Document:-

A/CN.4/SR.2020

Summary record of the 2020th meeting

Topic:

International liability for injurious consequences arising out of acts not prohibited by international law

Extract from the Yearbook of the International Law Commission:-

1987, vol. I

of action should be associated with the obligation of prevention and negotiation with a view to the establishment of a régime. He appreciated the Special Rapporteur's efforts to take account of the interests of developing countries by making it a condition for liability that the State of origin either had to know or had to have the means of knowing that an activity might cause injury. With regard to the two other conditions which must, in the Special Rapporteur's view, be fulfilled —namely that the activity in question had to be carried out within the territory of the State of origin or in areas within its control, and that it had to create an appreciable risk of causing injury—he pointed out that that wording appeared to apply only to potential risk, in other words to the stage following the occurrence of any actual injury. Article 4 was therefore likely to give rise to the reservations to which he had referred in connection with the obligation to establish a régime of prevention. He had no particular comments to make on the other draft articles.

55. Mr. AL-KHASAWNEH congratulated the Special Rapporteur on his thought-provoking reports, which, together with those of his predecessor, R. Q. Quentin-Baxter, had enabled the Commission to make great strides in charting the boundaries of a challenging and complex topic. Mr. Riphagen, a former member of the Commission, had described the topic as "the unfinished part of public international law",[18] but account now had to be taken of the fact that it had received a fair amount of approval both in the Commission and in the Sixth Committee of the General Assembly, even if that approval had been only tentative and somewhat tacit.

56. At the same time, it had to be recognized that, despite the progress made, the scope of the topic had been only partly explored and major questions as to its basis in international law and its usefulness remained to be settled.

57. It followed that the Commission was faced with difficult choices with respect to its future work on the topic. In that connection, it should be emphasized that responsibility for those choices lay with the Commission as a whole and not only with the Special Rapporteur. As Mr. Quentin-Baxter had pointed out in 1983:

> . . . a special rapporteur was not an advocate for his topic: his duty was to offer his views on the best way to approach it and to marshal information and relevant arguments. The handling of the topic then became a matter between the Commission and the General Assembly. . . .[19]

58. With such collective responsibility in mind, it had to be decided what choices were open to the Commission. It might, for example, be concluded that conceptual differences were notoriously hard to reconcile and that work on the topic should therefore be discontinued, if only for the sake of rationalization. Yet what was at issue in the present case was the role the Commission should play in responding to the needs of States and of the international community as a whole at a time when the reality of the interdependence of States and awareness of how hazardous the world had become called for inventiveness and ingenuity on the part of the Commission. Assharany, a fifteenth-century Egyptian mystic and jurist, had once said that "the wisest of men are those who can best interpret their times". He himself was of the opinion that, if the Commission could not find ways of responding to the international community's changing needs, other bodies would—not only in the field of the environment, but also in other fields where physical phenomena made themselves felt.

59. To suggest that work on the topic should be discontinued because it had no basis in contemporary international law was not only to miss the point of the work, but also to make the concept of progressive development of the law meaningless, for that concept presupposed the formulation of new rules based on justice and equity, as well as on the rules of logic and morality. Unlike Mr. Graefrath (2016th meeting), he did not believe that international law developed on the basis of approval by States, rather than on the basis of logic and moral precepts. Without wishing to underestimate the principle of sovereignty, he had to point out that it could hardly be the exclusive source on which the Commission's work depended, even in areas where interdependence was less readily recognizable.

The meeting rose at 1.05 p.m.

[18] *Yearbook . . . 1983*, vol. I, p. 263, 1800th meeting, para. 16.

[19] *Ibid.*, p. 260, para. 1.

2020th MEETING

Wednesday, 24 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, 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.

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]

[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.

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. AL-KHASAWNEH, continuing his statement from the previous meeting, said that maxims such as *sic utere tuo ut alienum non laedas*, or to express it in the terminology of Islamic law, *la dharar wa la dhirár*, and the principle that an innocent victim should not be left to bear his loss—which was also found in Islamic law and doubtless in other legal systems as well—were much too broad to constitute legal rules. That fact, however, should not obscure their relevance or applicability, for they were part of the reservoir of moral and intellectual ideas from which the principles and rules of all legal systems were derived.

2. Another drawback, which might tempt the Commission to give up the present topic, was the existence of terminological difficulties. They could hinder attempts at progressive development and codification for fear of the unknown. A heavy reliance on terms used in one particular legal system—for example, the common law—could give the impression that the concepts underlying those terms existed only in that system and had no place in a universal instrument. Those fears were none the less exaggerated. If one looked beyond the actual words, one was struck by the similarity of concepts in the various legal systems. For instance, it could safely be asserted that most of the terms employed in the reports now under consideration connoted concepts in Islamic law, although of course under different headings and applications. He accordingly urged members to keep terminological difficulties in mind but not to be discouraged by them.

3. The second choice before the Commission, one which he was inclined in principle to favour, was to continue work on the topic and see how far it was possible to go. The Commission, out of its sense of professional commitment, should make that effort. Even if the end-product ultimately proved unacceptable, it was possible to take comfort in the thought that a complete draft would have been provided for States and publicists to criticize. If, on the other hand, the end-product commanded general acceptance and proved timely, the Commission's efforts would have been adequately rewarded.

4. The Commission's immediate task, however, was to see how far it could go, and that raised a number of interrelated questions about the content and scope of the topic and about the degree of progressive development that was politically feasible.

