

Document:-  
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**Summary record of the 1633rd meeting**

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

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results over the past decade in its campaign against the injurious consequences of certain activities. Formerly, those activities had not been considered wrongful, but they had gradually come to be so treated, by recourse to such notions as abuse of right, liability without fault and an increased requirement of due care. In addition, the Japanese courts had applied the rules of procedure to the advantage of the injured party; evidence brought by the injured party had been judged more easily admissible than evidence for the adverse party. In medical matters, statistics had often been considered sufficient, without strict proof of a causal connexion. In his view, that attitude of the Japanese courts deserved attention, since it provided a way of remedying the injurious consequences arising out of lawful activities.

35. Lastly, he emphasized that the topic under consideration was both new and old. The Commission had always refrained from deciding whether it was carrying out codification or progressive development of international law on a particular matter. In view of the rapid evolution taking place in the international community, however, it was to be hoped that in the present case the Commission would try not to confine itself to pure codification.

36. As far as the notion of shared resources was concerned, the Commission should use it only with the greatest caution.

37. Mr. DÍAZ GONZÁLEZ associated himself with previous speakers in congratulating the Special Rapporteur on his report. He believed that its value lay above all in showing that the topic, under its existing title, did not have an evident, solid basis, since it might be expected to disappear with the progressive development of international law. It could be foreseen that acts which were currently permitted to States, in the sense that they were not prohibited by international law even though they had injurious consequences, would eventually be governed by rules as codification developed.

38. It seemed to him that the first part of the preliminary report had a certain importance for English-speaking countries with a common-law background, as it dealt with differences in terminology. But in countries which had inherited a civil law system, the differentiation outlined in the report was of lesser importance, since the concepts of responsibility and obligation had a well-defined legal content.

39. The principle put forward by the Special Rapporteur, that all that was not prohibited by law was permitted, must be regarded as relative to some extent. For instance, since the Second World War the rule *nulla poena sine lege* was no longer absolute, for at the Nuremberg trials an offence had been created specially to condemn war criminals.

40. The development of technology had shown that the utilization of certain resources, even when carried out in accordance with the principle of State sovereignty and when not prohibited by law, might

cause harm to another State and involve acts which gave rise to liability. It should also be borne in mind that harm arising from an act committed by a State and not prohibited by law could not always be subsequently compensated. Furthermore, it was, as the Special Rapporteur had pointed out, very difficult to draw the line between a lawful act and an act not prohibited by law which had harmful consequences. He believed that the nub of the question lay not so much in liability without fault as in compensation for harm done.

41. It was important to ask where the topic led to. If the Commission was going to establish rules governing acts committed by a State that were wrongful, such acts would no longer be acts not prohibited by international law, but would become regulated acts which were wrongful under the rules governing them. It seemed to him that the topic as such was too wide, and he could not see any basis on which the Commission could found the regulation of acts not prohibited by international law which gave rise to the liability of a State.

42. The same doubts could be expressed with regard to primary and secondary rules. It seemed to him that, so long as there was no primary rule establishing an obligation, there could be no secondary rule giving rise to responsibility. In general, his first thoughts on the topic led him to express concern at any attempt to establish rules governing the injurious consequences of acts not prohibited by international law, because the topic, as it stood, did not seem to be sufficiently tangible or real.

*The meeting rose at 4.55 p.m.*

## 1633rd MEETING

*Tuesday, 15 July 1980, at 10.15 a.m.*

*Chairman:* Mr. C. W. PINTO

*Members present:* Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### **International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/334 and Add.1 and 2)**

[Item 7 of the agenda]

### **PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (concluded)**

1. Mr. QUENTIN-BAXTER (Special Rapporteur),

replying to points raised during the discussion, said that the first speaker, Mr. Riphagen (1630th meeting), had taken the view that since the rules relating to the environment might be peculiar to the environment, the Special Rapporteur should not seek to draw up unduly wide-ranging rules. A Special Rapporteur was bound by the title of his topic, however, and consequently had to resist any temptation to treat it narrowly.

