

Document:-
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Summary record of the 2023rd meeting

Topic:
<multiple topics>

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

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16. Another question was the title of the present topic. He objected in particular to the words "not prohibited", which distorted the focus of the topic and could be taken to mean that any act not prohibited by international law was in fact permitted. Besides, that formula appeared to go beyond the scope of the present topic in its impact on various other activities and their lawfulness under international law.

17. There was no lacuna in the law as he saw it, only in the approach of those called upon to apply it. International law had a creative and innovative aspect which should not be overlooked, and the impression should not be given that it consisted of a body of negative principles. Indeed, if that were so, there would not have been a law of the sea nor would the principle of the common heritage of mankind, already mentioned by Mr. Shi (*ibid.*), now be established in international law for all time. The words "not prohibited" were therefore neither helpful nor desirable and should be deleted from the title of the topic. It might be possible to speak instead of lawful activities of States or activities authorized or permitted under international law. One member had mentioned inherently lawful and inherently unlawful activities; but the word "inherently" applied more specifically to dangerous activities than to the broader activities covered by the present topic.

18. With regard to the Special Rapporteur's third report (A/CN.4/405), he felt that it was proper to emphasize "knowledge" or "means of knowing" as a test for determining the liability of a State. He further noted that it would be more appropriate not to dissociate the notions of "territory" and "control", as the Special Rapporteur did (*ibid.*, paras. 44 *et seq.*), in any assessment of State liability.

19. He trusted that the ideas he had advanced would receive the Commission's careful consideration, particularly since other members had already warned against undue generality and conceptualization.

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

The meeting rose at 11.25 a.m.

2023rd MEETING

Tuesday, 30 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCaffrey

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

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (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.2⁴)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR
(*concluded*)

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 (*concluded*)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate on the topic, said that the main conclusions to be drawn were, first, that the Commission should endeavour to fulfil the mandate it had received from the General Assembly; secondly, that the draft articles should not discourage the development of science and technology; and thirdly, that prevention should be linked to reparation in order to preserve the unity of the topic and enhance its usefulness.

2. A number of general principles were also applicable, including the principle that every State should have as much freedom of action within its territory as was compatible with respect for the sovereignty of other States; the principle of prevention and the related principle of reparation in the event that harm occurred; and the principle that an innocent victim of injurious transboundary effects should not be left to bear his loss. It was important to note that, while there had been a difference of opinion as to whether those principles were accepted principles of customary international law, it had not been suggested that they were inadequate in terms of the subject-matter they would govern.

3. Some members of the Commission had advised him to be cautious and more realistic, while others had urged him to be firm and even audacious. Perhaps his true course lay in being cautious as to the scope of the topic, firm in the case of principles and realistic about procedures and obligations. In any event, he was fully aware of the need for the political support of States, as well as of the practical problems to which any set of articles on the topic would give rise.

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.

4. One of the many issues raised related to the nature of the proposed articles and the question whether a draft framework convention or a set of recommendations was being prepared. Mr. Mahiou (2018th meeting), for instance, had stated that the schematic outline could provide the basis for a régime of liability, while Mr. Shi (2020th meeting) had said that the Commission should avoid theoretical problems by proposing a working hypothesis and continuing to draft articles. His own view was that the Commission should seek to draft a set of coherent articles that would be compatible with the principles of law and justice and then take a decision in the matter or leave it to the General Assembly to decide.

5. Another issue concerned the foundation of the topic, which was, in his view, harm, whether actual or potential. It had been suggested that he intended to take the concepts of shared expectations and *abus de droit* as the foundations of the topic. However, he had never proposed that shared expectations should serve as a foundation, only that they should be a condition for mitigating strict liability. Nor had he ever mentioned *abus de droit*, which, in his view, was not firmly rooted in international law, was seldom, if ever, invoked by international courts as a basis for their decisions, and was virtually unknown in certain systems of law. Unjust enrichment and the expropriation of amenities had also been mentioned, but they were merely different ways of saying the same thing and none could be the basis for liability in the context of the present topic.

6. There was nothing exotic about the doctrine of strict liability, which had followed the same evolution in international law and in internal law. The only question was how to couch that concept in general terms. The Commission should not, however, continue to question the theoretical foundations of the topic.

