

Document:-
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Summary record of the 2018th meeting

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

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

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had an obligation to notify other potentially affected States and to consult and negotiate with them. A further question concerned the obligations of the State of origin in the event of an accident, and it was that question which differentiated international liability very sharply from State responsibility. There were instances in which State responsibility shaded into the topic of international liability, but he agreed with the Special Rapporteur that, for the purposes of legal analysis, the two should be treated separately, since they were governed by entirely different legal régimes.

19. He would illustrate his proposition by reference to the *Trail Smelter* case. In that case, there had been no dispute that the damage initially caused by the smelter had given rise to responsibility for activities that were not prohibited by law. Indeed, the kind of activity involved was now covered by rules such as Principle 21 of the Stockholm Declaration,⁹ under which a State could use its territory as it wished so long as no harm to other States ensued. The arbitral tribunal in the case had, however, introduced a régime designed to prevent unacceptable levels of injury to the United States of America, and specifically to the State of Washington. Under that régime, so long as the smelter complied with certain regulations concerning the times and quantity of emissions of fumes, the smelter, and indeed Canada, would not be acting wrongfully. The question which had then arisen was what would be the position if the smelter complied with the régime but unreasonable levels of harm were still produced. Obviously, there could be no responsibility in such a case, and it had therefore been agreed that compensation would be paid for any harm resulting from activities of the smelter carried out in compliance with the régime (see A/CN.4/402, para. 30, *in fine*). What had been at issue, therefore, was not responsibility for wrongfulness, but rather a duty to compensate for action that was not wrongful.

20. Other similar situations had arisen, for example in connection with nuclear power plants. They would have to be dealt with and clarified, more particularly with reference to the obligation which arose in the event of an accident that occurred despite the best efforts of the State of origin to prevent it. Admittedly, conventional régimes dealt with some of those situations, but what would happen in the absence of a conventional régime, since such régimes were not universal? It would, moreover, be difficult to have a series of separate conventions for all the specific situations that might arise. He therefore agreed that a general treatment of the subject was necessary. He also agreed that the Special Rapporteur could perhaps provide an indication in the commentary or in a future report of the kinds of activity which, in his view, would be covered by the topic. It would not be advisable to include a list of such activities in the body of the articles themselves.

21. Speaking as Chairman, he said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 10.55 a.m.

⁹ See footnote 6 above.

2018th MEETING

Friday, 19 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

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

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/402,² A/CN.4/405,³ A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2⁴)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)⁵ (*continued*)

1. Mr. TOMUSCHAT said that the Special Rapporteur's three reports should enable the Commission to gain a better grasp of the topic and begin to determine the direction its endeavours were to take. Some major questions still had to be resolved, and he would like to mention them in an effort to provide some answers.

2. The first related to the mandate assigned to the Commission by the General Assembly. The impression to be gained from reading the topical summary of the discussion in the Sixth Committee (A/CN.4/L.410, sect. F) was not one of very firm resolve on the part of the General Assembly that the Commission should succeed in its work, and it could not be said that the Assembly had given the Commission much guidance in

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.

its task. In his opinion, the General Assembly, in entrusting the matter to the Commission, had not been aware of the enormous problems that the topic raised. After confirming Mr. Ago's decision to deal under State responsibility solely with responsibility for wrongful acts, the Assembly had, in its concern for legal logic, simply decided to instruct the Commission to study liability for risk, which was viewed as the other aspect of responsibility. But it had never been demonstrated that such a study met the needs of States. Accordingly, the Commission could, to some extent, rightly stand aloof from the Assembly's directives at the present time.

3. The second question concerned the practical value of the topic. In his view, the example of Chernobyl and the destruction of forests in central Europe as a result of air pollution were clear indications that it was advisable, indeed necessary, for the international community to have rules to deal with the matter, particularly for preventive purposes, and hence for the Commission to complete its task successfully.

4. The third question concerned the relationship between the general convention that the Commission might elaborate and the many conventions that were designed to regulate particular aspects of the subject, especially in the field of environmental protection. The answer given by the Special Rapporteur in that regard in draft article 5, whereby the present articles would apply subject to other international agreements, seemed inadequate, for in each instance it would be necessary to determine whether another agreement provided a definitive and exhaustive answer to the problem it sought to regulate. A review of the existing conventions showed that they provided specific solutions for specific problems, that the parties had sought to adapt the legal régime to the particular features of each situation; hence it did not seem possible to eliminate all those nuances, distinctions and gradations by imposing the stifling uniformity of a general régime. Nor should it be forgotten that international environmental law had developed considerably over the past 10 years.

