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A/CN.4/SR.2804

Summary record of the 2804th 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:-

2004, vol. I

State or to an international organization. In any case, conduct would be attributed to a subject of international law.

56. As he had noted in his report, *ultra vires* conduct could be considered from two different angles. One was the legality of *ultra vires* conduct, and then, as suggested by Mr. Pambou-Tchivounda, the Commission might have to look to the reasons for such conduct. However, considered from the perspective of responsibility of international organizations, the legality of *ultra vires* conduct was not decisive. An international organization should not be allowed to disclaim attribution because of the *ultra vires* nature of its conduct if the actions of the organ, official or agent related to the functions entrusted to them. Seen from that angle, the Commission did not have to take up the question of validity.

57. Acknowledgement of conduct by an international organization did not imply that the same conduct could no longer be attributed to a State. A reference in the commentary might be sufficient to allay Mr. Yamada's concern in that regard. Mr. Economides and Mr. Rodríguez Cedeño had rightly stressed the need for acknowledgement to be consistent with the existing rules of the organization. He was reluctant to endorse their suggestion that some wording should be added to article 7. To do so would depart from the parallel with article 11 of the draft on responsibility of States, while a similar concern could also be expressed with regard to States. Moreover, it would not be easy to identify which rules of the organization specifically related to the question.

58. Despite some criticism, the general sense of the discussion seemed to have been that all four draft articles should be referred to the Drafting Committee, and he therefore proposed that the Commission should decide accordingly. The remaining question was whether the Drafting Committee should also be instructed to draft a provision parallel to article 9 of the draft articles on State responsibility, as suggested by Mr. Momtaz, Mr. Pellet and Mr. Kolodkin, and possibly also provisions parallel to other articles. That was the matter with respect to which he had mentioned an analogy when introducing his second report. He had not couched his suggestion in general terms, as Mr. Pambou-Tchivounda had alleged, but had referred only to those organizations which exercised control over a territory in the way that States did, and to the extent that they actually exercised that control; only then could an analogy be drawn. Although there were a few organizations that exercised control over a territory, the cases were limited. Moreover, instances such as those cited in articles 9 and 10 on State responsibility were rare, and he personally would prefer to see some wording in the commentary explaining why the draft articles departed from those on State responsibility.

59. The CHAIRPERSON asked whether the Commission was ready to refer draft articles 4 to 7 to the Drafting Committee and to request the Drafting Committee to elaborate some paragraphs in the commentary, explaining why the approach taken differed from the one used in the articles on State responsibility.

60. Mr. PAMBOU-TCHIVOUNDA asked whether it was part of the Drafting Committee's work to help prepare the commentary.

61. The CHAIRPERSON said that, as a number of members of the Commission had proposed including in the draft articles other provisions modelled on those of the articles on State responsibility, he was suggesting that the Drafting Committee should be used as a forum in which to discuss ideas for possible inclusion in the commentary. The Special Rapporteur would doubtless appreciate such assistance. On that understanding, he took it that the Commission wished to refer draft articles 4 to 7 to the Drafting Committee.

It was so decided.

Organization of work of the session (*continued*)*

[Agenda item 1]

62. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of responsibility of international organizations would be composed of Mr. Candioti, Mr. Chee, Mr. Economides, Ms. Escarameia, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Yamada, and Mr. Comissário Afonso (*ex officio*).

The meeting rose at noon.

2804th MEETING

Wednesday, 26 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/537, sect. C, A/CN.4/540,[1] A/CN.4/543,[2] A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. Sreenivasa RAO (Special Rapporteur), introducing his second report on the legal regime for the

* Resumed from the 2797th meeting.

[1] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

[2] *Ibid.*

allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540), said that the first part of the report contained the comments of States at the fifty-eighth session of the General Assembly on the main issues concerning allocation of loss. For the sake of convenience, the issues were classified under various headings (see chapter I of the report). States seemed fortunately to agree on a number of subjects. While the Commission should have a fuller discussion on the subjects identified, it was also important not to question what had been agreed on by reopening the debate on issues already resolved. No matter what efforts it made, the Commission would never achieve a perfectly organized text, owing to the very nature of the topic.