7. He agreed that harm was at once the element which generated liability and the condition for reparation. In the case of State responsibility for wrongful acts, harm was something different, since it placed an obligation on the delinquent State to restore the situation to the conditions existing prior to the violation. In the case of the topic under consideration, reparation was determined on the basis of different factors and might not be equivalent to the actual damage suffered. Did it follow, in the context of State responsibility, that, without material damage, any right of action was merely symbolic? Or should reference be made to the concept of satisfaction in international law which sometimes followed a breach of an obligation not entailing material harm? In any event, he recalled having stated in his second report (A/CN.4/402, para. 9) that a distinction between the two topics had to be made on the basis of injury "in the sense accepted thus far" by the Commission, since injury as defined by the Commission in the context of State responsibility did not give rise to responsibility and hence to reparation. For the time being, therefore, harm was neither a condition for the existence of a wrongful act nor a condition for reparation in the case of State responsibility.

8. If the Commission agreed with his position, the debate on whether the underlying principles of the pres-

ent topic, as set out in section 5 of the schematic outline, did or did not amount to principles of customary international law could be avoided. He had started from the premise that sovereign equality was a confirmed principle of international law: if one State had unlimited freedom to carry out activities in its territory which caused harm to a neighbouring territory and no compensation was required, that equality was broken; in other words, one territorial sovereignty would prevail over another. One possible conclusion was that the principle laid down in section 5, paragraph 1, of the schematic outline could be deduced from sovereign equality and should therefore be recognized as a principle of international law. The same conclusion could, however, be reached by an inductive process, since the principles in question could very well be inferred from judicial decisions, bilateral and multilateral treaties, and declarations of international conferences and other bodies. In any case, it was not sufficient to say that the application of those principles should be left to agreement among States, for, if the principles were deemed to be non-existent, any such agreement would be tantamount to a concession on the part of the State that had the factual possibility of acting. Indeed, if the law were to remain silent on the matter, it would favour those States which had such a possibility, to the detriment of the States which suffered the harmful consequences of such action. Such a situation would not be conducive to international solidarity. If the Commission decided that the principles in question did not exist in international law and should therefore not be proposed for the purposes of the progressive development of the law, it should say so clearly and shoulder its responsibility before the General Assembly and world opinion in general.

9. Views in the Commission differed on the need to include a list of dangerous activities in the draft. As he had already pointed out, such a list would be obsolete in 10 years' time and would in any event take account only of certain activities, whereas the General Assembly had requested the Commission to deal with the consequences of all non-prohibited activities. He would nevertheless endeavour to meet the concerns of those who favoured such a list, perhaps by including one in the commentary and giving a more detailed description in the draft articles of what constituted a dangerous activity. As to the relationship between the articles and existing conventions, he agreed that the wording of draft article 5 was not felicitous and suggested that it be replaced by the wording of article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.

10. He thought that Mr. Calero Rodrigues (2019th meeting), who considered that a list of activities would merely underline the uselessness of a general convention, was being unduly pessimistic. Under the draft articles on the law of the non-navigational uses of international watercourses, for example, a State's responsibility was discharged if it could prove that everything reasonable had been done in the light of modern technology. Should harm arise as a result of an accident due to the dangerous nature of an activity on or near a river, however, the responsibility incurred would be in the nature of strict liability.

11. In that connection, he could not agree that the General Assembly had been unaware of the problems of strict liability when it had assigned the Commission the task at hand. The Commission had advised the General Assembly that, owing to the entirely different nature of liability for risk and the different rules governing it, a joint examination of the topic of State responsibility and the present topic would only make both more difficult to grasp. The General Assembly had therefore deliberately taken the decision that the Commission should consider the two topics separately.