5. First, the draft articles under consideration were notable for the almost total absence of rules of substance. The articles on scope and definitions were followed by some saving clauses and then by what had been described as a "genuine conciliation procedure". The heart of the draft thus consisted of a number of procedural provisions. That was not all the international community expected of the Commission and he strongly urged that more room should be made for substantive provisions. The formulation of such provisions would of course call for ingenuity if the draft was not to encroach upon the domain of general secondary rules governing State responsibility.

6. In that connection, the "original sin" referred to by the Special Rapporteur might well have been committed by the Commission itself when it had decided to study State responsibility in terms of primary and secondary rules, the logical result being to put a strait-jacket on topics which, like the present one, existed in a twilight zone.

7. The present topic had been described as *terra incognita*; but the territory had already been mapped, albeit approximately. Furthermore, it had already been cut down to half its size by the decision to exclude economic activities. The previous Special Rapporteur, R. Q. Quentin-Baxter, had been fully aware of the fact that the decision not to deal with economic activities meant a collapse of the unity of purpose of the topic. One of the arguments he had advanced in support of that decision was that State practice in the area was non-existent at present. Mr. Quentin-Baxter's suggestion, however, had not been that economic activities should be left out altogether but that that aspect of liability should be dealt with in a manner similar to the Commission's treatment of the law of the succession of States. Accordingly, the Commission should avoid giving the impression that it was oblivious to the logical and moral issues involved in restricting the topic to physical activities. It should be understood that, once State practice developed, the Commission would take up the question, although a greater element of progressive development would be called for.

8. The question also arose as to how to introduce greater precision into the draft. The matter of the list of legitimate activities giving rise to transboundary harm had been raised by Mr. Koroma (2018th meeting) and satisfactorily answered by the Special Rapporteur. Such a list was obviously desirable, but it ran the risk of very early obsolescence.

9. He had doubts about the viability of the approach of drawing distinctions between land uses, water uses and air uses, although it had been recommended in a study by the Asian-African Legal Consultative Committee with regard to nuclear activity. Any such division was bound to be arbitrary. The best frame of mind in which to approach the present topic was an increased awareness of the unity of the physical universe.

10. He had the same doubts with regard to what had been called "ultra-hazardous" activities, but was prepared to admit that, if the topic was confined to such activities, it might be easier to arrive at an agreement on the question of strict liability. The topic had already

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

been further delineated by the introduction of the concept of the "threshold" of appreciable physical harm, a concept which also had an impact on the question of strict liability. Personally, he did not favour any further attempts at delineating or narrowing down the scope of the topic; the Commission should be able to live with the degree of generality so far achieved in its work.

11. The unity of purpose of the topic reappeared in a different context when it was borne in mind that one of the goals was to encourage agreements between the States concerned and to provide residual rules in the absence of such agreements.

12. Suggestions had been made for a "framework agreement" and he wished to reiterate his criticism of such an approach, made earlier in connection with the topic of the law of the non-navigational uses of international watercourses. As he saw it, that approach was the very negation of the idea of progressive development and codification, the aim of which was to furnish a set of rules in a clear and uniform instrument. An argument in support of the framework approach was that it would increase the specificity of applicable rules. But the result might well be rules so specific and so dependent on unpredictable factors as to become what Mr. Quentin-Baxter had termed "non-principled solutions", and that process might lead in the end to a mosaic of rules representing the antithesis of codification.

13. The negotiations for an agreement on such specific rules would in all probability depend on variables such as the relative strength of the negotiating parties, not to mention the skill of the negotiators. Yet surely the prime task of the legislator was to provide not a tailor-made solution to fit every case, but a general yardstick with built-in flexibility.

14. There was also the related problem of the political will of States and their general disposition to co-operate. When those elements were present in abundance, the topic became redundant. More often than not, however, that will and that disposition could not be assumed. The present topic, like that of the law of the non-navigational uses of international watercourses, was essentially a compromise between the reality of interdependence and the principle of territorial sovereignty. The problem became clearer when one considered that the end-product was intended for world-wide use. The raison d'être of the present topic was the realization that neither national legislation nor regional agreements were sufficient to deal with the problems involved, and a telling example was the fact that half of the pollution in Norway was generated in the United Kingdom,

15. Since the end-product was meant for use by a heterogeneous world, it was obvious that some of the procedural duties mentioned in the schematic outline might prove unrealistic. It was not realistic to expect States at war with each other or which did not recognize each other to apply the duty to inform and to negotiate. Those examples were not exceptional, but simply extreme manifestations of a common phenomenon, namely the lack of political will and of a general disposition to co-operate. Hence the Commission would be well advised to take such situations into consideration.

16. He had a few tentative suggestions to make as to how far, and in what ways, the draft could reflect those political realities. First, a greater role should be assigned to international organizations both in providing technical assistance in fact-finding and in aiding the process of negotiations.

17. Secondly, the normative aspect of the draft should be strengthened, a point that concerned the draft's acceptability to States. It had been said that the prospect of that acceptability came at the cost of a significant dilution of the normative content of liability. He himself, however, had always considered that acceptability to States was not necessarily related to the inferences that could be drawn from the debates in the Sixth Committee of the General Assembly. In that connection, it should be stressed that the small and weak States that formed the majority of the world community would probably be attracted more by a clear normative instrument that defined their rights and duties than by a system of conciliation with variables that usually worked against them.