2. In his conclusions, set out in paragraph 36 of the report, the first point on which there appeared to be general agreement was that the legal regime to be elaborated must be both general and residual. That meant that the Commission must avoid issues of private international law, it should not become involved in the harmonization of national laws and it should not reopen the discussion on questions that had been settled under the topic of State responsibility. The Commission should accordingly not try to elaborate an unduly detailed or legislative text. It was necessary to leave enough room for States to apply the regime in a way that best corresponded to their own situation.

3. As to the scope of the topic, covered in conclusion 2, there appeared to be agreement on the fact that it must be the same as that of the draft articles on prevention of transboundary harm from hazardous activities,[3] with the result that the same threshold had to be maintained, that of "significant harm".

4. Conclusions 3 to 7 dealt with a situation in which damage occurred despite the precautions taken, and with compensation for victims. The fundamental principle must be that, insofar as possible, innocent victims must not be left to bear the loss. Any scheme for the allocation of loss placed the duty of compensation first on the operator. The operator was required not only to take the necessary measures as part of the requirement of prevention and to show appropriate financial guarantees, but also to equip himself with the necessary contingency plans and emergency preparedness. In practice, however, an operator had never been allocated the full share of loss. That being so and in order to protect potential victims, it was necessary to provide for compensation through supplementary sources of funding.

5. With regard to the definition of "damage" eligible for compensation, there was wide agreement that it should cover damage to persons and property, including elements of State patrimony and natural heritage, as well as damage to the environment or natural resources within the jurisdiction or in areas under the control of a State. For some, damage to the environment *per se*—namely, to the global commons—should not be left uncovered. That issue raised enormous difficulties, since there was no commonly agreed definition of the global commons. The reference was generally to the high seas, Antarctica and outer space, whose protection was provided for under special regimes. Another difficulty derived from the fact that the sources of damage to the environment were many and complex and it was therefore difficult to establish liability. Questions of the liability of the State and other problems such as establishing the causal connection and quantification of damage were some of the stumbling blocks that stood in the way of constructing a liability regime for the global commons. He outlined a number of areas for consideration in conclusion 8, paragraphs (*a*) and (*b*).

6. Turning to conclusion 9, he said that the State's role in any scheme for the allocation of loss was another issue that should be looked into. The question was whether it was desirable to impose on the State the obligation to earmark funds to meet the shortfall where requests for compensation far exceeded the operator's share. There was virtually unanimous agreement that there must be a supplementary funding system in which several actors would participate, but there did not seem to be consensus on the idea of imposing an obligation on the State, its share being considered merely as a contribution. Any scheme of allocation of loss that went beyond the operator's share would have to be treated as the progressive development of the law. There was also disagreement on the degree of detail that should be included in the scheme for the allocation of loss. However, if State responsibility was to remain general and residual, care should be taken to ensure that the text was not too detailed.

7. As to the form that the draft principles should take, he stressed that there was a large diversity of preferences and practices among States concerning the principles that constituted a regime of international liability and that, in the light of the considerations outlined in conclusion 10, he had deemed it useful to present the recommendations in the form of general principles with explanations, but he was open to any other suggestion.

8. He had accompanied the 12 proposed draft principles included in the last part of the report with as many explanations as it had been possible to provide in the time available. The explanations were not traditional commentaries, but very general proposals which contained only the seed of an obligation, and were intended to bring together a wide range of information to be considered by States themselves when they applied the legal regime in question. The different sources were clearly identified so that there would be no confusion as to the "fatherhood" of the ideas and concepts explained.

9. He drew attention to draft principle 2 containing a definition of the terms used and, in particular, to paragraph (*a*), which he read out in full, and paragraphs (*b*), (*c*), (*e*) and (*h*). The concept of damage, including measures of reinstatement of the property, went far beyond what was accepted in writings on the subject and in practice, but if it was presented as progressive development and not imposed, there was a good chance that States would gradually include some elements of it.

