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Summary record of the 2022nd meeting

Topic:
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2022nd MEETING

Friday, 26 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCaffrey

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. 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.

Visit by a former member of the Commission

1. The CHAIRMAN extended a warm welcome to Mr. Sucharitkul, a former member of the Commission.

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)

2. Mr. Sreenivasa RAO said that the topic under consideration was an important aspect of international law and could and should be distinguished from the topic of State responsibility, although there were admittedly areas and elements common to both. The treatment of the topic should also differ from that which the Commission was giving to the question of the régime for non-navigational uses of international watercourses, although there, too, there were certain common aspects inasmuch as the question of liability also arose in the context of international watercourses.

3. The Special Rapporteur had recognized the importance of those basic points in delineating the course

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.

of action to be followed, which was different from the methods adopted for the topic of State responsibility and for international watercourses. In that regard, the efforts of the previous Special Rapporteur, the late R. Q. Quentin-Baxter, had not been altogether successful and some members of the Commission, as well as some representatives in the Sixth Committee of the General Assembly, had been inevitably drawn into a very general theoretical debate on the subject of State responsibility. At the same time, the clash of concepts involved in the development of the subject of international watercourses, particularly the question of how the freedom of States to pursue the goals of progress and rational and optimum utilization of national resources was to be reconciled with the duty to exercise one's rights within an overall framework of accommodation and reasonableness, had had its impact on the approach and thinking not only of the Special Rapporteur, but also of several members of the Commission.

4. State responsibility was essentially a question of State-to-State relations and dealt mostly with obligations and standards involving conduct at the State level; it was not conditional upon specific results or injury. On the other hand, liability—in the specific sense of the need for reparation as distinct from the more literal sense of responsibility—arose in all cases of breach of conduct or obligations which involved injury or harm. The Commission had to concentrate on that basic distinction in common law.

5. The subject of liability had to be studied carefully in order to identify its various legal components, namely the conditions under which it arose, the defences or mitigating factors, the means by which it was established and the manner in which the type and extent of reparation could be determined. In that connection, various issues had been raised, such as the relationship between cause and harm, the burden of proof, the presumption that arose in the event of refusal to co-operate, the duty to notify and knowledge of the risks involved. It was also necessary to investigate the conditions under which liability did not exist and specify the factors that could snap the legal chain of causation: acts of God, *force majeure*, contributory negligence of the victim, intervention of a third party and "shared expectations", which was simply another term for the well-known defence of tacit or implied agreement or acquiescence. Personally, he did not favour using the term "shared expectations", for it had much broader scope and significance. The Commission should therefore focus on the relevance of those factors in various contexts, such as nuclear accidents, outer space activities and activities concerning resource exploration and exploitation in marine areas.

6. The existing body of precedent should also be carefully studied in order to draw generally acceptable conclusions that could guide decision makers in identifying the most relevant mitigating factors. In that respect, he shared the view expressed by the Special Rapporteur in his second report (A/CN.4/402, para. 51) that there was no clear-cut division between strict and absolute liability and that there were many shades of strictness, ranging from the "channelling" of liabi-

lity to the operator in the nuclear field, with an almost total lack of exceptions, to more benign forms, such as simple reversal of the burden of proof or recourse to inferences which would work in favour of the plaintiff.

7. Hence the debate on whether strict or absolute liability was recognized in customary international law was neither decisive nor even necessary. State practice was focusing on specific activities, within the framework of specific treaty régimes. What was more important and even crucial for the Commission's present purpose was to note that, in order to establish liability, there had to be an acceptable and generally agreed threshold of harm or injury, a threshold that would naturally differ from one activity to another.

8. In that regard, scientists and informed observers were not in agreement on, for example, the tolerable levels of radiation for different subjects (humans, animals, the environment, the rivers or the oceans) or on the conditions under which the levels of tolerance could vary. Similarly, the debate on the use of pesticides and chemical substances, on noxious gases, on waste disposal and on the dumping of nuclear substances had led to numerous disagreements on the question of what the threshold should be.