18. Thirdly, the duty of prevention should be strengthened and amplified in the draft. Admittedly, initiative should not be discouraged and he was fully aware of the right of States to deal with nature within their territories. That was an extension of perhaps the most fundamental of rights, namely the right of survival. It must be remembered, however, that the draft was governed by the concept of "appreciable physical harm" and hence by the weakest interpretation of the maxim *sic utere tuo ut alienum non laedas*. Harm beyond that threshold was likely to be irreparable and it would be almost impossible to compensate for it. Everything would ultimately depend on how highly one regarded the idea of progress.

19. On the vexed question of strict liability, the previous Special Rapporteur had said in his fourth report that:

> . . . wrongfulness and strict liability are often regarded as the active principles of two quite distinct systems of obligation—the only possible systems of obligation that legal reasoning admits. . . .[6]

Starting from the premise that the present topic fell outside wrongfulness, a simple exercise in logical elimination led to the conclusion that the draft had to be governed by a standard of strict liability. Besides, that standard had a good claim to being a general principle of law within the meaning of Article 38 of the Statute of the ICJ. The standard of strict liability, which conformed with fairness and morality, also had a claim to be regarded as a general principle of common sense and efficiency. In his second report, the present Special Rapporteur had cited an interesting passage from a study by Ms. M. H. Arsanjani, who had emphasized that strict liability was now accepted by most legal systems, "especially those of technologically developed countries with more complex tort laws", adding that "while States may differ as to the particular application of this principle, their understanding and formulation is substantially alike" (A/CN.4/402, footnote 61).

[6] *Yearbook . . . 1983*, vol. II (Part One), p. 216, document A/CN.4/373, para. 51.

20. It had been claimed during the discussion that State practice did not support the principle of strict liability. True, State practice in the matter was not abundant, but it was nevertheless possible to speak of a nascent practice, which should be helped by the Commission's efforts. In that connection, two considerations had to be kept in mind. The first was that the scope of the draft had already been narrowed significantly by the limitation of the activities covered and by the requirement that the threshold of appreciable harm had to be reached. Secondly, a strict-liability standard was desirable in as much as the interests of developing countries should be protected, and it should not be moderated unduly by negotiations and shared expectations. He mentioned that consideration with hesitation, not because it lacked merit but because a North-South element was best introduced in the Sixth Committee.

21. In any event, the scarcity of State practice could not be an overriding consideration and should be viewed in the wider context of the Commission's role, the need for inventiveness in the light of the reality of interdependence and the need to give substance to the concept of progressive development.

22. On the basis of those considerations, his tentative conclusion was that the draft should incorporate a degree of strict liability that was strong enough to be meaningful. At the same time, it should be noted that, even in the case of an activity with the risk of causing injury beyond the threshold of appreciable harm—such as nuclear activity—exceptions had been introduced to moderate the operation of the principle, as in the case of the provisions of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, as modified by the 1964 Protocol. On the other hand, it would be going too far in the other direction to state, as did the Special Rapporteur, that, in cases where there was no existing régime, liability should be "of the least strict form". His own view was that the existence of a strong degree of strict liability should be presumed and exceptions thereto should be introduced, for example *force majeure*, fortuitous event, negligence by the victim and the intention of third parties to cause harm.

23. He was not at all certain that it would be of any assistance to the Commission's work to introduce the concept of shared expectations into the draft, and he noted that the Special Rapporteur shared his doubts (*ibid.*, para. 55).

24. Subject to drafting improvements, the draft articles themselves were largely acceptable. Nevertheless, he would urge that the distinction between natural situations and man-made situations drawn by the Special Rapporteur in his third report be studied further. It was important to bear in mind that the draft spoke of "activities", and not "acts". The distinction, which was already an arbitrary one, was also likely to become blurred.

25. The Commission was obviously working on a "simple model" which should be developed in order to take account of situations where one or more States of origin and one or more affected States were involved. A particularly complicated case, but one that had actually occurred, was where nationals of one State held shares in a company in another State and the legitimate activities of the company caused harm in their own State. In that case, it was necessary to examine questions concerning the joint liability of States and of corporate liability. That was not likely to prove an easy exercise, bearing in mind that questions concerning the liability of the territorial State and sometimes of the State that had physical control would also have to be taken into consideration in the model.

26. Lastly, the title of the topic would have to be reworded and brought into line with its scope, which was now confined to physical activities. Unfortunately, that rewording would have the effect of making even more unwieldy the present serpentine title.

Mr. Díaz González, First Vice-Chairman, took the Chair.

27. Mr. SHI said that the debate on the topic showed that the deeper the Commission went into fundamentals, the harder it was to make any headway. Indeed, that had been the situation since the topic had been placed on the Commission's agenda in 1978. He would thus refrain from discussing the major theoretical issues, so as not to add to an already complicated situation, and would confine himself to a few general remarks on the Commission's course of action. Before doing so, however, he wished to pay tribute to the Special Rapporteur, whose six draft articles constituted a valuable contribution to the progress of work on the topic.

28. He had no doubt as to the need for the progressive development and codification of the law on the present topic. The General Assembly's decision to assign the Commission a mandate to work on the subject in itself testified to the need of the community of nations for that progressive development and codification. In recent years, the need for a legal régime defining the rights and obligations of States with regard to activities not prohibited by international law had been corroborated by the concerns of States about the injurious effects of modern industry, science and technology on the ecological environment and the direct injury they caused to many innocent people in the States of origin and in other States. Nevertheless, he concurred with the view that, apart from a few international conventions which provided for the liability of States parties to make reparation to other States parties for damage caused as a result of activities specifically defined in the conventions, the concept of international liability for harm caused by lawful activities of States did not exist in general international law.