12. The purpose of the whole exercise was illustrated by an observation contained in the report of the World Commission on Environment and Development entitled *Our Common Future*:

National and international law has traditionally lagged behind events. Today, legal régimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. . . .⁶

He did not wish to sound like Cassandra, but, unless States gave up certain notions that were incompatible with the realities of the present century, which was characterized by interdependence, things might take an unexpected turn for the worse. Mr. Tomuschat (2018th meeting) had rightly pointed out that, in the modern day and age, transboundary effects were the equivalent of aggression in the nineteenth century and that State sovereignty had more to fear from that new threat than from the use of force. With that in mind, the international instrument being envisaged should have four main purposes: to provide international law with the necessary legal concepts to cope with the reality of new dangerous activities; to provide States with mechanisms to arrange régimes for new activities and with the principles to guide them in drafting such régimes; to help States resolve existing situations of conflict through the machinery of the schematic outline or other machinery; and to complement existing régimes of State responsibility for wrongful acts.

13. It had been suggested that the terminology of the three topics—international watercourses, State responsibility and the present topic—should be harmonized and that a list of the terms used, together with their meanings, might be included in an article, an annex or the commentary. He wrote his reports in Spanish, of course, and used Spanish legal terminology, which was very similar to the French. The only liberty he had taken was to use the term *responsabilidad estricta*, which was not a legal term in Spanish, since his predecessor, R. Q. Quentin-Baxter, had used the term “strict liability”. It had been suggested that he had borrowed concepts from common law, but that was hardly likely, since his legal training had been in civil law. Admittedly, he had made certain references in his second report (A/CN.4/402) to literature of Anglo-Saxon origin, but that was because international conventions recognized various degrees of strict liability and he had wished to underline the need for flexibility in the topic. There had also been translation problems, but he had no control over translations into other languages.

14. One very important aspect of the topic was prevention, which some members thought he had over-emphasized, but which others had said he had not emphasized enough. The majority of members of the Commission nevertheless considered that prevention was absolutely necessary, and the General Assembly had had the same reaction several years earlier. Some members also thought that obligations of prevention led into the realm of State responsibility, inasmuch as a violation of such obligations gave rise to the secondary obligation of reparation. Ultimately, the two régimes could coexist in the same instrument, but the most important thing was to separate them conceptually.

15. Responsibility encompassed two different elements: the consequences of the breach of an obligation, and the duties imposed by law on any person acting in society. On that basis, he believed that obligations of prevention came within the terms of the Commission’s mandate. Some members had also referred to section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline, both of which contained the statement that “failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action”. He wondered, however, whether the Commission might not be accused of actually dealing with the consequences of wrongful acts, since to say that an act had no consequence seemed to involve a secondary norm. If the sentence in question were deleted, the draft articles would remain in the realm of primary norms, since they would deal with obligations of prevention, not with their consequences, as well as with obligations of reparation, which were not the consequence of a wrongful act. Whatever view was taken regarding the real nature of such obligations in customary international law, it was clear that some consequences attached to their violation under the draft and that those consequences had an important feature in common, namely that they were linked with the harmful event and therefore had to do with the reparation process. Section 5, paragraph 4, of the schematic outline, for instance, provided for an unfavourable consequence of a procedural nature in the event of the breach of the obligation, and the obligation under both section 3, paragraph 4, and section 2, paragraph 8, would reappear at the moment of compensation. Section 4, paragraph 3, provided that, in determining the reparation due, “account shall be taken of the reasonableness of the conduct of the parties, having regard to . . . the remedial measures taken by the acting State to safeguard the interests of the affected State”. Account could also be taken of any relevant factors, including those set out in section 6, and specifically in paragraphs 4, 9 and 10 thereof.

16. A question central to the scope of the topic was whether the unintentional violation of territorial or non-territorial sovereignty entailed liability. The purpose in asking that question was to determine whether the topic was of manageable dimensions. Mr. Quentin-Baxter’s answer had been to apply the criterion of a physical consequence, which could be summed up as follows: causal responsibility required a causal chain in the physical world, at one end of which there was an area within the territory or control of one State and at the other end of

⁶ Oxford University Press, 1987, p. 330.

which there was an area within the territory or control of another State which suffered the harmful effects of an activity. In the physical world, as exemplified by the decision in the *Lake Lanoux* arbitration, harmful effects had to have negative economic or social repercussions. In economic and social relations, however, it was impossible to establish such a relationship with certainty. He therefore understood the concerns of those members who considered that to go beyond the realm of a physical consequence could lead to so many variations and conceptions of action and injury that the topic would be rendered unmanageable.

