

Document:-
A/CN.4/SR.2531

Summary record of the 2531st 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:-
1998, vol. I

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2531st MEETING

Friday, 15 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,¹ A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ADDO said that he endorsed the conclusions reached by the Special Rapporteur in his first report (A/CN.4/487 and Add.1) and agreed in particular that the draft articles proposed by the Working Group at the forty-eighth session of the Commission² should be referred to the Drafting Committee for consideration. The provisions of draft articles 4, 5, 10 and 13 would require States generally to prevent, mitigate or repair harm, to compensate the injured State and to notify other States of the risks involved in the proposed activities. As Mr. Hafner had said, harm must be defined and the Special Rapporteur would do well to give the matter some thought. "Harm" and "risk" were key concepts that did not lend themselves to simple and precise definition. A wide and very diverse range of situations had been identified as constituting transboundary environmental harm, but no general definition had emerged as authoritative. It seemed safe to say, however, that not every detrimental effect resulting from transboundary environmental factors fell within the concept and that four conditions had to be met.

2. The first condition was that the harm must result from human activity and not from *force majeure* or an act of God. Detrimental effects due to environmental factors without some reasonably proximate causal relationship to human conduct would also be excluded. The second was that the harm must result from a physical consequence of the human activity. The third was that the physical effects must cross a national boundary. The fourth was that the harm must be significant or substantial. The last condition

left room, however, for subjective judgement and had therefore drawn criticism. It was nevertheless especially important, in his view, to establish a threshold in order to define legally significant harm because acts detrimental to the environment were so pervasive and numerous.

3. In addition, non-compliance with prevention rules should entail State responsibility. Pursuant to the principles of State responsibility, States were accountable for breaches of international law. Such breaches of treaty or customary international law enabled the injured State to file a claim against the violating State either by diplomatic action or by recourse to international mechanisms where they existed. As a violation of international law, non-compliance with prevention rules must entail State responsibility, even in the absence of harm.

4. A persistent problem was the situation in which the transboundary environmental injury was caused not by the State itself, but by a private operator such as a transnational corporation. Perhaps that was a case for applying the polluter-pays principle, but he would welcome any light that the Special Rapporteur could shed on the issue.

5. There was certainly a world of difference between international liability and State responsibility. The latter depended on a prior breach of international law, whereas international liability reflected an attempt to develop a branch of law in which a State might be liable for harmful consequences of an activity that was not in itself contrary to international law. It was doubtful whether rules of prevention could be subsumed under that rubric.

6. With regard to paragraph 229 of the report, failure to comply with duties of prevention must entail State responsibility. That was the only way of ensuring that States which had assumed such duties would take them seriously. With regard to paragraph 230, the Special Rapporteur concluded that failure of the operator to comply with duties of prevention would and should attract the necessary consequences prescribed in national legislation under which authorization had been given. What would happen, he wondered, if national legislation prescribed no civil penalty or was silent on the consequences?

7. In conclusion, he endorsed the recommendations made by the Working Group in paragraphs 4 and 5 of its report at the forty-eighth session of the Commission and urged the Special Rapporteur to prepare draft articles based on those proposed by the Working Group as soon as possible.

8. Mr. AL-KHASAWNEH, recalling the words of the late Quentin-Baxter, said that legal reasoning admitted of only two active principles of obligation: responsibility for fault and responsibility for harm in the absence of fault. The latter principle ultimately rested on the equitable notion that an innocent victim should not be left to bear his loss alone. That principle had been gradually developed in national societies, especially industrialized ones, to meet the exigencies of modern life, when the carrying out of many indispensable activities could result in harm. The success of the principle depended on the existence of an exclusive and well-funded system of insurance and reinsurance. Such a system did not exist in international life, but there was no reason why appropriate regulations should not be developed on the basis of the progressive

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

² See 2527th meeting, footnote 16.

development of the law, although there should be no illusions about the fact that a greater infusion of progressive development than most States were accustomed to was needed for that purpose.

9. The topic had first been encountered when the Commission had come across circumstances precluding wrongfulness in its study of State responsibility, but those circumstances covered environmental damage arising out of lawful activities and other non-material damage. A classic example was when a State, acting under the United Nations Convention on the Law of the Sea, inspected the cargo of a ship it suspected of carrying drugs and contraband—clearly a situation when wrongfulness was precluded even if no such prohibited cargo was found, but harm was nevertheless caused. That was why narrowing the scope of the draft to exclude such activities, as the Special Rapporteur suggested in paragraph 111 of his report, threatened to undermine the draft's unity of purpose.