29. Accordingly, the topic could be said to be novel and unprecedented. For that reason, the Commission had encountered a number of fundamental and difficult theoretical and doctrinal issues. The first was the determination of the legal bases for the topic. Another was the question whether strict liability existed in customary international law. Yet another was whether the concept of prevention could be made an element of liability. Since 1978, there had been much divergence of views on all those and other basic issues.

30. For want of theoretical guidance, the Commission's work on the topic had been very slow. As he saw it, there were two ways in which the Commission could try to get out of that predicament. The first was to request the General Assembly to defer the Commission's consideration of the topic. Such a deferral would not in any way hinder States from continuing as usual to enter into specific agreements regarding liability for injury caused as a result of specifically defined hazardous activities not yet governed by specific régimes. Another argument for deferral was the Commission's heavy work-load. Suspending work on the present topic would afford the Commission an opportunity to make progress on the topic of State responsibility, which had been before it for such a long time. There were precedents for such a course: the draft Code of Offences against the Peace and Security of Mankind had been deferred for a number of years for perfectly valid reasons.

31. Another solution would be for the Commission to leave aside all difficult theoretical issues for the time being and to adopt a working hypothesis for the topic, which could be drafted by the Special Rapporteur on the basis of the first three principles of section 5 of the schematic outline. Those principles were that States of origin should be assured as much freedom of choice in regard to activities within their territory or jurisdiction as was compatible with the interests of other States; the principle of prevention; and the principle that an innocent victim should not be left to bear his loss or injury. Adoption of those three principles should not, however, be construed as acceptance by the Commission of the concept of strict liability or an admission that prevention formed part of liability. The Commission could draft articles on the basis of that working hypothesis, with due regard for the needs of States and for the practicability and acceptability of the rules to be formulated. It should also give careful consideration to the scope of the activities to be covered by the draft articles and the balance of the rights and interests of the State of origin and the affected State.

32. There was no lack of precedent to show that it was perfectly feasible to formulate draft articles without first resolving basic theoretical issues. For example, the Charter of the Nürnberg Tribunal for the trial of the major war criminals had been formulated to meet the practical needs of the times, with little guidance from legal theory or State practice, but the result had been endorsed by the United Nations in its fight against nazism and fascism and had been hailed by peoples all over the world. Despite the fact that some of the basic theoretical issues had subsequently been a source of legal controversy, the Nürnberg principles were now well established. Another concept now accepted by States which had also been the subject of much heated debate was that of the common heritage of mankind. In his view, therefore, the Commission could, with the approval of the General Assembly, create new concepts that were acceptable to States, as had happened in the case of the law of the sea.

33. Accordingly, the Commission should either request the General Assembly to defer consideration of the topic, on the ground that it was still not ripe for codification and also because other topics of long standing on the Commission's agenda had to be completed, or alternatively adopt a working hypothesis along the lines he had suggested.

34. The six draft articles submitted by the Special Rapporteur in his third report (A/CN.4/405) were, on the whole, acceptable, although they did raise certain problems. For instance, a list of the activities to be covered by the draft should be included in the article on scope, otherwise the draft was unlikely to meet with general acceptance.

35. Mr. OGISO congratulated the Special Rapporteur on yet another masterly report on a highly complex topic. It had been recognized both by the previous Special Rapporteur, R. Q. Quentin-Baxter, in his fourth report[7] and by the present Special Rapporteur in his third report (A/CN.4/405) that there was a consensus that the scope of the draft articles should be confined to physical transboundary harm. Matters such as product liability or transboundary harm of an economic nature therefore fell outside the scope of the draft. It was gratifying to note in that connection that the Special Rapporteur had retained the word "physical" in draft article 1, but the same word should be inserted before the words "transboundary injury" at the end of draft article 4.

36. The Special Rapporteur's approach to strict liability differed somewhat from that of his predecessor. For example, the expression "strict liability" did not appear in the schematic outline, nor was it to be found in the draft articles under consideration. The Special Rapporteur had none the less referred to that concept in his second report (A/CN.4/402, para. 11), in a passage cited from the previous Special Rapporteur's fourth report. Owing to certain omissions, however, the passage gave the impression that the previous Special Rapporteur had envisaged the possibility of adopting strict liability rules: in his own view, that had not been so. The previous Special Rapporteur had not suggested, in the passage in question, that strict liability was an established international legal rule, but rather that the principles set out in section 5 of the schematic outline might be justified only through a review of State practice. The present Special Rapporteur had yet to complete that review and it would therefore be going too far to infer a rule of strict liability from general deductions without a more detailed examination of State practice. Furthermore, the argument adduced by the present Special Rapporteur regarding possible mitigation of the automatic operation of the strict liability rule[8] would not be valid unless an examination of State practice revealed that the principle of strict liability was to be found in international law.

37. He was not sure whether the Special Rapporteur intended to introduce into the draft the concept of shared expectations, but if he did, it should be spelt out in the article on the use of terms, since it was an important new concept which triggered the duty of reparation.

[7] *Yearbook* ... *1983*, vol. II (Part One), p. 201, document A/CN.4/373.