10. Draft principle 3 stated the main objective, which was cost internalization, as well as the objective of protection, restoration and clean-up of the environment.

[3] See 2797th meeting, footnote 3.

11. On the subject of principle 4, he said that he shared the view that there were in fact not two alternatives, but only one. He had nevertheless wanted to make it clear that, in some people's view, there were indeed two alternatives, so as to allow the members to make up their own minds. From the lengthy debates on the question of transboundary liability that had taken place both in the Commission and in the Sixth Committee of the General Assembly, it had clearly emerged that, in any scheme for the allocation of loss, it was the operator who bore the primary responsibility. However, the definition of the operator was not very clear. It varied over time and also, for example, according to the national law or even the activity concerned. The same applied to the choice of joint and several liability, which must be left to States.

12. Draft principle 8 concerning the availability of recourse procedures was one of the most important and must definitely be incorporated in the scheme, although without recognition and enforcement of judgements, it was only to be hoped that those recourse procedures would be effective.

13. Draft principle 10 was intended to comply with the request of some members who wanted a provision to be included on the settlement of disputes. Draft principle 11 was designed to make it clear that the draft was a working basis only, to which States were invited to add.

Organization of work of the session (*continued*)

[Agenda item 1]

14. Mr. CANDIOTI asked whether the intention was to have a debate on the second report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities and the 12 proposed draft principles as a whole. He wondered whether it might not be preferable, as had been the case with other draft articles, to divide the principles into groups or segments, depending on whether they related, for example, to scope, reparation or compensation or procedural questions.

15. Mr. Sreenivasa RAO (Special Rapporteur) said that it all depended on the time available to the Commission. In his view, it would be entirely possible to divide the discussion into two halves, with the first concentrating on procedure and the other on substance. He recalled, however, that the Commission's intention was to complete its consideration of the second report during the current session. It was for the Commission to decide, but personally he considered that members should be free to contribute as and when they wished.

16. Ms. XUE suggested that the Commission should begin by discussing chapters I and II of the report, with particular emphasis on chapter II, which contained the Special Rapporteur's general conclusions and provided the main focus of the report, whereas chapter I contained explanations of how the Special Rapporteur had reached his conclusions. Only when the Commission had a clear understanding of the whole report could it do justice to the proposed draft principles.

17. Mr. PELLET said that he could not agree with Ms. Xue. Chapters II and III could not be treated separately and the proposed draft principles could be understood only in the light of the Special Rapporteur's general conclusions. If it was decided to divide the discussion into several parts, the only proper way to proceed would be for the Commission first to consider the form of the draft and then to turn its attention to the substance. He himself was in favour of the Special Rapporteur's sensible suggestion that it should be open to members to contribute as they saw fit, so long as time constraints allowed.

18. He also wondered what the Commission would do with the draft principles once it had considered them. He would prefer that they should not take the form of draft articles. It would also be best if they were not referred to the Drafting Committee as a single text, since that would entail an enormous amount of work.

19. Mr. KATEKA said that members should be free to express their views on the whole of the report or chapter by chapter. In his view, the draft principles were essentially draft articles, but it was for the Commission to determine what form they should take at a later stage. He did not see why the whole text should not be referred to the Drafting Committee, which had had to deal with far more extensive texts in the past.

20. Mr. CHEE said that he fully supported Mr. Pellet's view. The first three chapters must be treated together. As for the form that the draft text would take, his preference would be for a set of draft principles, in view of the explanations accompanying them, which were submitted mostly in the form of a declaration.

21. Mr. BROWNLIE said that it would be extremely difficult to have a preliminary discussion about the organization of the text without touching on matters of substance. What appeared to be a drafting problem often concealed a problem of substance. The Commission should begin with a general debate and, once the main lines of discussion became apparent, it could turn to the question of the form that the draft text should take. He was not sure that it should take the form of draft articles, but, in any case, it would be a mistake for the Commission to reach a premature decision by default during a debate on organization of work.

