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Summary record of the 1690th meeting

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1690th MEETING

Tuesday, 14 July 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add. 1–3)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*concluded*)

ARTICLE C (Transfer of part of the territory of a State),

ARTICLE D (Uniting of States),

ARTICLE E (Separation of part or parts of the territory of a State), *and*

ARTICLE F (Dissolution of a State)

1. The CHAIRMAN invited the Commission to consider articles C, D, E and F, which read:

Article C. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory in question is transferred, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part referred to in subparagraph (*a*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the transferred territory or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. (*a*) the predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory;

(b) the successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

Article D. Uniting of States

1. When two or more States unite and so form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provisions of paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

Article E. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) the part of State archives of predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part referred to in subparagraph (*a*), that relates directly to the territory to which the succession of States relates shall pass to the successor State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the successor State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of documents of their State archives connected with the interests of their respective territories.

6. The provisions of paragraphs 1 to 5 apply when part of the territory of a State separates from that State and unites with another State.

Article F. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) the part of the State archives of the predecessor State, which should be in the territory of a successor State for normal administration of its territory, shall pass to that successor State;

(*b*) the part of the State archives of the predecessor State, other than the part referred to in subparagraph (*a*), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The passing of the parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the respective territories of the successor States, shall be determined by agreement between them in such a manner that

each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. Each successor State shall provide the other successor State or States with the best available evidence of documents from its part of the State archives of the predecessor State which bear upon title to the territories or boundaries of that other successor State or States, or which are necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of documents of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

6. The provisions of paragraphs 1 to 5 shall not prejudge any question that might arise by reason of the preservation of the unity of the State archives of the successor States in their reciprocal interest.

2. Mr. BEDJAOUI (Special Rapporteur) said that the comments made in the Sixth Committee in 1980 had been concerned with the question of agreement, which, as was apparent from article C, paragraph 1, was fundamental in the matter.

3. The representative of Trinidad and Tobago had said that the agreement must be based on the principle of equity and take into account all the special circumstances of the case. He had also asked that all the rules which the Commission wished to see respected in connection with the conclusion of the agreements in question should be spelt out in the body of the articles. Another representative had pointed out that almost all treaties in the matter of State succession embodied an agreement applicable to archives; from that, he had concluded that the rule laid down by positive law was that there must be an agreement between the successor State and the predecessor State, and that the Commission should do no more than state that rule in article C, paragraph 1, since to go any further would be to depart from State practice. It had also been stated that the predecessor State should enter into an obligation of result and accept its responsibility towards the successor State for recovering, for the latter's benefit, all archives situated outside the territory. Another representative had, however, taken the view that the obligation should be one of means only, requiring the State merely to do everything in its power to recover those archives.

4. In his view, what mattered was that the agreement between the predecessor State and the successor State should be based on the principle of equity and should take account of all the special circumstances of the case. The Commission could not restrict the content of article C to the terms of paragraph 1, omitting the remainder of the text, since the result would be an article that lacked substance, did not lay down any valid rule and would be of no benefit to States when it proved impossible to reach an agreement.

5. The comments on article D could be broken down into two main groups. In the first place, it had been said that paragraphs 1 and 2 would be contradictory. That was the main thrust of the written comments of the Swedish Government (A/CN.4/338), according to which paragraph 1 laid down a rule of international law on the passing of archives, whereas paragraph 2 provided that the internal law of the successor State should govern the allocation of archives subsequent to their passing.

6. His own opinion was that the contradiction was only apparent, since prior to the uniting of States the predecessor States were free to decide on the allocation of archives under agreements between themselves—although such agreements would only be valid *inter se*—whereas the purpose of article D was to indicate which was the successor State. The final wording of the article would, however, depend on the decision taken by the Commission regarding draft article 12.[1]

7. Some contradiction had also been noted between the wording of the article and the commentary thereto. He trusted that the Commission would ensure that the commentary followed the final text of the article as closely as possible.

8. Only minor points had been raised in the Sixth Committee regarding articles E and F (see A/CN.4/345 and Add.1–3, paras. 292–295).