[8] See *Yearbook* ... *1986*, vol. II (Part Two), p. 56, para. 198.

38. Work on the topic was complicated by the lack of State practice, particularly in the areas of notification, negotiation and reparation, and it was not clear whether the duty to inform and to negotiate had been established as a generally applicable international legal rule. Consequently, it would be desirable for the draft to contain a recommendation that the States concerned should make arrangements for those purposes. In that connection, he had noted with interest that, in the schematic outline, the previous Special Rapporteur had used the word "duty" rather than "obligation", and "should" instead of "shall".

39. As far as the duty of reparation was concerned, State practice showed that there were several forms of allocation of damages for lawful activities, which did not always entail the liability of the State alone. Indeed, under most treaties, an operator engaging in certain dangerous activities was primarily liable for damage caused by such activities, the State being the warrantor for the operator's liability. For example, under the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the liability of the operator for any nuclear damage was absolute and the State of origin was required to guarantee payment of claims for compensation for nuclear damage which had been established against the operator by providing the necessary funds to the extent that insurance or other financial security covering the operator's liability was inadequate to satisfy such claims (art. VII, para. 1). Similar "mixed liability" rules were to be found in other treaties governing the operations of nuclear vessels and the carriage by sea of nuclear material. The extent of such liability, however, and especially the relationship between the civil and international elements, might still be open to debate. On the other hand, the direct liability of the State for damage caused by lawful activities had been recognized in only one case, namely in the 1972 Convention on International Liability for Damage Caused by Space Objects, specifically in article II thereof. As indicated in the preamble, article II had been drafted on the basis of the need to ensure the prompt payment of a full and equitable measure of compensation to victims of damage which might on occasion be caused by space objects. In his view, that formula had not been established as a general rule of international law and the strict liability rule would therefore not be generally applicable to all cases of international liability arising out of various kinds of lawful activities.

40. With regard to the draft articles themselves, he was a little doubtful about the expression "appreciable risk" in article 4, particularly since it did not appear in article 1. If that expression was to be retained, however, it should be defined in article 2, since it involved a very vague concept.

Mr. McCaffrey resumed the Chair.

41. Mr. BARSEGOV said that he first wished to congratulate the Special Rapporteur on the considerable amount of work he had done on an extremely complex and controversial yet highly topical subject. Regardless of one's views on the possible solutions to the questions involved, it had to be recognized that the Special Rapporteur had truly sought to find bases for his own approach to the topic. The advances in science and technology and the growing interdependence between States meant that it had become indispensable to deal with questions concerning the injurious transboundary effects of lawful activities conducted by States on their own territory. Quite clearly, a solution to the problem of liability incurred in that connection would make for greater confidence between States, foster inter-State co-operation, and avoid the adverse impact of scientific and technological developments and the deterioration of the environment.

42. Two trends had emerged in international regulation of the matter. The first consisted in dealing with the question in the context of specific problems arising out of certain activities: the peaceful use of outer space, industrial activities—particularly the chemical industry—the use of nuclear energy, the use of water resources, and so on. The second lay within the framework of the topic under consideration and was apparent in the effort being made to formulate general principles. To set its work on the right track, the Commission should engage in an objective evaluation of the current legal situation.

43. Like it or not, the fact remained that, at the present time, it could not yet be said that the liability of States for transboundary injury caused to a third State as a result of lawful activities was institutionalized. As a set of rules based on fundamental and universal general principles, State liability for transboundary injury caused in the territory of another State as a result of lawful activity still did not exist. In terms of law, there was no general obligation requiring States to adopt preventive measures and to supply information on, for example, the construction work they were planning. Such an obligation stemmed solely from specific intergovernmental agreements regulating all the questions connected with the possible emergence of harmful consequences on a foreign territory or with the elimination of such consequences.

44. It was for that reason that the problem under consideration was new, even if it had already arisen in some particular cases. For example, in the case of environmental pollution, the principle of the liability of States had been formulated in very general terms in international declarations that were in the nature of recommendations, particularly in the Stockholm Declaration,[9] Principle 21 of which set out in general terms the idea of liability for the effects of pollution on territories situated beyond the State's jurisdiction. However, not all aspects of the problem were considered exhaustively in that principle of general liability, which, in the way it was formulated, was not adequate, and that was revealed by Principle 22, which stated:

Principle 22

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

The direction provided by Principle 22 in regard to the development of rules of international law was entirely justified. At the present stage, international practice was moving towards the elaboration and adoption of

[9] See 2017th meeting, footnote 6.

agreed rules concerning that kind of liability in specific fields of activity. The material liability of a State for damage caused by carrying out a lawful activity on its territory or in areas of common use stemmed from agreements in force.

45. Broader and more thorough legal bases for settling questions of liability incurred for the injurious consequences of lawful acts in specific fields would afford genuine opportunities for subsequent codification of the current norms and for the formulation of general legal principles. In the absence of provisional regulation of the specific issues connected with concrete aspects of activities giving rise to injurious consequences, it would be extremely difficult to elaborate general legal principles concerning liability incurred for transboundary injury arising out of lawful activities conducted by States on their territory.