5. Consequently, a more concrete approach should be adopted, beginning with a scrutiny of the multilateral conventions cited in the study of State practice prepared by the Secretariat (A/CN.4/384), in an effort to see which gaps the draft was to cover and the way in which the draft would develop existing law—something that States themselves would need to know clearly before they agreed to submit to it. However, while it seemed quite clear that air pollution and nuclear hazards should come within the scope of the draft, what about, for example, genetic experiments, which could well have harmful effects beyond the boundaries of States which undertook or authorized them; and what about the clearing of tropical forests, which could lead to changes in climate? It was certainly possible to speak in both those examples of "physical consequences", but was it the Commission's intention to include them in the scope of the draft?

6. The text proposed by the Special Rapporteur for article 1 was indeed convenient because it was general and could thus be applied to virtually all new problems, without resorting to devices for interpretation. Yet it was dangerous precisely because it was far too flexible.

He was therefore not persuaded by the Special Rapporteur's arguments against drawing up a list of the activities to which the draft would apply. Admittedly, such a list could well become outdated very quickly, but legal techniques existed to offset that risk: for example, an executive body or assembly of the States parties could revise the list when necessary by a resolution adopted with a qualified majority, thereby avoiding the need to resort to an additional protocol.

7. Naturally, questions of orientation could not be left aside. The Special Rapporteur was right to say that States were in need of legal protection against activities undertaken by other States that involved a major risk. Such protection was necessary for the sovereign equality of States to be effective, for nowadays the territorial integrity of States could be threatened much more seriously by hazards to their environment than by the risk of aggression or foreign intervention. For instance, a small European country could be completely annihilated in the event of a serious accident at a nuclear power plant situated close to its borders, and some members took the view that international law offered no recourse, for the maxim *sic utere tuo ut alienum non laedas* was simply a legal precept. A State's existence and well-being could not be left to the mercy of its neighbours, and if those neighbours engaged in activities entailing a particular risk they should at least bear the cost. He therefore endorsed the three principles mentioned by the Special Rapporteur (2015th meeting, para. 4)—which should be set out in the form of articles—namely that each State was in principle free to act as it wished in its own territory, that it should respect the sovereignty not only of its neighbours, but of all other States that might suffer harm from its activities, and that a victim of major injury should not be left to bear his loss when the injury was caused by another State. Members should none the less agree on the significance to be attached to those principles, particularly the scope of the *sic utere tuo* rule, which was too imprecise and general, as the Special Rapporteur recognized in his third report (A/CN.4/405, para. 67), and which could not by itself engage the responsibility of States under the rules contained in part 1 of the draft articles on State responsibility.⁶

8. Even if the principles pin-pointed by the Special Rapporteur were taken as the point of departure, the result in every instance would not necessarily be responsibility viewed as an obligation to make reparation, whether monetary or otherwise. Emphasis should be placed above all on prevention. Very often, damage such as destruction of the ozone layer, alterations in climate, nuclear contamination of an entire region, etc. was irreparable. Moreover, even the wealthiest State might not have the means to make reparation, particularly in the case of nuclear disaster. Reparation *a posteriori*—satisfactory perhaps from the point of view of legal logic—was totally ineffectual in the most serious situations. If the accent was placed on prevention, it was also necessary to move outside the excessively narrow framework of bilateral inter-State relations. The formulation of suitable concrete rules called for a forum for exchanges of views, consultations and

⁶ See 2016th meeting, footnote 6.

negotiations, a forum that could only be an international organization—as was already the case in most risk sectors. That was one of the differences compared with the other drafts that the Commission had adopted so far.

9. In part 1 of the draft articles on State responsibility, a breach of any obligation under international law constituted an international offence and, in Mr. Riphagen's view, part 2 of the draft was based on the idea that any breach of a rule of international law entailed the obligation to make reparation, yet it could be inferred from the draft articles under consideration that no such automatic effect existed. In any event, the authors of the Stockholm Declaration had taken care to specify in Principle 22⁷ that recognition of the *sic utere tuo* principle, which was the basis for Principle 21, did not necessarily imply recognition of the duty to compensate for damage caused by pollution. He endorsed such a cautious approach and considered that the reticence regarding the *sic utere tuo* maxim could be explained by fear that acceptance of it might entail all the consequences of international liability. Things were simpler if the maxim was taken merely as a point of departure to provide an internal logic and a structure for the rules to be elaborated.