22. Mr. KOSKENNIEMI said that it seemed imperative that the Commission should hold a general discussion on the gist of the report which had been submitted to it before going into drafting questions or questions of form. His only concern was that the Commission should have a sufficient amount of time to discuss the core of the report, namely chapter II. Questions about the form that the draft principles should take were of secondary importance.

23. Mr. PAMBOU-TCHIVOUNDA said that the first three chapters of the report were interconnected and that the various points under consideration should not be separated. As the Commission's session had two parts, he wondered whether it would not be possible to devote the first part to a discussion of the Special Rapporteur's general conclusions—in other words, the substance—and to discuss the draft principles or articles during the second

part. The Special Rapporteur seemed to have submitted the draft principles in order to prompt reactions from the Commission, possibly with a view to improving them, going into them in greater detail or even recasting them. Spreading the debate over both parts of the session would be a way of meeting those expectations.

24. Mr. Sreenivasa RAO (Special Rapporteur) said that the conclusions that he was submitting in his second report were not significantly different from those that he had reached in the first report.[4] The Commission had therefore already had a chance to discuss some of them and, in the text under consideration, he was only repeating them or trying to shed further light on them. As far as the form of the draft principles was concerned, he personally had no objection to them being referred to as draft articles. It would, of course, be wise to discuss the general principles—the conclusions—before going on to form. He invited members to put forward any comments that they might wish to make, in a productive manner.

25. The CHAIRPERSON said that he believed that there was general agreement on considering the report as a whole, without splitting up or fragmenting the discussion too much. In their statements, the members could refer to the report as a whole. Nevertheless, in order to facilitate and focus the discussion, he suggested that it should be divided into two parts, the first on the Special Rapporteur's general conclusions and the second on recommendations concerning the draft principles that he proposed. Any members who so wished could, during the first part of the general debate, express their views on the form of the draft text and on the chapter relating to the comments of States on the main issues concerning allocation of loss. The Secretariat had informed him that the Commission had plenty of time to complete the debate and then refer some principles to the Drafting Committee in accordance with its usual practice. If he heard no objections, he would take it that the members of the Commission agreed to follow the procedure that he had just outlined.

It was so decided.

The meeting rose at 11.35 a.m.

2805th MEETING

Thursday, 27 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

[4] *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/531, p. 71.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/537, sect. C, A/CN.4/540,[1] A/CN.4/543,[2] A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to comment on the Special Rapporteur's second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540).

2. Mr. BROWNLIE said that, given the unusual subject matter and the form proposed—namely, draft principles—the question as to whether the Commission should refer the text to the Drafting Committee was a much more complex one than it would normally be. Moreover, the report in general, and in particular the draft principles, posed structural questions, and it would be very difficult and perhaps pointless to try to divorce the two.

3. His first point was a general policy concern. The topic had an economic background, and the Commission was probably in need of some expert input in that area. Even affluent States based on the rule of law were reluctant to provide substantial legal aid in ordinary cases, and much less so in relation to inter-State or other international claims. Thus, the likelihood of States producing a State-supported supplementary compensation fund of the type envisaged in draft principle 5 seemed negligible. Hence the need for some kind of background social policy and economics expertise in that context.

4. His second general point was that the relationship between such State-provided compensation and the availability of recourse procedures, provided for in principle 8, was difficult to understand. There was an obvious analogy between the availability of recourse procedures and the concept of provision of local remedies. The question arose as to whether such State-supported compensation would be conditional on exhaustion of the recourse procedures. Local remedies were a two-sided coin; on the one hand, the territorial sovereign should provide claimants with adequate procedural justice; on the other, recourse to the court system might be a prior condition to any sort of supplementary compensation, or indeed to any compensation at all.

5. Similarly, he was uncomfortable about the role of the operator. It was currently fashionable to fix responsibility on the operator, who might conceivably have a long purse, and was thus an attractive scapegoat. However, from the point of view of international law and, indeed, even from that of public law, it was the Government which had a broad duty to control and restrain activities which might cause transboundary damage on its territory, and that duty

[1] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

[2] *Ibid.*