46. Soviet legal science and the practice of the Soviet Union sought to find a solution to those questions and to other international issues of common interest for the good of each State and of mankind as a whole. The Soviet Union took an active part in resolving those questions in concrete fields of activity. For example, it had been at the origin of the elaboration and adoption of the 1979 Convention on Long-range Transboundary Air Pollution,[10] which it had been the first to ratify, along with its two protocols.[11] On the basis of those principles, at the First Special Session of the IAEA General Conference, held from 24 to 26 September 1986, the Soviet Union had proposed a programme for establishing an international régime for the safe development of nuclear energy for peaceful purposes.[12] The Soviet programme was designed to create a system to prevent nuclear accidents and minimize the effects of such accidents for other countries, and one of the major elements related to liability for transboundary damage.

47. The Soviet Union advocated the establishment of common international standards concerning accidental concentrations of radio-nuclides and levels of radioactive contamination in affected areas. The elaboration and adoption of such international standards were indispensable not only for all countries to be able to take adequate measures of protection, but also to provide a legal basis for claims concerning transboundary damage caused by radioactive emissions. The Soviet approach was that it was essential to settle the question of liability for nuclear harm for the purposes of regulating various aspects of safety in the production of nuclear power. The Soviet Government drew the attention of the international community to the fact that the absence of a carefully devised international régime, acceptable to the majority of States, for liability for damage resulting from nuclear accidents constituted a grave lacuna in the legal bases for international co-operation to develop nuclear energy for peaceful purposes. Although attempts at international regulation had already been made in various fields relating to the safety of nuclear energy, the question of political, moral and material harm in the event of an accident at a nuclear plant had not been examined sufficiently, hence the attempts to use nuclear accidents to increase tension and distrust in inter-State relations.

48. In solving the problem, account obviously had to be taken both of the global interests of mankind and of the interests of the various countries—those of the people who had to suffer the harmful transboundary effects and those of the people on whose territory the accident had occurred. As a national of the country in which the Chernobyl accident had occurred, he had been particularly appreciative of the international solidarity which had been displayed in helping his country to eliminate the consequences of the accident. The Soviet people had been deeply grateful for the efforts of the American physician, Dr. Robert Gale, and many other persons, who had been prompted by purely humanitarian concern. But it had reacted sharply to the deplorable attempts made to exploit the accident for political reasons and to speculate on the misfortune of other people. It had not been the misfortune of a few people; it had been the misfortune of one and all. The Soviet Union had none the less done everything possible to minimize the consequences of the accident, not only on its own territory but also on the territory of all other countries. For that reason, the above-mentioned Soviet programme envisaged the establishment of an international instrument that could provide for the liability of States for damage caused at the international level by a nuclear accident and for the material, moral and political consequences of acts carried out on the pretext of defence against the consequences of nuclear accidents—for example, the spreading of unscrupulous information, the adoption of unwarranted restrictive measures, etc.

49. That had a direct bearing on the Commission's work in the field of liability for transboundary injury: such abnormal reactions towards the country that had been the first victim of a nuclear accident might well emerge in other fields. A unilateral approach could lead to injurious consequences for many other countries, particularly the developing countries, if a similar accident, whether or not nuclear, occurred in those countries and their foreign policy, for instance, was not acceptable to one State or another. The point of departure should be that no one was safe from such tragedies at a time of rapid advances in science and technology. Everything should be done at the legal level to prevent the adoption of an approach that was lacking in objectivity. In the case of the transboundary consequences of lawful activities—and not of wrongful activities, which entailed different consequences—the Commission should recognize that the first victim of accidents and other events involving environmental pollution and other harmful consequences was precisely the country in which the accident took place. For that reason, the Commission should guard against a unilateral and egocentric approach. An example of such a narrow viewpoint was to be found in the third report (A/CN.4/405, para. 15), which stated that "it is fair and logical that whoever derives the principal benefit from the dangerous undertaking or activity must assume the costs thereof, and not pass them on to third parties". Taken to its logical conclusion, such an approach would be not only unjust, but also blinkered, for

[10] E/ECE/1010.

[11] ECE/EB.AIR/11 and ECE/EB.AIR/12.

[12] IAEA, document GC(SPL.I)/8.

it would overlook the possibility that those who now viewed things solely from the standpoint of an impartial observer or a victim of transboundary injury might soon find themselves in the same predicament. Such an approach was a disservice to the progress of science and technology and hampered the advancement of civilization, since, in a way, it imposed a penalty on pioneering scientific and technological developments from which mankind as a whole stood to benefit.

50. The establishment of general principles should not stand as an obstacle to science and technology. Yet such a danger did exist and could well become a reality if the social function of law was ignored, a function which, in the present instance, consisted not only in rendering justice to the victims of injury and preventing the recurrence of such injury, but also in not placing shackles on the progress of science and technology or the advancement of civilization by declaring that any ultra-modern work was dangerous and in some way liable to punishment. Accordingly, the draft articles under consideration should at least incorporate some element of balance, in other words provisions under which it would be inadmissible to cause moral and political harm to the country in which the injury had occurred and under which liability would be established for such harm, caused unjustifiably under the pretext of protection against the harmful consequences of activities that were lawful under international law.

