisaged in article 2, paragraph 2 (*c*), "could have a far-reaching and interesting consequence" when an activity conducted anywhere had repercussions in the territory of a State or on persons or objects under the control of that State. In addition, the Special Rapporteur stated that "every State would have a right—as soon as and as long as it was affected in

[7] *Yearbook . . . 1983*, vol. II (Part One), pp. 204-205, document A/CN.4/373, para. 12.

its territory—to set in motion the machinery and procedures provided for in the present articles" (*ibid.*, para. 53). That also applied to article 3. Careful thought should therefore be given to the consequences, which might be even wider than those mentioned in the report (*ibid.*). As the Special Rapporteur pointed out (*ibid.*, para. 43), the definition in article 2, paragraph 5, covered persons and objects and it would therefore include foreigners and their property as well as the property of foreign States. Thus the rights were not limited to the States in whose territory the adverse effects were felt. He was not sure that the cumulative effect of those two definitions was desirable or necessary, but if it was, attention should be drawn to it.

39. The expression "transboundary injury" was used to denote not only transboundary harm or loss caused by a wrongful act, as in article 6, but also transboundary adverse effects caused by lawful acts involving appreciable risk, as in article 2, paragraph 6, and article 4. The Special Rapporteur rightly pointed out in his report that there was a great difference between the duty to make reparation in the case of State responsibility for wrongful acts and the duty of reparation in the context of State liability. The difference arose when the claim to reparation in the latter context was reduced to a compensation claim, and continued as it became clear that it was dependent not directly on the damage caused, but on many other factors, as the Special Rapporteur explained (*ibid.*, paras. 57-58). Possibly, therefore, the word "injury" should be reserved for a breach of a legal obligation which might, but need not necessarily, entail material damage. In the context of liability, it would be better to speak of "harm" or "loss" rather than "injury", to make it clear that the reference was to material damage and also to avoid any confusion with injury caused by wrongful acts.

40. In his report (*ibid.*, para. 17), the Special Rapporteur asked how the existence of an appreciable risk could be determined and then referred in passing to agreement between the States concerned. It was the latter element, however, which provided the real basis for any such determination; for even if States agreed to seek a third-party decision, the determination whether a certain activity involved an appreciable risk would be the outcome of agreement between the States concerned—just as the Commission's draft would acquire legal force only as and when it was accepted by States. Hence he did not agree with the Special Rapporteur that it would be "imperative to resort to machinery for fact-finding" (*ibid.*). Nor did he accept the statements that "for the purposes of the present study, the objective opinion of a third party is the only way out of the impasse" (*ibid.*, para. 18), and that "if third-party involvement in ascertaining these facts is not accepted, no régime will be able to function" (*ibid.*, para. 19). He was convinced that it was for the States concerned to decide what activities should be deemed to entail appreciable risk, and what means or machinery they would use for the settlement of disputes.

The meeting rose at 12.35 p.m.

2017th MEETING

Thursday, 18 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, 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. Razafindralambo, Mr. Reuter, Mr. Roucounas, 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 (*continued*) (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[4])

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)[5] (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he would reply only to some of the issues raised in the discussion so far. In reply to a question by Mr. Tomuschat (2015th meeting), he explained that general lines for the development of the present topic had already been submitted in 1982 in the form of a "schematic outline". That outline had two basic objectives, one being to propose to States certain procedures for the establishment of régimes to regulate activities which gave rise or might give rise to transboundary harm, and the other being to provide for situations in which such harm had occurred prior to the establishment of a régime.

2. The schematic outline had been well received by the General Assembly, and the then Special Rapporteur, R. Q. Quentin-Baxter, had been encouraged to proceed

[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.

[5] For the texts, see 2015th meeting, para. 1.