10. The Commission's work on the topic lay between the progressive development and the codification of international law. The basic concepts were firmly anchored in positive law, whereas everything that would make the draft valuable and useful was not. Consequently, the Commission was facing a very great risk of failure. It should be less ambitious and confine itself to starting on regulations that could always be supplemented and improved later, once the foundations had been laid.

11. Mr. MAHIOU said that it was his intention to speak on questions of a general nature and that he would discuss the draft articles themselves at a later stage. The first general question related to the Special Rapporteur's second and third reports: it was rather an abstract question which might seem to be a theoretical digression, but it was a digression that seemed useful, for the Commission should clarify a number of theoretical bases in order to move ahead in codifying the topic. The question might also seem to rake over the debate held in 1970, when, on the proposal of Mr. Ago, the Commission had approved the idea that a State incurred international responsibility once a wrongful act could be attributed to it, thereby making the wrongful act the necessary and sufficient condition for responsibility. That choice, which stemmed from logical reasoning, had above all made it possible to demarcate the topic under consideration for the purposes of codifying part 1 of the topic of State responsibility. In basing its work on wrongful acts, the Commission had been on sure ground and had avoided adding to the difficulties inherent in the topic of State responsibility the further difficulties that were specific to the topic of liability for risk or strict liability. The Commission had been right to classify the difficulties, so as to resolve them one after the other. He understood and accepted

that distinction, more for practical than for theoretical reasons.

12. From a theoretical standpoint, he disagreed somewhat with the conclusions drawn by the Special Rapporteur, who had stated in his second report (A/CN.4/402, para. 9): "The fact that injury, whether actual or potential, is such a key factor makes for a clear-cut distinction between the present topic and that of State responsibility for wrongful acts", and who, in support of that argument, had cited Mr. Ago (*ibid.*, para. 10), according to whom: "It therefore seems inappropriate to take this element of damage into consideration in defining the conditions for the existence of an internationally wrongful act." It was on the basis of that analysis that injury was regarded as playing no role in the topic of responsibility for wrongful acts, whereas it lay at the very core of the present topic. What, therefore, was the place held by damage in the régimes of responsibility and of liability? In his opinion, it was important, at least for the purposes of a clear discussion, to revert to that analysis and indicate why he was not wholly convinced by the Special Rapporteur's reasoning.

13. Admittedly, in responsibility for wrongful acts, damage did not determine the wrongfulness of an act. An act of a State was wrongful once it violated an international obligation, regardless of the consequences, in other words the injury. However, the injury remained if the State that was the victim sought reparation. Mr. Ago had recognized as much, since he had taken the precaution of indicating that: "The extent of the material damage caused may be a decisive factor in determining the amount of the reparation to be made."⁸ Personally, he considered that, in the absence of damage, responsibility seemed quite theoretical, and he wondered whether there was not some ambiguity in the analysis of both Mr. Ago and the Special Rapporteur, more specifically in regard to the distinction between the foundation and the conditions of responsibility. Writers had not always established such a distinction and it was not easy to make, yet from a comparison of responsibility and liability he wondered whether the distinction might not be relevant and of special significance. In the case of responsibility for wrongful acts, the wrongful act was the foundation of responsibility, in other words the act generating responsibility; consequently, the absence of a wrongful act meant the absence of responsibility. Damage, in that case, was simply a condition for implementing responsibility in order to obtain reparation. Conversely, in the case of liability for acts not prohibited by international law, injury was both the foundation and the condition of liability, in other words it was the act generating liability and the condition for implementing the procedure to obtain reparation. In short, injury existed in the régimes of both responsibility and liability, but it did not perform the same function in each case. Accordingly, the approach to liability for acts not prohibited by international law could be clarified.

14. It was a relatively new field and the Commission was perhaps engaged more in the progressive develop-

⁷ See 2017th meeting, footnote 6.