51. It was the wish to formulate rules which took account of the interests of all countries, which were just, which were based on scientific principles, which would hold firm against subjective distortions and which were realistic and practical that shaped the Soviet position on the present topic, not only in specialized international agencies and in diplomatic meetings but also in the formulation of rules which, generally speaking, would establish liability for all injurious transboundary consequences. Rules relating to international liability were now under discussion, particularly in IAEA, an agency in which the Soviet Union had proposed the conclusion of a new multilateral convention that would do away with the limitations of the Paris and Vienna Conventions, instruments of a regional character that viewed liability in terms of civil law and dealt solely with injury caused to private persons or to organizations. They left aside questions pertaining to inter-State relations, including liability for harm caused to the environment. The Soviet Union had therefore advocated a broader approach that took particular account of the needs of the modern world. It had also envisaged the possibility of elaborating provisions on liability for transboundary injury, but unfortunately had encountered opposition in that regard. Some States had taken the view that the question of State liability for nuclear accidents was very complicated and could give rise to controversy. According to them, "the temptation to make haste on the pretext that domestic public opinion needed a palliative would have to be resisted. The establishment of a new international régime of State liability in the nuclear field would have far-reaching implications and accordingly needed the most careful study."[13] At the same time, IAEA had been invited to take into consideration the results of the Commission's work, although the Commission had not achieved any results in that field.

52. He had drawn attention to those facts simply to show that the formulation of legal rules, even in an area for limited regulation of specific activities, was not without great difficulties, in terms of international law and in technical terms. The difficulties could well prove even greater in the formulation of general rules applicable to all types of lawful activities. Moreover, most members of the Commission had pointed to the difficulty of the task and many had said that the question was not ripe for codification. Suggestions had been made to deal only with certain aspects of the question or merely to enunciate general principles. Analysis of the documents submitted to the Commission and the debate on the topic had clearly shown that members still did not have at their disposal the requisite legal materials to formulate precise provisions establishing the cases and the circumstances in which liability was incurred for the consequences of lawful activities, as well as the legal bases and the extent of such liability. Until such time as the legal nature of liability under international law was examined with the necessary clarity and precision, until such time as the numerous technical problems outstanding were settled and the relevant international rules and other criteria were worked out, not only would it be impossible to assess risk or injury properly, but there would be no objective basis for determining the extent of liability and the amount of compensation for injury.

53. The artificial or hasty formulation of binding general rules in matters pertaining to international liability for all lawful activities, in the absence of concrete legal elements establishing the types, thresholds and other criteria and conditions of such liability, would do no more than foment endless discussions and conflicts, without the necessary legal basis to resolve them. In view of the present climate in international relations, such an approach could well turn such a delicate question into a political game, played in bad faith. By endeavouring to hasten things, the Commission not only would not facilitate but would prevent just and speedy settlement of the question of liability and reparation in the light of the interests of all parties.

54. Consequently, the sole genuinely realistic way for the Commission to proceed was to resolve first a number of absolutely essential questions which had not yet been sufficiently developed in the theory of international law, in international treaties or in international relations. It was not that the Commission should slow down its efforts: rather it should focus them appropriately so as to find the link that would enable it to unwind the entire chain. Just as a building was started with the foundations, so the Commission should lay the foundations for its work on the international rules concerning the concrete fields of lawful activities.

55. Unfortunately, the materials available to the Commission, although they bore witness to the Special Rapporteur's wish to justify the necessity and even the possibility of formulating rules on liability, raised more questions than they answered. The lack of precision started with the very title of the topic, which was "International liability for injurious consequences arising out

[13] Statement by the delegation of the United States of America at the 667th meeting of the Board of Governors of IAEA, held at Vienna on 19 February 1987.

of acts not prohibited by international law", not "International liability for injurious consequences arising out of lawful acts" as the rules of formal logic required in view of the title of the set of draft articles on responsibility for wrongful acts. Yet the present topic concerned activities that people conducted every day—agriculture, industry, construction, the use of water resources and nuclear energy, etc. The choice of the title of the topic therefore raised a number of questions, and further explanations were needed. It should be clearly and directly specified that the injury in question was injury arising out of a lawful activity.

56. Even the conceptual basis for the study of the topic was uncertain. He had already mentioned the difficulties involved in the attempt to assimilate the legal concepts of certain countries—in the present instance, the concepts of the common-law countries—to those of international law. It should be emphasized that "international" law, if it was to be described as such, should employ concepts common to all countries. But in fact different and sometimes contradictory interpretations were being offered for concepts drawn from the legal system of one or a few countries. One could, if the worst came to the worst, choose concepts that were close to one another. Yet to do so it would be essential to hold firm to clear and definite notions that were lacking in the system from which those concepts were drawn. The situation was further complicated by the fact that notions from internal civil law were being applied to international law. He had tried to discover how those who upheld the English doctrine had applied the common-law notion of liability to international law and had found that the Commission in fact went much further.

57. For example, Brownlie[14] simply noted that "it may happen" that a concrete legal rule provided for compensation for the consequences of acts qualified as lawful or "not unlawful", and he illustrated that possibility by referring to a legal situation that was completely different from the one covered by the topic under consideration by the Commission. Brownlie spoke of reparation for loss or damage caused by the boarding and searching on the high seas of a foreign vessel mistakenly suspected of piracy and other wrongful acts. With reference to cases of lawful activity conducted by a State on its own territory that engendered the obligation to pay reparation, Brownlie considered the issue from the angle of abuse of rights, which presupposed that the person invoking that obligation should produce evidence that a right had been exercised only in order to cause damage, without any advantage to the person entitled to the right. Brownlie found an application of that thesis in the practice of international tribunals, and particularly in the PCIJ's judgment in the case concerning *Certain German Interests in Polish Upper Silesia* (Merits).[15] It was Brownlie's conclusion that the principle of abuse of rights came under the heading of the progressive development of the law and did not exist as a general principle of positive law. The members of the Commission who sought to apply the notion of liability to international law thus proved to be bolder than the representatives of the common-law countries.