17. Two other interesting criteria were dangerous activities and the human environment. The schematic outline had opted for dangerous activities with adverse physical consequences and, if that criterion were selected, only harm arising out of such activities would fall within the topic. In an effort to identify the activities to be covered by the topic, he had tentatively added two further criteria: (a) that the risk created must be predictable in general terms and must also be appreciable or visible, but, if hidden, must be known to the State of origin; (b) that that State must know or have means of knowing that the activity in question was carried on within its territory. Those conditions were designed to mitigate liability. Mr. Calero Rodrigues apparently believed that it was not only foreseeable damage, but all damage, that should give rise to compensation. That approach would, however, impose on States a very strict form of absolute liability—and that was not the purpose of the draft.

18. Attention had been drawn to certain ambiguities in the terms “territory”, “jurisdiction” and “control”. The Commission was endeavouring to identify the entity to which liability for the events covered by the topic would be attributed and many members, including himself, considered that at the international level it should be attributed to a State within whose territory or control an activity with injurious transboundary effects occurred. As Max Huber, the arbitrator in the *Island of Palmas* case (see A/CN.4/384, annex III), had stated, sovereignty in the relationship between States signified independence, with the right to exercise over a given area and to the exclusion of any other State the functions of a State—the corollary of that right being the duty to protect within the territory the rights of other States.

19. Territoriality was therefore a major basis for the exercise of jurisdiction and for the attribution of liability for its extraterritorial injurious consequences. In the context of the present topic, most of the activities of concern occurred within the limits of State territory, a portion of the globe where a sovereign State exercised exclusive jurisdiction and where, subject to international law, it was entitled to allow or prohibit certain activities, while remaining liable to the other members of the international community for some consequences of those activities. That was the meaning that the term “territory” was intended to have in the draft articles.

20. With regard to the term “control”, reference might be made to the advisory opinion of the ICJ in the

Namibia case,⁷ as Mr. Roucouas had rightly pointed out. In its acceptance in that case, the word meant that a State which effectively exercised exclusive jurisdiction over a territory could be held liable for certain extraterritorial injurious consequences of activities conducted within that territory. That was a case where the international community refused, for policy reasons, to legitimize the presence of the State concerned in the territory in question by recognizing its jurisdiction, yet still wanted to hold that State liable, for to do otherwise would have been to reward it for its illegal presence.

21. There were two other situations to be covered. The first concerned activities conducted beyond areas under the exclusive jurisdiction of States, in other words in areas which belonged to the common heritage of mankind and which all States were entitled to use, subject to international law. Where such use caused injury to others, the party causing the injury was liable. In that connection, the draft articles referred to activities on the high seas and in outer space.

22. The second situation concerned activities conducted in regions of the world which were neither part of the common heritage of mankind nor part of the territory of a State. Those were areas in which international law gave one State some exclusive and permanent rights, while also granting other rights to other States. In such cases, the exercise of exclusive rights by the first State engaged its liability, but, where other States also enjoyed certain rights, they too would be liable for the consequences of their activities. A case in point was the exclusive economic zone, where the coastal State exercised permanent and exclusive rights, although other States also had certain rights, such as the right of navigation.

23. In areas belonging to the common heritage of mankind, such as the high seas and outer space, the attribution of liability was a more complicated matter; but there again, some analogies might be drawn from the writings of Max Huber and the provisions of general international law. In much the same manner as the exclusive exercise by a State of jurisdiction over its territory engaged its liability for injurious consequences arising therefrom, the exclusive jurisdiction of a State over a vessel, as symbolized by its flag, also engaged its liability for damage caused by that vessel. The exclusive economic zone provided an example of those two aspects of liability. A coastal State would bear liability for the injurious consequences to which the exercise of its exclusive rights might give rise, but other States would be liable for the injurious consequences of the exercise of the rights to which they were entitled under the flag principle.

24. It had to be stressed that the rules concerning the attribution of liability in international law in no way altered or limited the private-law remedies available either under the internal law of the State concerned or under private international law.