⁸ *Yearbook* . . . 1970, vol. II, p. 195, document A/CN.4/233, para. 54.

ment than in the codification of international law; hence the need for a better grasp of the foundation of the new rules and the new kind of responsibility. The reports by the previous and present Special Rapporteurs, while they did not entirely solve the problem, did provide serious food for thought. Nevertheless, the present Special Rapporteur displayed some hesitation in regard to the foundation or foundations of liability. His second and third reports revealed four foundations, namely risk, with the concept of a dangerous activity; shared expectations, a fertile concept that was open to discussion because of the novelty of the terms and because it was so difficult to delimit its content; unjust enrichment; and the breach of an obligation, particularly an obligation of prevention—hence the link with responsibility for wrongful acts. Mr. Bennouna (2016th meeting) had proposed yet a fifth: abuse of rights.

15. Perhaps there were too many foundations and, instead of taking a difficult path, or indeed entering a cul-de-sac, it would be more reasonable to simplify the problem and take the view that injury was the foundation and the condition of liability for acts not prohibited by international law. In that way, damage—potential or actual—could be made the central concept, one which would not act as a criterion for drawing a distinction with responsibility for wrongful acts but would help to define the origin of liability without too much concern for differentiating it from responsibility for wrongful acts.

16. To conclude on that point, while he fully appreciated the Commission's concern to draw the boundaries between liability for acts not prohibited by international law and responsibility for wrongful acts, he did not think that the difference should be regarded as final. The Special Rapporteur's analysis showed that responsibility and liability sometimes shaded into one another, particularly when he discussed the breach of an obligation of prevention. A more thorough investigation of lawfulness and wrongfulness revealed that lawfulness could prove to be a sometimes uncertain criterion, since it was open to variation and lay at the core of another controversy concerning soft law, to which the Special Rapporteur alluded in his third report (A/CN.4/405, para. 22).

17. Consequently, the evolving concept of lawfulness could well lead the Commission on to shaky ground on which it would be difficult to build a satisfactory normative edifice. The two régimes of responsibility should not be contrasted at all costs. A difference did exist and he agreed with the separation between the two régimes for the purpose of making headway in considering them, but it should come as no surprise that there were sometimes convergences and even a continuum from one to the other. Accordingly, the Commission should endeavour above all to explore the concepts and the rules that could be used to establish the two régimes. The responsibility was the same, but it was viewed from two different angles. Responsibility for wrongful acts was viewed from the angle of the author State and sought to prevent or limit wrongful acts by attributing to them a number of consequences that entailed reparation. The legal aspect prevailed over the aspect of reparation. In the other case, the problem was viewed

from the angle of the State that was the victim: the régime of liability sought essentially to make reparation for the damage suffered. The idea was not so much legality as justice, the purpose being to make sure that the State that was the victim did not bear the consequences of acts imputable to another State.

18. His second general remark related to the topic itself and what the Commission could do with it. It was a volatile topic that sometimes eluded the Commission when it sought to demarcate it, despite the impressive efforts of the Special Rapporteurs. However, the subtlety displayed by the present Special Rapporteur in his analysis might raise some doubts: were the elements analysed with such finesse ripe for codification or progressive development? It was a question with two facets that could guide the future work of the Commission. To begin with, was the schematic outline used to delimit the topic and added to by the Special Rapporteur an adequate basis for defining a régime of liability for acts not prohibited by international law? If the answer was in the affirmative, the question then was could it lead to a convention? His own position, one that could well change because the topic was bound up with technological developments, which held surprises for mankind with each passing day, was that a number of principles and rules on liability could indeed be set out. But he harboured doubts as to the nature of the instrument to be elaborated. In his opinion, the régime could only be a general framework, a set of recommendations to guide the conduct of States. If the Commission adopted that point of view, the draft articles would be easier to prepare and the Commission could move ahead in developing the relevant rules of international law without causing too much concern among States. Moreover, he wondered whether the Commission's future progress in considering the topic would not be bound up with the headway it achieved in the topic of responsibility for wrongful acts. A definition of the rules concerning responsibility for wrongful acts would be a great help in enunciating the rules on liability for acts not prohibited by international law.

19. The essential thing, however, was to achieve practical results, namely the establishment of a régime of compensation. Theoretical debate was inevitable at the stage now reached in considering the topic, for a useful normative framework could be devised only on clear foundations that commanded general consent. If the draft articles referred to theories that were excessively ambiguous or open to dispute, a dialogue of the deaf might well ensue. He hoped to speak later on the draft articles themselves, which were a more concrete field for discussion, and, at that time, to be more constructive. The role of members of the Commission was not solely to offer criticism; it was, above all, to help the Special Rapporteur in his task.