2. Mr. Riphagen had pointed out that a State's willingness to enter into commitments regarding measures to prevent injury and, in the event that injury none the less occurred, to make equitable risk allocation, was not necessarily matched by willingness to agree on a regime of liability, and that there was no absolute link between the rules relating to precautionary measures and the liability which would arise in the event that such measures were not taken, or that damage occurred, even if they were. That point served to underline the subtle boundary between lawful acts and responsibility for wrongfulness: non-compliance with such commitments would, of course, constitute a breach of an obligation, and the responsibility flowing from that breach might or might not be commensurate with the damage that had occurred.

3. Mr. Riphagen had drawn attention, at the 1609th meeting, to certain parallels in municipal law, referring in that connexion to the regimes being promoted, for example, by the OECD, and had noted that the effect of the "polluter pays" principle was similar to that of liability for an act not prohibited. The great merit of that principle was that it negated a commercial inducement to pollute, and it was quite true that the regime with which the Commission was concerned was directed first and foremost at prevention. The only qualification he wished to make, as Special Rapporteur, was that the kind of regime being promoted by OECD was agreed to by States and governed their relationships accordingly. He was not, however, suggesting that no relationship could arise at the international level unless States chose, either expressly or tacitly, to forgo their obligations under such regimes. Indeed, the only right and sensible way of dealing with, for example, transnational industrial pollution, was for the States concerned to seek to unify their plans and standards accordingly. It might well be that in cases where the transnational effect was entirely incidental to the harm which occurred within a particular territory, States would be content to leave the victim to seek the remedies available in the State where the trouble had originated, but that would be the exception rather than the rule.

4. Another point raised by Mr. Riphagen, as well as a number of other members, concerned degrees of liability, on which he (the Special Rapporteur) had not thought it necessary to make any specific suggestions at that early stage. The Commission would remember that, in its work on the topic of succession of States in matters other than treaties, it had elected to rely, at a

certain point, on an equitable rule and to indicate the factors to be taken into account in applying that rule; also the International Law Association, in its Helsinki Rules (see A/CN.4/334 and Add.1 and 2, para. 49), had included a list of factors, which was not exhaustive, to indicate the area within which States having an interest in the matter should be left to find their own accommodation.

5. By the same token, the main emphasis in the topic with which the Commission was concerned should be on prevention and on encouraging States to establish their own regimes to govern particular situations. There was no doubt that in certain circumstances such regimes would have an indirect impact on the standards relating to wrongfulness, independently of the treaty regime. For example, pursuant to treaties dealing with oil spillages at sea, States parties imposed an obligation under their municipal law upon a designated operator—provided that, in so far as was necessary, sovereign immunities should not stand in the way of justice—and set a limit to the amount of liability in any particular case. If a State failed to adhere to such rules and made no effort to reach agreement with the other States concerned on the consequences of major spillages caused by ships flying its flag, it could not be argued that the only regime that would apply was one of responsibility for an act not prohibited. Indeed, failure to take the kind of precautions which other States in a similar position considered necessary in order to prevent damage that was clearly foreseeable might well tip the balance between right and wrong. Although that was not a matter which fell to be considered within his topic, he considered that the elaboration of regimes relating to lawful acts would provide tribunals with an indication of the kind of standards that were deemed reasonable and normal in a particular situation. Hence that was one area in which his topic could have an impact on the substantive treatment of wrongfulness.

6. He agreed that there was a certain overlap between his own topic and the law of the non-navigational uses of international watercourses, but there were only advantages to be gained from such a common pool of material. He did not foresee any difficulty arising out of the overlap between his topic and State responsibility, but would bear in mind the need to take account of the relationship between the two topics and would look to Mr. Riphagen for guidance on the rules relating to damages.

7. Mr. Sucharitkul (1631st meeting) had perhaps established the balance of what the majority of speakers believed should be the scope of the topic. Specifically, he had endorsed the recommendation of the Working Group referred to in paragraph 65 of the report regarding the minimum content of the topic and had expressed the view that no maximum should be set. In preparing the report, he (the Special Rapporteur) had had no difficulty in working within that framework, although he had concentrated to some

extent on the material available concerning the environment.

8. One point alluded to by Mr. Sucharitkul concerned the moving frontier between rightfulness and wrongfulness, in other words, between acts that were regarded as permissible, provided the actor took full account of the consequences, and acts that were forbidden. Mr. Sucharitkul had rightly concluded that, as that frontier moved into the area of wrongfulness, a new element would arise to replace it in the area with which the Commission was concerned. He (the Special Rapporteur) had, however, also sought to take account of the numerous fairly innocent activities which he considered might have a permanent place in that area.