25. With regard to the suggestion made by Mr. Ogiso (2020th meeting), he said that several existing conventions attributed primary liability to the operator of the

⁷ See 2019th meeting, footnote 12.

entity which had caused injury and held the State liable only as the guarantor of payment. That type of remedy was, however, only one of many available to the parties when negotiating a régime. They could also agree to limit or allocate liability as between themselves, or only to provide equal access to courts and other internal-law remedies. Such private-law or alternative régimes were, however, not sufficient to relieve a State of liability in the absence of any régime. Although private-law remedies were useful in giving various choices to the parties, they failed to guarantee prompt and effective compensation to innocent victims, who, after suffering serious injury, had to take proceedings against foreign entities in the courts of other States. Private-law remedies by themselves would, moreover, not encourage States to take more effective preventive measures in relation to activities conducted within their territory which gave rise to injurious transboundary consequences.

26. He did not intend at the present time to ask the Commission to refer to the Drafting Committee the six draft articles he had submitted. Some of those texts had been tentative and he would redraft them in his next report in the light of the comments made during the discussion.

27. Mr. BENNOUNA said that, even if the draft articles were not referred to the Drafting Committee, the discussion would have enabled the Commission to make headway in its analysis of the topic. The key question of the dividing line between the present topic and that of the general régime of responsibility had, however, still not been answered. If it was true, as the Special Rapporteur had said, that the breach of obligations of prevention could give rise to reparation, the Commission was, in the final analysis, dealing with activities that were to some extent prohibited. It would therefore be necessary to define the scope of the topic more clearly, for otherwise he feared that the Commission would face the same problems at its next session. The Commission must, of course, take risks and assume responsibility for them, but, in order to do so, it had to have a sound basis. The Special Rapporteur had stated that, in his opinion, there had to be a continuum between prevention, injury and reparation and that what gave the topic its originality was injury, regardless of the lawfulness or wrongfulness of the activity in question and of the problem of attribution. The Commission was therefore not entirely clear whether the framework of the topic was liability for risk or strict liability and whether provision should be made both for preventive measures and for liability for risk. If that was the case, the study of such a question might go beyond the mandate the Commission had received from the General Assembly.

28. The CHAIRMAN, speaking as a member of the Commission, said it would be well to remember that the topic under consideration was not a traditional subject of international law. Its contours were becoming increasingly clearer as the Commission proceeded with its work and the subject had been further refined at the present session. Perhaps members of the Commission should give themselves more time to assimilate the various aspects of the topic, even though they might all

wish to know immediately exactly what its scope was. They certainly had the benefit of excellent guidance from the Special Rapporteur in that regard.

29. Mr. REUTER said that the Special Rapporteur, whose summing-up and efforts to take account of the opinions of all members he had greatly appreciated, appeared to consider that the heart of the topic lay not in liability in the absence of a wrongful act, but rather in the concept of dangerous activities and the risks they involved. He himself had no problem agreeing that, in some cases, the result would be responsibility for a wrongful act and, in others, liability for a non-wrongful act. He also thought that the Commission should not take the General Assembly's instructions too literally, for it assigned the Commission a topic for practical reasons and indicated the cases it had in mind. If the Commission found that such cases should be dealt with in terms both of responsibility for wrongful acts and of liability for lawful activities, it should not hesitate to say so, if not in its report on its thirty-ninth session then at least in its report on its fortieth session.

30. He recalled having proposed (2021st meeting) that members of the Commission might think about liability for unintentional violations of the status of State territory and non-territorial space. The Special Rapporteur had taken note of that proposal and had situated the problem in terms of causality. It was possible that causality might not always be the same in the case of the present topic as in the case of responsibility for wrongful acts, where the problem was dealt with by means of the meaningless formula that the State was responsible for direct injury, but not for indirect injury, except in the case of an act committed with intent to harm. In referring to liability for an unintentional violation, however, he had been thinking not of intent to harm, but rather of the hypothesis in which a State conducted a dangerous activity but hoped that no harm would actually occur. In other words, the intention of the State was to engage in an activity, but it did not rule out the possibility that such activity might have dangerous consequences. Where harmful smoke emissions had occurred, as for example in the *Trail Smelter* case, no arbitrator would now hesitate to refer to a violation of territorial status.