9. However, the Swedish Government had proposed, in its written comments, that the Commission should bring articles E and F into line with article B;[2] that it should not restrict the freedom of States to conclude all such agreements as they deemed desirable; that, in articles E and F, it should delete paragraph 4, which restricted States' freedom of choice on the ground of the right of peoples to development, to information about their history and to their cultural heritage; and, lastly, that it should delete from paragraph 2 of each of those articles the phrase reading: "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives", which, again, restricted the contractual freedom of the predecessor State and the successor State or States.

10. He did not think that it would be advisable to delete paragraph 4 nor to foreshorten paragraph 2 of articles E and F, since the agreements concluded between the predecessor State and the successor States should conform to certain principles—principles which the Commission had, moreover, formulated in very general terms. The paragraphs in question simply laid down for States general guidelines, which they should have no difficulty in following. The constraints thus

[1] For text, see 1661st meeting, para. 95.

[2] *Idem*, 1689th meeting, para. 16.

imposed by the draft articles could not be burdensome for States acting in good faith and for the common good, and the Commission should not therefore act on the Swedish Government's comments on that point. It could, however, consider in the Drafting Committee the possibilities of bringing articles E and F into line with article C.

11. Mr. USHAKOV said that, as the conclusion of an agreement between the predecessor State and the successor State was always a difficult matter, article C, paragraph 2, provided a valid basis for dealing with the passing of archives.

12. Article D, paragraph 2, was in fact unnecessary, since once the State had come into possession of the archives it could decide on their allocation by reference to its internal law. The Commission should, however, bring the wording of the article into line with the wording, as finally adopted, of draft article 12.

13. Article E called for more careful consideration, since it juxtaposed the concepts of the passing and the reproduction of State archives but contained a paragraph—paragraph 5—that dealt exclusively with the question of reproduction. It would therefore seem advisable to bring article E, paragraph 2, into line with article F, paragraph 2, which was better drafted, by deleting the provisions relating to reproduction.

14. The phrase in article F, paragraph 2, to the effect that each of the successor States should be able to "benefit as widely and equitably as possible" from those parts of the State archives that had passed to other successor States lacked clarity and would therefore be ineffective. He would favour its deletion, so as to preserve the application of the basic principles laid down in paragraph 4.

15. Mr. REUTER expressed his unreserved support for the Special Rapporteur's views.

16. He said that he, too, considered it preferable to leave article D, paragraph 2, as it stood, and that it was justified not to mention in the article the agreements that might have been concluded between the predecessor States prior to their uniting, since once the States had united such agreements lost their international character to become part of the internal law of the new State, and were then beyond reach of international law. The wording of paragraph 2 was therefore entirely satisfactory, and only some obstacle of a constitutional nature could prevent the new State from enacting legislation to amend agreements concluded previously.

17. The Special Rapporteur had said that paragraph 4 of articles E and F perhaps laid down not so much a rule of *jus cogens* as an obligation upon States with regard to the conclusion of the agreements contemplated. It might perhaps be advisable to modify the wording of that paragraph somewhat and, consequently, that of article B, paragraph 6, too.

18. Lastly, he agreed with Mr. Ushakov that the part of article F, paragraph 2, was not entirely satisfactory, since archives could, of course, be allocated equitably, but not widely. The phrase in question seemed to contradict the principle of equity, but to accord with the rule of reproduction—which could be carried out widely. It would therefore be possible to recast the paragraph to take account of Mr. Ushakov's comments and to confine the concept of equity to the allocation of archives and the concept of wide benefit to their reproduction.

19. Mr. CALLE Y CALLE agreed with the observations made by Mr. Ushakov concerning the deletion from article E, paragraph 2, of the reference to the reproduction of parts of the State archives of the predecessor State.

20. With regard to the reference to the right of peoples to development, contained in paragraph 4 of draft articles E and F, he said that it might be advisable to insert an adjective such as "overall" in order to make it clear that the reference was to general, and not simply economic, development.

21. He drew attention to a number of drafting errors in the Spanish text of the draft article.

22. Mr. BEDJAOUI (Special Rapporteur) said he supported Mr. Calle y Calle's proposal that the meaning of the concept of development, in articles B, E and F, should be made clearer by the addition of the word "overall" or "integral".