58. Even if the Special Rapporteur's explanations regarding the conceptual differences between responsibility and liability were accepted, the first course should be to formulate articles containing definitions of the basic terms and then find equivalents in all the working languages. It seemed from the Special Rapporteur's explanations that "liability" meant no-fault liability, but even English legal dictionaries gave different definitions of that concept. It was therefore essential for the Commission to agree on the meaning of all those terms.

59. Again, the key element in the proposed régime, around which the ideas of reparation and prevention were constructed, seemed to be physical injury—not only actual injury, but also potential injury. But it was difficult to see how injury which had not occurred could lie at the origin of an international obligation concerning not only reparation for injury, but also its prevention. The explanations given by the Special Rapporteur, in which potential injury was assimilated to risk, viewed as the basis for the régime, were not clear, particularly those contained in his second report (A/CN.4/402, para. 5).

60. The defect of some of the notions used by the Special Rapporteur was that they introduced subjective factors such as evaluation of risk. Yet, given the dynamic change in scientific and technological possibilities, the consequences of subjectivism could be serious. History afforded many examples of the ill effects of such a subjective approach, for instance the conservative reactions to the first appearance of the railways, the discovery of electricity, etc. Other notions, on the other hand, were imprecise as a result of objective factors, for example the geographical location of the activity (A/CN.4/405, para. 10), which might produce different effects depending on the type of activity in question and the size of the country's territory.

61. According to the Special Rapporteur, an activity could be considered as entailing risks only if it was capable of being evaluated. Unquestionably, only specialists could make a reliable evaluation for each kind of activity. Hence he could not agree either that "on first examination it is generally not difficult to appreciate the risks created by certain new activities or certain variations on existing activities" (*ibid.*, para. 11), or that "predictability may be general in that cases may be predictable in a general rather than in a specific sense" (*ibid.*, para. 13).

62. When it came to determining injury and consequently establishing liability, another difficulty arose because the injury occurred in a number of stages: emission of the pollutant, transboundary displacement and interaction with the elements of the environment. For example, the pollution might be cumulative from various sources in the territory of various States. It was extremely difficult, in both technical and legal terms, to determine which part of the injury was attributable to a particular source and to a particular aspect of the activities, and it could not be done without special means. Furthermore, account should be taken of natural factors—for instance, wind direction—which had very dif-

[14] I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), pp. 443 *et seq.*

[15] *Judgment No. 7, 1926, P.C.I.J., Series A, No. 7.*

ferent characteristics. It was a highly specialized task that called for suitable methods and means to be worked out to identify and differentiate between the sources of pollution and evaluate the scope of the harmful effect from each source. Thus arose the technical problem, and consequently the legal problem, of identifying the source of the transboundary pollution that had caused the injury. In addition to the differences regarding the sources of pollution as between the countries of origin, the differences connected with the types of activities had to be borne in mind. In that regard, the Special Rapporteur apparently believed that a State should take action against epidemics or disasters so as to ensure, above all, that they did not extend into neighbouring countries (*ibid.*, para. 26 (*b*)). The need for international co-operation to combat an epidemic or a natural disaster was undeniable, but it was difficult to see how they could entail liability. Should it not be presumed, in such a case, that the State on whose territory the disaster had occurred was taking, in its own interest and in that of its population, all the measures that were required?

63. The Special Rapporteur, endeavouring to solve the problem of liability without taking full account of existing practice, and doing so before international rules had been worked out, took the view that discretionary assessment by a third party was the only way out of the impasse and that, if third-party involvement in determining the factors for the appraisal was not accepted, no régime would be able to function (*ibid.*, paras. 18-19). It would be remembered that, for a topic analogous to the one under consideration, namely the law of the non-navigational uses of international watercourses, the Commission had decided not to adopt procedures involving third parties. Serious thought should therefore be given to the usefulness of such procedures for the present topic, since it seemed impossible to conceive of any machinery for establishing the facts if there were no scientific rules applicable to each type of activity: regardless of the procedure chosen to settle disputes, liability should be determined on the basis of an objective approach and not empirically.

64. Lastly, it was essential to begin by demarcating the topic in the light of the activities of other competent international organizations. It had already been said that consideration of the question of preventing transboundary injury should, in view of its technical aspects, be left to the specialized agencies. The Commission's aim should be to formulate not general theoretical provisions, but concrete and precise rules to facilitate the settlement of disputes in the light of the interests of all parties, thereby contributing to greater harmony and better understanding between States. Since concepts drawn from the legal systems of the common-law countries had to be used instead of concepts common to international law, it was necessary to work out, first of all, a "scheme of understanding", to agree on a set of notions based on international law and not on municipal law, so as to have equivalent terms in all the languages, and to include definitions of all the basic terms in the articles.

65. Pending the Commission's decision on the way in which it was to continue its work on the topic, he reserved his position on the draft articles.

The meeting rose at 1 p.m.

2021st MEETING

Thursday, 25 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, 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.

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. BENNOUNA said he was glad that the Commission, in response to the wishes of the Special Rapporteur, had held a fruitful discussion which had thrown some light on a subject that was fascinating in its topical interest, but difficult because of its novelty. The Commission should now fulfil its mandate from the General Assembly by completing the study requested of it.

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[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.