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Summary record of the 2814th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
2004, vol. I

explanation as to why silence and estoppel were excluded from the Special Rapporteur's concept of the subject.

54. A second point that he wished to make was that there was no such thing as a unilateral act: that was merely a familiar and convenient label. It was actually a case of legal relationships created by unilateral acts, the mechanics of what States did, or did not do, in reaction to the conduct of other States and whose effects were not unilateral. The *Nuclear Tests* case was a very good example of that phenomenon. The behaviour of French ministers who had made public statements on television had become meaningful because of its context and background. Categories were accordingly useless, because everything depended on the context and antecedents of particular events. Acts meant conduct, and conduct included the very important concepts of silence and acquiescence.

55. As the Working Group's recommendations to the Special Rapporteur indicated, the Commission was looking for some general criteria for identifying the legal relations that resulted from so-called unilateral acts or conduct. There were at least three possibilities. The first was that the precipitating conduct of the individual State showed an intention to create legal relations. That could be called an assurance or a promise, but it need be given no label whatsoever, as it was the conduct that must be analysed. In the *Nuclear Tests* case and others, legal relations had resulted without anyone involved using terms such as "promise". The second possibility, revealed again in the *Nuclear Tests* case, was that the principle of good faith came into play: in all the circumstances, the factor of reliance appeared as a reasonable response to the conduct concerned. A third possibility went back to the Ihlen declaration,[6] which appeared as a unilateral act because PCIJ had invoked it as evidence on the question of title to south-eastern Greenland. In fact, however, it had been part of an exchange between two ministers in which one had undertaken not to create difficulties over eastern Greenland, and the other had said that no difficulties would be made over Spitzbergen. It was perfectly possible to say that that was evidence of an informal agreement.

56. The term "recognition" had no standard content whatsoever: it could mean legal or political recognition. Non-recognition, for its part, could be either legal or political: either the entity in question did not qualify legally as a State, or its existence was deliberately ignored by other States, as a sort of sanction. Everything depended heavily on the factual context, and the application of terms such as "promise" could not be seen as a form of analysis, because it was not. Such categories must be left behind if anything useful was to be achieved, and a possible approach was to look for criteria, as the recommendations had sought to suggest.

57. It was unhelpful that the Special Rapporteur and his assistants insisted on ignoring silence. Silence was acquiescence, which was enormously important in the law. Similarly, with regard to estoppel, it did not matter whether its origin was Anglo-Saxon or Patagonian; the important point was that it was heavily embedded in the case law of ICJ; for example, in the *Gulf of Maine* case. Trouble lay ahead if the Commission laid aside whole areas of important jurisprudence and experience on the grounds that something was an allegedly Anglo-Saxon concept. It was the experience not just of States but of tribunals that had to be taken into account.

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), responding to the comments made so far, emphasized that the survey had been carried out under his sole responsibility. If no reference had been made to the Commission's previous discussions, that was because it had been taken for granted that everyone was aware of what had been said and recalled the differences of view that had emerged on certain subjects.

59. The most important question was what was to happen next. In his view, reviewing the categories and classifications used in the report was of lesser importance than seeking a definition covering both acts and conduct; concepts which, incidentally, he did not view as synonymous. Silence had been acknowledged in the report to constitute an extremely important form of conduct in international law that had highly significant legal consequences. Estoppel and acquiescence, too, were of fundamental importance in terms of their effects.

60. A working definition must be sought, more specific than the one elaborated in 2003 and covering all acts and also any conduct that was deemed to produce legal effects. The creation of a working group would be an important means of paving the Commission's way in two areas: drafting the definition as just described, and determining whether what was to be elaborated should be a set of draft articles or, as had been recently suggested, a series of guidelines or an expository study.

The meeting rose at 1 p.m.

2814th MEETING

Thursday, 8 July 2004, at 3.05 p.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

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

[Agenda item 1]

The CHAIRPERSON announced that the members of the Commission who had planned to speak on unilateral acts of States at the current meeting had agreed to postpone their statements until the following day. The Working Group on the topic of international liability would

[3] See 2812th meeting, footnote 2.

meet until 4.30 p.m., when the informal consultations on unilateral acts of States would begin under the chairmanship of Mr. Rodríguez Cedeño.

The meeting rose at 3.10 p.m.

2815th MEETING

Friday, 9 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, 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) (*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]

REPORT OF THE WORKING GROUP

1. The CHAIRPERSON invited the Special Rapporteur to report on the outcome of the deliberations in the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law.

2. Mr. Sreenivasa RAO (Special Rapporteur) said that the outcome of the Working Group's deliberations on the draft principles contained in his second report (A/CN.4/540), in the form of eight revised draft principles, was to be found in document A/CN.4/L.661 and Corr.1. The revised principles represented the fruits of an intensive collaborative effort on the part of the Working Group.

3. No preamble had yet been drafted. In order to expedite the proceedings, the Working Group recommended that the draft principles should be sent to the Drafting Committee with the instruction that they should be returned to the plenary together with a preamble. While the twelve principles that he had originally recommended had been compressed into eight, their essence had been retained and their clarity enhanced.

4. The eight revised draft principles read:

"1. Scope of applicattion

"The present draft principles apply in relation to damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

"2. Use of terms

"For the purposes of the present draft principles:

"(*a*) 'Damage' means significant damage caused to persons, property or the environment; and includes:

"(i) Loss of life or personal injury;

"(ii) Loss of, or damage to, property, including property which forms part of the cultural heritage;

"(iii) Loss or damage by impairment of the environment;

"(iv) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

"(v) The costs of reasonable response measures;

"(*b*) 'Environment' includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

"(*c*) 'Hazardous activity' means an activity that has a risk of causing significant harm;

"(*d*) 'Operator' means any person in command or control of the activity at the time the incident causing transboundary damage occurs;

"(*e*) 'Transboundary damage' means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out.

"3. Objective

"The present draft principles aim at ensuring prompt and adequate compensation to victims of transboundary damage, including damage to the environment.

"4. Prompt and adequate compensation

"1. States should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within their territory or in places under their jurisdiction or control.

"2. These measures should include the imposition of liability on the operator or, where appropriate, other

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

[5] *Ibid.*

* Resumed from the 2809th meeting.