9. Mr. Sucharitkul had noted that, in certain circumstances, the less developed States were not well equipped, in terms of their own legal order, to ensure protection of their environment both at home and abroad. That factor, which was recognized in Principle 23 of the Stockholm Declaration (A/CN.4/334 and Add.1 and 2, para. 16) would undoubtedly have to be taken into account when drawing up a regime or assessing the degree of liability, but, as Mr. Schwebel had observed (1632nd meeting), the problem was not confined to the less or to the more developed countries. In that area, the emphasis was always on the special needs and circumstances of the State concerned, and existing regimes showed how much effort had been made to accommodate the interests of the various parties, all effort that was greatly to be encouraged. As Mr. Sucharitkul had stated, it was not a question of complete freedom, but of ensuring that the obligation was not unreasonably severe in its application.

10. Mr. Sucharitkul had agreed that, in the case of lawful acts, the standard of care should be stricter, but he had not specified any particular standard. There again, the various regimes allowed States sufficient latitude to agree on the level of care which would meet their requirements in a given situation.

11. He agreed with Mr. Sucharitkul that the Commission was, in a sense, concerned with created risks, as opposed to the consequences of a natural situation. He considered, however, in connexion with a point raised by Mr. Pinto (1631st meeting) that omissions also fell within the title of the topic, since liability at the international level could arise from the omission of a State to take adequate precautions to avoid harmful results.

12. Mr. Sucharitkul had suggested that the bomb tests carried out 25 years earlier on the Marshall Islands might now be regarded, in view of developments in the law, as falling within a category of wrongfulness or, at any rate, might be considered in a different light. It was perhaps relevant to note, however, that there was often an element of choice in regard to the regime to which such matters were referred. In the case mentioned by Mr. Tsuruoka, the Japanese Government had not at any stage suggested

that the United States had acted wrongfully, but only that its action might call for an appropriate measure of redress. Moreover, at least one of the conventions on liability in the nuclear field stated expressly that the institution of a new form of liability for acts not prohibited did not deprive any party of recourse to another form of complaint allowed under international law. It was perfectly possible for two regimes to exist side by side, and when there was no regime for a particular incident, for the parties to refer to some other regime.

13. Mr. Calle y Calle had rightly noted that the title of the topic, though a little awkward, established precisely the kind of classification required. He had wondered exactly what the report sought to establish by drawing a comparison, in one specific context, between the principle with which the Commission was concerned and the work of Mr. Sørensen (A/CN.334 and Add.1 and 2, foot-note 29). Admittedly, the operation of that principle, which was extremely broad, was not confined to one area; the report could also have drawn a parallel with the kind of legal relationship that arose out of an obligation incurred when some harm or loss was suffered by a State or its citizens, since it was one matter to determine the existence of a legal relationship and quite another to determine how the incidence of liability would fall in a particular case.

14. Mr. Šahović (1631st meeting) had underlined the need to deal with the topic in general terms, even suggesting that the Special Rapporteur should concentrate on principles and should not be unduly concerned about rules. While that was welcome advice, it was necessary to strike a certain balance, particularly since a specific response was expected of the Commission. Moreover, in another context, Sir Francis Vallat had spoken of the disadvantages of seeming to be always concerned with the abstract and the general. It would therefore be advisable to make some progress at the specific level without, however, sacrificing objectivity and principles.

15. Mr. Pinto, in referring to the assessment of harm (*ibid.*), had stressed the need to take account of whether or not there was a shared interest, since it was unreasonable for countries which had no hope of immediate benefit from a particular activity to be put to undue trouble to maintain it. Once again, a series of factors was involved, but it was clear from existing regimes, as well as that proposed for sea-bed mining, that those factors were being taken into consideration. By and large, the States concerned should be left to work out such matters to their mutual benefit.

16. He agreed entirely that the kind of conflict which the Commission was required to regulate was aptly illustrated by the work of R. Pound, to which Mr. Pinto had referred.