31. Hans Thalmann was the only writer to have dealt with that question, in a thesis in German published in 1951 and entitled "Basic principles of the law of modern good-neighbourly relations between States",⁸ in which he had referred to "immissions", in other words harmful effects originating in an adjacent property and endangering the unhampered use of land not located on that property. It was that concept of "physical emissions" that the Special Rapporteur had adopted as a criterion for his topic. It could also be said that, in the case of some typical physical emissions—but not in that of slight emissions or those which occurred gradually—there was an unintentional violation of territorial sovereignty. If the Commission could move away from too narrow a definition of lawful and wrongful acts in its approach to the topic—and he

⁸ *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (Zurich, Juris-Verlag, 1951).

thought that it would probably be forced to do so—it would also be able to avoid the risks of differences of opinion among its members. If the Special Rapporteur reached the conclusion that the focus of the topic lay in dangerous activities and the risks they involved, he was convinced that the General Assembly would have no objection.

32. Mr. BARSEGOV noted that, in summing up the discussion on a complex and very topical subject, the Special Rapporteur had somewhat simplified his position. He recalled that, in his earlier statement (2020th meeting), he had expressed his concern about the lack of precision in the terms used and in the list of problems to be considered, a lack of precision that was, moreover, reflected in the title of the topic, which referred to non-prohibited acts, not to lawful acts. He had also said that, before formulating the rules that would govern that type of problem, the Commission had to lay sound legal foundations which would be free from any subjectivism and would not lead to any political games. However, the Special Rapporteur had not spoken of the work on liability that was being done in other organizations and had not explained how he intended to take account of that work, although several members had pointed out that the Commission could not overlook the work being done in other areas where the question of liability also arose. He therefore requested the Special Rapporteur to look into the question of the international rules which could serve as a basis for determining injury and without which it would be virtually impossible to solve problems relating to liability. He also regretted that the Special Rapporteur had had nothing to say about the extremely important question of the interests of a State in whose territory an accident occurred. If that question were not settled, it would be impossible to find an objective and balanced solution to the problem of liability as a whole.

33. Another important point on which the Special Rapporteur should focus attention was that, in the event of an accident in a State, it would be inconceivable to inflict physical or political injury on that State: that would only heighten tensions and mistrust among countries. He recalled that he had stressed the need to deal with liability for activities for which there was no basis in fact, such as spreading false information. There were also various other questions that the Special Rapporteur had unfortunately not taken into account in his summing-up, and he hoped that, when all the summary records were available, the Special Rapporteur would carefully consider all the views expressed during the debate.

34. Mr. BEESLEY said that, in his excellent summing-up of the discussion, the Special Rapporteur had focused on the basic question on which the Commission had to decide, namely whether it should engage in the codification of positive law or in the progressive development of the law on the topic under consideration. He himself had had the impression that, although no member of the Commission was opposed to the objective of the progressive development of the law, there might be some disagreement about the actual starting-point for the Commission's work. There had also been differences of opinion with regard to terminology and

the conceptual approach to the topic in the various legal systems. No one, however, had asserted that there was no legal basis for the concept of liability for harm resulting from lawful acts. He hoped that the Commission would not suspend its work on the topic because of those differences of opinion. It should be cautious, but resist the temptation to give up.

35. Mr. Sreenivasa RAO said that he shared the Special Rapporteur's views on the many questions he had raised in his excellent summing-up. Emphasis had been placed on the State as the entity which was liable in the cases covered by the topic and it was clear that every State had to assume responsibility for what happened in its territory; it was also obvious that an innocent victim must not be left to bear his loss. It should, however, be remembered that reparation was not always within the means of the developing countries, which made up 80 to 90 per cent of the international community. Thus, when dangerous activities were conducted in their territories by other agents, such as multinational corporations, those countries did not have the necessary resources to answer for liability. If realistic results were to be achieved, that aspect of the problem would have to be reflected in the draft.

36. The CHAIRMAN said that the consideration of agenda item 7 was concluded.

Relations between States and international organizations (second part of the topic) (A/CN.4/391 and Add.1,⁹ A/CN.4/401,¹⁰ A/CN.4/L.383 and Add.1-3,¹¹ ST/LEG/17)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

37. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic and indicate how he thought the Commission should deal with it.

38. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that the Commission had before it two successive reports on the topic, namely the second report (A/CN.4/391 and Add.1), submitted in 1985, and the third report (A/CN.4/401), submitted in 1986. In accordance with the decision which the Commission had taken following its consideration of his preliminary report¹² at its thirty-fifth session and which had been approved by the General Assembly in resolution 38/138 of 19 December 1983 (para. 3), he had continued his work on the second part of the topic, namely the status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States.

⁹ Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

¹⁰ Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

¹¹ Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

¹² *Yearbook . . . 1983*, vol. II (Part One), p. 227, document A/CN.4/370.

39. The Commission had considered the topic at its thirty-seventh session, in 1985.¹³ Due to lack of time, however, the discussion had unfortunately been brief and the Commission had been unable to take any decision on the draft article which he had submitted.¹⁴ It had deemed it advisable to resume its consideration of the draft article at its thirty-eighth session so that more members could express their views and the new members could become acquainted with the topic. It had merely requested him to consider the possibility of submitting concrete suggestions on the scope of the draft articles to be prepared, as well as a schematic outline of the subject-matter to be covered by the articles.

40. He had therefore prepared his third report (A/CN.4/401) for the thirty-eighth session of the Commission, which had been unable to consider it, again due to lack of time. He noted that the third report took account of the replies to the various questionnaires (1965, 1978 and 1984) sent by the Legal Counsel of the United Nations to the United Nations specialized agencies, to IAEA and to regional organizations. Those replies were contained in the studies prepared by the Secretariat in 1967¹⁵ and 1985 (A/CN.4/L.383 and Add.1-3) and in the collection issued in 1987 (ST/LEG/17).

41. He suggested that the discussion at the present session should focus on the third report (A/CN.4/401) and, in particular, on the possible scope of the draft articles (*ibid.*, para. 31) and the schematic outline for the drafting of the articles (*ibid.*, para. 34). It would be easier for the Commission to consider the second report in conjunction with the fourth report, which he would prepare for the next session. It would then be able to take a decision after having heard the comments of those of its members who had been elected since the topic had been included on the agenda.

42. Obviously he attached particular importance to the comments and suggestions which members of the Commission would make on the two main points dealt with in his third report, namely the scope of the privileges and immunities of organizations and the various persons in their service, and the schematic outline for the drafting of the articles. The Commission would thus be able to decide how its work should proceed and he would have a much clearer idea of its views concerning the mandate entrusted to it by the General Assembly.

43. The CHAIRMAN noted that the Special Rapporteur had suggested that the Commission should focus its discussion on his third report and, in particular, on the scope of the draft articles and the schematic outline he had proposed (A/CN.4/401, paras. 31 and 34).

44. Mr. TOMUSCHAT said that it would be helpful if the Commission could have a list of the States which

had ratified the 1975 Vienna Convention on the Representation of States.

45. The CHAIRMAN said that the Secretariat would prepare that list. He suggested that the meeting should rise to enable the Drafting Committee to meet.

The meeting rose at 12.25 p.m.

2024th MEETING

Wednesday, 1 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

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

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/391 and Add.1,¹ A/CN.4/401,² A/CN.4/L.383 and Add.1-3,³ ST/LEG/17)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

1. Mr. REUTER observed that the statements by members of the Commission were generally marked by their experience, whether at the Third United Nations Conference on the Law of the Sea, for example, or, as in the present case and in his own case, at the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, held in Vienna in 1986, which had completed a series of international conferences on treaties, but had also been concerned with international organizations. At the present stage, the Commission could not take up a subject which touched closely, or even remotely, on international organizations without taking account of the reactions evoked by the problems of international organizations at the 1986 Vienna Conference.

2. He wished to make two comments on the question that was of the greatest interest to the Special Rapporteur, namely the scope of the draft. First, it should be decided whether the draft would apply to all international organizations or only to some of them. The view of the Special Rapporteur and apparently of the Com-

¹³ See *Yearbook* . . . 1985, vol. I, pp. 282 *et seq.*, 1925th to 1927th and 1929th meetings.

¹⁴ See *Yearbook* . . . 1985, vol. II (Part Two), p. 67, footnote 252.

¹⁵ *Yearbook* . . . 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

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

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

³ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.