10. He was perplexed as to how a topic that had been meant to fill a lacuna in the system of obligations contemplated in State responsibility could undergo such a metamorphosis that it became an environmental topic: prevention of transboundary damage from hazardous activities. Presumably the rationale was that prevention was better than cure, a statement with which no one could disagree, although, in real life, people were more dogged in litigation after the event than cautious at the outset of an activity. That was why prevention *ex post*, self-contradictory as it might seem, still corresponded best to practical realities. At any rate, the centre of the topic was the occurrence of harm, and not prevention, and it was in defining the consequences of harm that the Commission could play its proper role.

11. As to prevention, the Special Rapporteur listed a number of principles of both procedure and content. The principles were presented in fairly general terms, presumably because the idea was to balance the right to sustainable development against the right to a clean environment. Different rules could of course be distilled from those principles, but, if the rationale for singling out protection was because it was better than cure, the Commission should aim at developing a regime to contemplate areas where the obligation of prevention was one of result and not of conduct. A standard of due diligence was very important, but it should not be forgotten that the scope of the topic had already been narrowed a number of times: first, by excluding physical activities; secondly, by confining the topic to ultra-hazardous activities; and, thirdly, by limiting the operation of State responsibility to thresholds beyond which any damage that occurred would be nearly impossible to repair. In other words, the Commission was dealing with the weakest possible formulation of the maxim *sic utere tuo ut alienum non laedas*. Lastly, the idea that failure to perform an obligation of prevention should not give rise to legal consequences, as suggested in paragraph 226 of the report, was difficult to accept.

12. Mr. HAFNER said he agreed that an obligation of result could be provided for in some areas, but he wondered which areas those would be. With regard to the great many activities undertaken by private operators, he wondered whether it was not going too far to make a State

responsible for damage that might be caused by such activities. That was an important matter from the economic standpoint.

13. Mr. AL-KHASAWNEH said that the answer would depend on the relative weight given to development, on the one hand, and prevention of damage, on the other. The era of development at any cost seemed to have come to an end. Islamic law considered that preventing damage took priority over acquiring advantages. In the situations under consideration, damage would be difficult to repair, especially because more and more dangerous activities were being carried out by private operators as a result of privatization. That was an important matter if the prevention regime was to be truly effective.

14. Mr. BROWNLIE said that it was important to take care, when drafting rules on prevention, not to adopt standards that were well below the existing principles of responsibility with which States must already comply in various contexts. Without going so far as to include a saving clause in the draft stating that the standards indicated should not be seen to be less than those already applicable in international customary law, the Commission must be cautious and bear in mind that, in many situations, the State already had responsibility for controlling the activities of the private operator. Concerning the law of tort, he was surprised that Quentin-Baxter had thought that no-fault liability was to be taken literally because, in common law, there was simply a switching of the burden of proof, that is to say, the respondent had the burden of exculpation and of proving that he or she had not committed a fault.

15. Mr. Sreenivasa RAO (Special Rapporteur), drawing the conclusions of the debate, said that it would appear that his attempt to summarize the very many concepts pertaining to the subject under consideration had given rise to some confusion. That was entirely understandable, particularly inasmuch as Part Two of the report covered an area which, although examined in many bodies, was far from enjoying a consensus. In any event, some of the ideas formulated had been very valuable and must certainly be presented to the international community by the Commission in the framework of the progressive development of the topic.

16. The question dealt with in Part One of the report which had been most commented on during the discussion was that of the threshold of harm. In that context, it was important to dispel a misunderstanding: the threshold was devised not to stop States from taking the necessary measures to prevent all harm, but to create a legal relationship between the States involved. In that generally accepted context, it would seem that there must be a reasonable threshold and, in the case under consideration, the adjective "significant" had already been largely commented on in the report of the Working Group at the forty-eighth session of the Commission, to which it might be useful for the members of the Commission to refer. He did not think that it was necessary to pursue the discussion on that point.

17. As to the other questions raised in connection with the scope of application of the draft articles, he was encouraged by the virtual unanimity on the idea of refer-

ring draft article 1, subparagraph (a), (and not article 1, subparagraph (b)) and draft article 2 proposed by the Working Group at the forty-eighth session to the Drafting Committee. That would enable the Commission to express its view without delay, especially as the subject had attained a degree of maturity.