17. Sir Francis Vallat (*ibid.*) had pointed out that the term "environment" frequently conjured up a notion of changes that affected only the ecology. Although he

(the Special Rapporteur) had not intended to use that term in such a narrow context, he thought it would be wise to remain within the boundary of the physical use of the environment.

18. Sir Francis had also noted a distinction between cases which might be governed by the duty of care and the criterion of negligence, and could therefore be classified fairly easily without reference to a special regime, and cases which should be covered by guarantee. A duty of care might, however, in itself call for the establishment of a special regime. For instance, where space objects were concerned, although all necessary precautions would undoubtedly be taken, the possibility of an accident, albeit remote, was so serious that the countries concerned were required to make appropriate provision. He agreed that the Commission should not depart from the standards of the reasonable man, but he also considered that, within a given regime, States should set their own standards; where it was necessary to appraise situations not covered by a regime, reference should be had to such parallels as existed under other regimes.

19. Referring to the comments made by Mr. Ushakov (*ibid.*), he pointed out that, while the Commission must indeed be concerned with the liability to compensate, it must also consider the duty to take preventive measures. He did not regard liability as being limited to inadequate monetary compensation for damage that was not compensable. Mr. Ushakov had also said there could be liability only if damage was caused. But responsibility for wrongfulness could also exist, even if no damage was caused. The regimes of wrongfulness and liability overlapped and, in many instances, offered a choice of reference points, which made for easier and more adequate settlement of disputes. He agreed with Mr. Ushakov that international relations, rather than the mere use of territory, should be the criterion governing the general development of the topic. The Commission was concerned as much with activities undertaken outside national jurisdiction as with those occurring within national jurisdiction and producing consequences outside it.

20. He noted the distinction drawn by Mr. Ushakov between consequences that were foreseeable, and therefore gave rise to a duty to prevent, and those that were attributable to circumstances such as *force majeure*, so that the equitable principles of State responsibility might provide a means of dealing with the situation.

21. Referring to the comments made by Mr. Barboza (1632nd meeting), he said that he subscribed to the widely held view of writers that it was simply not possible to draw a valid distinction between ultra-hazardous and other activities. Indeed, he saw no salvation in such an approach.

22. With regard to the use of the term "liability", he believed that it could be interpreted as meaning not only the consequences of an obligation, but also the

obligation itself. It was the responsibility of a State not to act wrongfully, and if it did so its responsibility was engaged. Moreover, State responsibility extended to all the content and consequences dealt with under the topic of State responsibility. If the term "liability" was to be used, it must have the same meaning as the term "responsibility", although in respect of a different set of obligations. Moreover, the terms "obligation" and "liability" could be regarded as coterminous, in that all obligations set up liabilities.

23. With regard to the relationship between the regimes of liability and wrongfulness, he regarded the duty to exercise due care as encompassing the establishment of what was harmful in a given context, provision for preventive measures and, if necessary, the construction of a regime of compensation. That interpretation raised no new doctrinal problems, and it was perfectly possible for States to choose to apply a regime of liability for acts not prohibited by law, if it provided an easier way of regulating common interests. Moreover, a State's prestige was not engaged to the same extent if it was found to be in breach of a rule which did not involve wrongfulness. State practice contained innumerable examples of States dealing with each other on a limited basis and refraining from establishing binding rules or determining a firm boundary line between right and wrong, preferring to allow that boundary line to develop out of their dealings with one another.

24. He thanked Mr. Verosta for substantiating his own references to the established principle of *sic utere tuo ut alienum non laedas* (*ibid.*). He also noted Mr. Verosta's warning not to depart from the general in order to deal with the particular. The topic was so broadly defined in the report because many of those concerned regarded it as another category of secondary rules and because it was really only as a result of the Commission's work that a new way of dealing with the problem was beginning to emerge. He was also grateful to Mr. Verosta for his observations concerning preclusions and other situations, and the benefit to be derived from the study of other materials, such as treaties on the treatment of aliens and the research of the Special Rapporteur on the non-navigational uses of international watercourses.