20. Mr. KOROMA said that, as stated by the Special Rapporteur in his second report (A/CN.4/402, para. 23), the Commission had a twofold objective in considering the present topic. The first was to provide States with a procedure for the establishment of régimes to regulate activities which, though not unlawful and not prohibited, gave rise or might give rise to transboundary injury. That was precisely the régime which was to

be found in most national legal systems. The second objective was to make provision for situations where such injury occurred prior to the establishment of such a régime.

21. During the debate, the autonomy of the present topic with respect to that of State responsibility had been questioned, and not for the first time. Mr. Graefrath (2016th meeting) had rightly said that, under customary international law, there was no general rule of liability for injurious consequences arising out of lawful activities. That consideration, and the link with the topic of State responsibility, had apparently obscured the present topic.

22. At the previous meeting, however, the Special Rapporteur had thrown further light on the subject by drawing a distinction between responsibility and liability. In 1973, the Commission itself had made a distinction between State responsibility for internationally wrongful acts and liability for injurious consequences arising out of acts not prohibited by international law, stating in its report on its twenty-fifth session:

... Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. . . .⁹

23. The Commission regarded the norms of strict liability as primary, not secondary norms. Responsibility imposed a duty or standard in performing an act, whereas liability designated the consequence of failure to perform that duty or to meet the required standard. He therefore concluded that the absence of customary rules did not relieve a State or an enterprise which had caused harm or injury of the duty to pay reparation to the injured State; nor did the absence of customary law deprive the injured State of its right to satisfy its claim at the expense of the State or enterprise which had caused the harm or injury.

24. In introducing his third report (A/CN.4/405), the Special Rapporteur had said (2015th meeting) that liability for the injurious consequences of acts not prohibited by international law could be understood only in the context of strict liability. Presumably, that proposition stemmed from the fact that the norms involved were primary norms, in the sense of the consequences of failure to perform a duty.

25. Even in treaty practice, the tendency had been to adopt the same method. For example, article II of the 1972 Convention on International Liability for Damage Caused by Space Objects specified:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

Under article VI of the same Convention, the only basis for exoneration from liability was gross negligence or intent to cause damage on the part of the claimant. Similarly, the relevant articles of the 1982 United Nations Convention on the Law of the Sea contained provisions on the responsibility and liability of States in respect of pollution of the marine environment.

26. Strict liability, however, could be viewed as an attempt to prevent harm and, where harm did occur, as an obligation to pay compensation. Should the concept of strict liability give rise to difficulties, the Special Rapporteur could perhaps recast the draft articles in terms of prevention and compensation.

27. The Special Rapporteur was right to say that any list of dangerous activities would soon be overtaken by new technological developments. In the draft articles, the Special Rapporteur had attempted to define the scope and the main elements of the topic. Article 1 defined the scope as transboundary injury giving rise to "a physical consequence". That expression lacked clarity, for it was not certain whether "physical consequence" covered, for example, the case of gas emissions escaping from the State of origin and affecting persons in another State. His comment was prompted by the statement in the third report (A/CN.4/405, para. 39) that: "The idea which this article seeks to convey seems to be that a given hazardous activity gives rise to specific changes or alterations of a physical nature." Yet it was well known that some of the most lethal gases had no smell and their impact on the physical environment could not be detected: the effect was felt only by man. He would welcome an explanation from the Special Rapporteur on that point.

28. He approved of the spirit behind draft article 4, in particular the idea of constructing a special régime for developing countries, as some conventions on pollution had done. However, given the scope of article 1, which covered activities or situations that were presumably created by man, the defence of lack of knowledge could not be admitted, even for harm caused by developing countries. The basis of liability in the present instance was not knowledge, but injury. In accordance with the provisions of article 1, the affected State had to establish that it had suffered some physical consequence. Accordingly, the basis of liability would be the harm or injury caused to the affected State.

29. In conclusion, he believed the topic should be developed so as to provide recognition of transboundary injury, and also to protect the sovereignty and territorial integrity of States from pollution or exploitation from outside.