18. In respect of the concept of prevention itself, he was pleased that chapter VI of the report had given rise to so little criticism.

19. With regard to chapter V, it had emerged clearly from the discussions that the duties of prevention were best reflected in the principles of prior authorization, environmental impact assessment and, if necessary, notification, consultation and negotiation.

20. The question of the standard with which due diligence must comply had attracted the most comments. It must be understood that it was pointless to try to state abstractly what could be defined only in a specific context. However, the discussions had had the dual merit, first, of stressing that due diligence covered all reasonable and prudent precautions which a Government must take and hence included the obligation to set up a legal and administrative framework and monitoring mechanisms for dangerous activities; and, secondly, of making it clear that the manner in which that obligation was fulfilled could be assessed only in a real situation. Instead of seeking to introduce a rigid structure, the Commission should essentially leave the assessment to the States concerned.

21. Reference had been made to the consequences of failure to comply with due diligence, a question which was particularly acute when the States concerned did not agree. After due consideration, it appeared that the question boiled down to ascertaining to what extent it was possible to hold responsible a State which had taken all reasonable measures and to what extent a private operator could incur the obligation to pay compensation. He was not certain that the legislative and judicial systems of countries offered the best possibility of dealing with cases of failure to comply. State responsibility as it related to the operator's liability raised a very interesting question, but would have to be analysed further in the light of current-day realities. It would probably be better for the Commission to return to that at a later stage of its work. For the time being, its objective was to define the content of due diligence. As pointed out in paragraph 219 of the report, the Commission might consider failure of duties of prevention at the level of State responsibility. There was no question that States would have major responsibility in prevention because they would have to legislate, exercise control and introduce protection measures of other States.

22. One member had also raised the question whether the State could continue the dangerous activity if it had been unable to agree with its neighbours on risk management. It had been proposed that a compulsory dispute settlement system should be established. Article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses provided for a limited system of fact-finding missions. That article had been the subject of a fairly lively discussion but the majority of representatives in the Sixth Committee appeared to have approved it. However, if the whole problem of non-compliance

with the obligation of due diligence and of evaluation of conformity with a rule of conduct was left to the realm of State responsibility, in other words, if it were placed within the context of the topic of State responsibility, a compulsory settlement regime might not be at all suitable.

23. At all events, the duty of prevention would always be favourably regarded by States, which would never see it as a duty that was excessive. It served them because it protected their own people, as well as the people of other States, and was also part of what contemporary civil society demanded of Governments. So whatever procedures the Commission proposed and whatever principles it identified, States would pay heed to its conclusions. They would do their utmost to place those procedures and principles at the service of their own interests because respect for international law was known to be no more than the implementation of a clearly understood national egoism.

24. Mr. ECONOMIDES, commenting on the concept of "threshold", namely, on the level of harm a State was supposed to prevent, said that the Commission seemed to be hesitating between two possibilities: between setting the threshold at "significant harm", an option that found favour with the majority of members, and sticking to the idea, which he himself had upheld, that the State should endeavour to prevent "any" harm. The question also arose whether there was not an intermediate solution and whether the Commission could not identify a new criterion, for example, that of "minimum harm", since what was involved was prevention, not actual harm. For his own part, he continued to think that the aim of the State should be to cause no damage, as required by the general principle of "prudent management".

25. Mr. AL-KHASAWNEH said that, in his view, it was impossible to define "significant harm". That word was used in the Convention on the Law of the Non-navigational Uses of International Watercourses, but it should be regarded as a kind of legal presumption, like the "reasonable man" concept. As Mr. Economides had suggested, an absolute rule ("any damage") might be preferable to the solutions offered by a graduated system ranging from the minimal to the massive through the reasonable, the appreciable, the significant and so on. At all events, the Commission should not rush into a decision.

26. Mr. ROSENSTOCK said that he would advise the Commission to refer for guidance to the way the commentary to the articles on the law of the non-navigational uses of international watercourses³ explained the term "significant", which applied to damage that was more than minimal and less than substantial. Its authors had dropped the word "appreciable" because they feared that it would not cover everything that would be scientifically detectable. The Commission could perhaps adopt the same approach: in other words, with regard to prevention, it could lay down a relative threshold which it would analyse in the commentary to the relevant article.

The meeting rose at 11.15 a.m.

³ See 2530th meeting, footnote 5.