25. He had noted Mr. Schwebel's suggestion (*ibid.*) that the study might be extended to include the question of *ex gratia* payments and other types of situation. In that connexion, he recalled that in extending the limits of their territory or economic zones, States had, in the past, taken account of the legal interests of countries that had traditionally made use of the areas in question. Situations of that type were germane to the topic under consideration. He had noted that Mr. Schwebel regarded the rules outlined in paragraph 60 of the report as providing a good working basis.

26. Referring to the observations made by Mr. Thiam (*ibid.*) regarding the distinction between the

regimes of wrongfulness and liability for lawful acts, he said that the duty of due care was, in itself, the application of a primary rule and, until that rule had been applied, the regime of wrongfulness could not come into play. States might choose not to characterize their own conduct as wrongful if it departed from certain objective standards. Only if the duty to compensate was not performed would a different form of responsibility arise. The regime of liability was a necessary and useful adjunct to the regime of responsibility for wrongfulness.

27. The doubts expressed by Mr. Reuter (*ibid.*) as to whether the topic really existed were reasonable, since no reference to it could be found in standard works. Mr. Reuter had also stated that conventional regimes usually resulted precisely from the impossibility of establishing the existence of a duty to exercise due care, so that some other absolute standard had to be substituted for it. It should be noted, however, that the applications of such a standard might extend beyond the range of questions which were normally associated with ultra-hazardous situations. In general, when activities within a State produced consequences outside its boundaries, only the State in which the activities had occurred was able to control them, or even to give an authoritative explanation as to how or whether they had been carried out. That advantage had been noted in the *Corfu Channel* case (A/CN.4/334 and Add.1 and 2, para. 36). However, the other States concerned might be entitled to a liberal inference as to the proof of events occurring in the first State.

28. Mr. Reuter had been correct in observing that, in approaching the topic, he had not attempted to propound a doctrinaire view or to suggest obligations other than very general ones. His main concern had been to indicate that, when States dealt with each other in such matters as the causing of harm, they did so on a basis of equality. Mr. Reuter's observations concerning the need to establish thresholds raised the question of the primary duty to ascertain what constituted harm in a given situation and to take appropriate measures. Greater prominence should be given to preventive than to compensatory measures.

29. With regard to the view that the Commission was breaking new ground, he pointed out that the topic had not been foisted on the Commission by the General Assembly, but had been taken up as the result of deliberate decisions taken by the Commission each year since 1973. Moreover, the title had been determined, in every detail, by the Commission itself. The General Assembly had simply taken the Commission at its word by inviting it to proceed with the study of the topic. The Commission therefore had a duty to do so.

30. With regard to the observations made by Mr. Tsuruoka (1632nd meeting), he agreed that it was important to avoid interpreting the term "environment" in a narrow, ecological sense.

31. Mr. Tsuruoka had also emphasized that preventive measures were more important than compensatory measures. He was grateful to him for his offer to provide material on the relevant State practice of Japan. He also agreed with Mr. Tsuruoka that the Commission should not lose sight of the important factor of international solidarity in dealing with the topic. He took note of Mr. Tsuruoka's reference to the case of the Japanese plant in Thailand, and of his warning not to confuse the question of shared resources with the general question of environmental protection.

32. Referring to the comments made by Mr. Díaz González (*ibid.*), he said that it had certainly not been his aim to propose an *ex post facto* law to be imposed on States which had committed no wrongful act.

33. As to the way in which he had dealt with the term "liability" in the report, he explained that he had attempted to show that the use of two words in English where only one word was used in the other working languages could raise very serious drafting problems. The Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea<sup>1</sup> suggested that such a formulation was possible, but that was a question for the Drafting Committee.

34. Referring to paragraph 65 of the report, he said that the words of the Working Group set up by the Commission at its thirtieth session showed quite clearly that the topic was concerned with cases in which danger was created within the jurisdiction of one State and damage was suffered by other States, or by citizens of other States. It was also quite clear that social and economic factors would come into play, as they had even with respect to the rules laid down by the International Court of Justice for determining the base lines from which the territorial sea should be measured.

35. While those who saw merit in a separate system of no-fault or risk responsibility might regard his approach to the topic as disappointingly conservative, it should be remembered that his course was governed by the wording of the title of the topic and by the distinction drawn by the Commission between primary and secondary rules.

*The meeting rose at 11.30 a.m.*

<sup>1</sup> "Informal Composite Negotiating Text/Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2-5).