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

30. Mr. AL-BAHARNA congratulated the Special Rapporteur on his excellent reports and expressed appreciation for the way in which he had dealt with some of the most complex issues. The critical analysis of the schematic outline provided in the second report (A/CN.4/402) was particularly helpful in explaining the terms used in the draft articles.

31. The complexity of the topic lay in the fact that there were still no positive rules of customary international law on the subject. Yet the Special Rapporteur took the view that such rules could be developed and, in support of that opinion, had referred in his preliminary report¹⁰ to the detailed survey of State practice prepared

⁹ See 2017th meeting, footnote 7.

¹⁰ *Yearbook* . . . 1985, vol. II (Part One), p. 97, document A/CN.4/394.

by the Secretariat (A/CN.4/384). As he had stated in paragraph 10 of the preliminary report, the material contained in the survey held out good prospects for identifying positive rules of general international law governing the topic or, at any rate, for determining the lawfulness of State policy with regard to future conduct. The Special Rapporteur had also recalled that many representatives in the Sixth Committee of the General Assembly had considered that the law of outer space and the law of the sea, particularly as the latter related to marine pollution, provided a firm foundation for the principle that States were under an obligation, first, to prevent damage, and secondly, to provide compensation if damage occurred. For his own part, he was in favour of the development of general rules and procedures on the basis of the revised draft articles submitted by the Special Rapporteur in his third report (A/CN.4/405), and thought that a multilateral convention on the topic was justified by the speed of technological progress.

32. The topic had first been included on the Commission's agenda in 1978, but, owing to its novelty and difficulty, much time had been spent on conceptualization and the preparation of a schematic outline, and the problems had been aggravated by the untimely death of the previous Special Rapporteur, R. Q. Quentin-Baxter. The present Special Rapporteur had had to consider the extent to which he could base his ideas on the work and reports of his predecessor, and had fortunately decided to accept Mr. Quentin-Baxter's schematic outline as the raw material for his work.

33. It was clear from the Special Rapporteur's third report that the door had been left open for members to discuss the general issues of concepts and scope, which remained unresolved, as well as the basic rules of general international law. Mr. Thiam had confirmed that approach when, as Chairman of the Commission at its thirty-eighth session, in 1986, he had introduced the report on that session to the Sixth Committee of the General Assembly and had referred to certain ambiguities which still existed, particularly regarding the interplay between different sections of the schematic outline.¹¹ There seemed to be general agreement, however, on the need for a link between the two main duties which formed the basis of the topic: prevention and reparation. The concept of injury in the sense of material harm, whether actual or potential, could provide that link.

34. The Commission's discussions on the scope of the topic had proved inconclusive. It was therefore one of the three points on which the Special Rapporteur had sought clarification from the Commission, raising the question in his second report (A/CN.4/402, para. 11) whether the scope of the topic should be confined to physical activities by the State of origin giving rise to transboundary harm. Members' views on the matter differed. Some favoured inclusion in the topic of all activities by the State of origin, while recognizing that State practice had not yet developed sufficiently in that direction. Others would prefer to include only ultra-

hazardous activities. Furthermore, the Commission had not settled the question whether damage caused in areas beyond national jurisdiction or to the common heritage of mankind should be covered.

35. The magnitude of the harmful effects of activities arising out of, for example, the use of nuclear energy, or the use of outer space (such as the passage of satellites over a State's territory), or the release of industrial waste into rivers, lakes, oceans or the atmosphere, and the cumulative effects of such activities on persons and objects in another State or territory, could not be ignored. It was therefore necessary to develop general rules to govern and control such activities. According to the previous Special Rapporteur, in the light of State practice the main thrust of the new topic was to minimize the possibility of loss or damage and to provide means of redress if loss or damage did occur, without, if possible, prohibiting or hampering activities carried out within the territory or control of a State which might be useful or beneficial.¹² That idea corresponded to the balance-of-interests test reflected in Principle 21 of the Stockholm Declaration.¹³

36. The duty of the State of origin to negotiate also posed various problems. In the present Special Rapporteur's view, the problems were not insurmountable because a number of variables, such as the location of the activity and the statistical data available on the injurious impact of certain activities, usually helped to determine the State with which the State of origin should negotiate. The Special Rapporteur had considered the twin obligations to inform and to negotiate in his second report (*ibid.*, paras. 35 and 37), but the idea of imposing a duty on the State of origin to inform and to negotiate in such a manner had not met with a sympathetic response in the Commission, since many members had thought it would jeopardize the sovereignty of that State.