9. It had been suggested that experts should be invited to elucidate for the Commission the scope and type of standards needed and help in clarifying the technical and scientific content of the topic. A more thorough understanding of the subject in all its dimensions was no doubt required, but it should be remembered that there was no single expert opinion on the matter, just as there was no single group of experts for all the different aspects of science and technology involved in the present topic. It was therefore clear that it would not be appropriate to talk of liability in general terms. The important thing was to establish standards that were generally acceptable to technical experts, and later to States and the responsible authorities. It would then be significantly easier for the Commission to provide indications to determine the type and quantum of reparation or damages that were appropriate.

10. It was therefore essential to determine the basic principles applicable in the matter. The first principle was State sovereignty, namely each State's freedom of action in so far as was compatible with the rights of other States. Everyone was in agreement with that principle, which was valid for all the topics before the Commission. At the same time, it was in the interests of all States to have rules on liability, not so much to try to find a guilty party as to regulate the problem of reparation, with the emphasis on preventive measures. In the case of river pollution, for example, the State of origin was the first to be affected by the pollution; hence there was no real conflict of interest with other affected States.

11. The events at Bhopal had clearly shown that multinational corporations controlled almost all aspects of scientific and technological development. The role of multinational corporations in science and technology had been the subject of much criticism and called for separate analysis. Profit was the primary consideration for such companies, whereas States were compelled by

economic and social needs to involve them in their development process. The situation was of the type which called for application of the principle, formulated by the Special Rapporteur, that an innocent victim should not be left to bear his loss. The victim in the case cited had been the State itself, millions of whose inhabitants had been affected by the catastrophe. The question of liability in such instances would have to be examined and he believed that the Commission could not escape that problem.

12. Another policy question had been raised by Mr. Barsegov (2020th meeting), namely the need to encourage innovation and enterprise in moving into new areas of science and technology. In that regard, a balance had to be struck between experimentation and reasonableness. Undeniably, certain beneficial activities had to be encouraged. At the same time, however, there should be a reasonable time-lag from experiment to industrial application; the magnitude of the risk also had to be kept in mind.

13. In September 1986, IAEA had adopted two conventions, the first on early notification of a nuclear accident and the second on mutual assistance in such matters,⁶ but it was significant that the conventions did not deal with the question of liability. At the meeting in March 1987 of IAEA's Standing Committee on Civil Liability for Nuclear Damage under the 1963 Vienna Convention, the important question of the liability of the operator had been mentioned, but it had been suggested that the Commission was the proper body to study it. The Commission should therefore deal with that question under the present topic.

14. Another policy issue was the prevention of adverse effects with respect to such matters as nuclear damage, pollution and damage caused by chemical substances. In those cases too, the activity in question first harmed the State of origin, before it could cause damage to other States. There was thus a common interest in dealing with the matter, and that common interest was precisely the *raison d'être* of the Commission's current work. Due regard should be paid to all the elements involved, such as the problem of multinational corporations, which were agents of profit. The main purpose of the State, however, was not profit. Therefore the State was not the only subject to be considered in connection with liability. It was worth noting that, even in the United States of America and Japan, the public authorities had little or nothing to do with scientific and technological advancement, and multinational corporations were therefore among the leading actors in the field of application of science and technology for development purposes. That being the case, the Commission must not fail, in its study of international liability, to give sufficient attention to the role, responsibility and liabilities of those important actors as well.

15. A number of other issues, in addition to the responsibility of multinational corporations, required careful examination, such as the nature of absolute or strict liability, exceptions to the obligation to make reparation in the case of certain scientific activities, and the transnational effects of certain activities.

⁶ See 2019th meeting, footnotes 13 and 14.

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

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

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

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

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

The meeting rose at 11.25 a.m.

2023rd MEETING

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

Chairman: Mr. Stephen C. McCaffrey

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. 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 (*concluded*) (A/CN.4/384,¹ A/CN.4/402,² A/CN.4/405,³ A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2⁴)

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

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

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

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

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

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