37. With regard to reparation, it had been suggested that, in the case of certain activities resulting in catastrophic damage, the question of liability should be set aside and the problems regarded as coming within the field of co-operation between States as members of the international community. The principle of strict liability should, however, be generally accepted as the basis for reparation. The nature of liability remained controversial. On that subject, the United Kingdom representative in the Sixth Committee had observed that it might be helpful, in determining whether a State should be held liable for an activity which it did not know was likely to cause harm, to carry out a comparative study of relevant national laws; he had also noted a tendency in recent years for States to adopt absolute liability principles, which might suggest that in such cases the State of origin should at least share the cost of reparation with the affected State on an equitable basis, since the nationals of both States were innocent.¹⁴

¹² See *Yearbook* . . . 1982, vol. II (Part Two), p. 86, para. 116.

¹³ See 2017th meeting, footnote 6.

¹⁴ *Official Records of the General Assembly, Forty-First Session, Sixth Committee*, 39th meeting, para. 14.

¹¹ *Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 27th meeting, para. 69.

38. The Commission had spent 10 years discussing the topic and it was therefore high time to decide whether or not to formulate articles along the lines suggested by the Special Rapporteur. The importance of the topic and the rapid development of technology militated in favour of the formulation of positive rules of international law, and the starting-point should be the draft articles which had been submitted. Naturally, those articles would require improvement in the light of the comments of members of the Commission, so as to ensure that the obligations of prevention and reparation placed on the State of origin were not unduly onerous. A balanced review of the articles that took account of the interests of both the State of origin and the affected State would undoubtedly facilitate the adoption of a framework agreement or multilateral convention on a vital and complex topic.

The meeting rose at 12.30 p.m.

2019th MEETING

Tuesday, 23 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCaffrey

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

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/402,² A/CN.4/405,³ A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2⁴)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

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.

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

ARTICLE 5 (Relationship between the present articles and other international agreements) *and*

ARTICLE 6 (Absence of effect upon other rules of international law)⁵ (*continued*)

1. Mr. CALERO RODRIGUES, thanking the Special Rapporteur for his well-thought-out third report (A/CN.4/405), said that the six articles proposed were based on those submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, in his fifth report⁶ and dealt with fundamental concepts. The Special Rapporteur still had doubts about some of those concepts, and it was clear from the debate that the Commission had even more doubts. Even allowing for the fact that only eight of the present members of the Commission had participated since the outset in the consideration of the topic and the fact that half the members had not taken any part in the discussion of the previous Special Rapporteur's reports, there was something wrong when the scope and nature of a topic remained undefined after 10 years of study.

2. He agreed with the general and substantive reservation made by Mr. Francis (2017th meeting) regarding the way in which the work was proceeding. The Commission had moved away from the basic concept of liability and compensation to that of the duty of care and rules of prevention, with emphasis on procedures, which had become the focus of its attention. He had already had occasion to express doubts in the Sixth Committee of the General Assembly about the advisability of including matters relating to prevention within the scope of the topic, but had not foreseen that such matters would take over the topic, as they were now doing. The marked shift in approach from the duty of reparation to the duty of prevention was best illustrated by comparing the statement made by Mr. Quentin-Baxter in paragraph 72 of his second report:

. . . once an activity which generates or threatens transboundary harm has been made the subject of a régime to which other States affected have agreed, there is little left for rules developed pursuant to the present topic to regulate—except, perhaps, the question of liability for unforeseen accidents . . .⁷

with that made in paragraph 47 of his fourth report:

. . . Reparation has always the purpose of restoring as fully as possible a pre-existing situation; and, in the context of the present topic, it may often amount to prevention after the event. . .⁸

The result of that shift in approach was that the concept of liability for injurious consequences arising out of acts not prohibited by international law had faded away to be replaced by that of State responsibility for wrongful acts. Under the latter concept, damage would be compensated not on the basis of mere causality, but rather because a State, in failing to fulfil its obligation of prevention, had committed a wrongful act. It followed

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

⁶ *Yearbook* . . . 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

⁷ *Yearbook* . . . 1981, vol. II (Part One), p. 121, document A/CN.4/346 and Add.1 and 2.

⁸ *Yearbook* . . . 1983, vol. II (Part One), p. 214, document A/CN.4/373.