23. With regard to articles E and F, he was aware of the difficulties mentioned by Mr. Ushakov, which were probably due to hasty drafting. He also recognized that the wording of paragraph 2 of both articles was virtually the same except for the reference to the question of reproduction in article E, but would ask the Commission to give the matter further consideration before deleting that reference.

24. It was true that paragraph 5 of article E dealt with reproduction, and required each State concerned to make reproductions available at the request and at the expense of the State concerned. That paragraph was, however, silent as to the reasons for the obligation thus created, whereas paragraph 2 made it clear that it was to ensure that each State benefited as widely and equitably as possible from parts of the State archives other than those covered by paragraph 1 of the article and concerning the territory to which the succession of States related. Paragraph 2 set forth the substantive conditions and, in a sense, was the precursor of paragraph 5, which only dealt with some of the purely technical aspects of reproduction.

25. He recognized, however, that the wording of article E, paragraph 2, was awkward and considered that the Commission should redraft it along the lines indicated by Mr. Reuter. However, the Commission should perhaps do so by including a reference to reproduction in article F, paragraph 2, rather than

deleting the present such reference from article E, paragraph 2.

26. Mr. USHAKOV said that article B, paragraph 2, of which article E, paragraph 2 was the counterpart, had originally been included in the draft articles to take account of difficulties stemming from the need to maintain the integrity of archival collections. Under the terms of that paragraph, the reproduction of archives could, in certain circumstances, take the place of their passing. To take account of that same requirement of integrity, the Commission had added paragraph 6 to article F. To his mind, it would be better to add a provision similar to article F, paragraph 6, at the end of article E than to group the two concepts of passing and reproduction in the same provision. The latter would, indeed, be a dangerous course, since the provision in question might be interpreted to mean that reproduction could, by virtue of an agreement between the parties concerned, be substituted for passing, whereas the original intent had been solely to preserve the unity of archives.

27. Mr. BEDJAOUI (Special Rapporteur) explained that the reason why the problem of the unity of archives had been considered only in the case of article F, relating to dissolution, was that it was in the event of dissolution that the unity of archival collections was the most at risk. Paragraph 6 of article F in fact appealed to the goodwill of States; however, if they invoked the question of unity misguidedly, they might strip the preceding five paragraphs of all effect. Consequently, it would be dangerous to generalize the use of a provision that would allow for evasion of the rules which the Commission had laid down.

28. He agreed with Mr. Ushakov concerning paragraph 2 of articles E and F and proposed that the paragraph should be moved to the end of the article in both cases. In that way, paragraphs 1, 3, 4 and 5 would lay down specific rules, while the last part of paragraph 2 would contain a reminder that the principle of equity must be respected. It should be noted, however, that the field of archives was extremely complex; the Commission should therefore move very carefully towards any revision of article E, paragraph 2.

29. Mr. USHAKOV said that article F, paragraph 6, embodied a simple safeguard clause, not a rule, and there was therefore no reason why that clause should not apply to all that part of the draft which dealt with State archives.

30. The CHAIRMAN suggested that articles C, D, E and F should be referred to the Drafting Committee.

It was so decided.[3]

31. The CHAIRMAN thanked the Special Rapporteur for having made himself available despite his heavy responsibilities and for having thus enabled the Commission to conclude its second reading of the draft articles on the succession of States in matters other than treaties.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/346 and Add.1 and 2)

[Item 5 of the agenda]

Draft article submitted by the Special Rapporteur (*concluded*)

Article 1 (Scope of these articles)[4] (*concluded*)

32. Mr. TABIBI congratulated the Special Rapporteur on his report and analysis of a difficult topic. He recalled that the Special Rapporteur had stated (1685th meeting) that he had found Part 1 of the draft articles on State responsibility[5] to be of assistance. In reality, those draft articles might create difficulties for the Special Rapporteur and the Commission, since the dividing line between the two topics was extremely fine.

33. Whatever rules were prepared by the Commission should be preventive, rather than concerned mainly with the question of remedies. If the Commission succeeded in that goal, it would have performed a great service to mankind and to international law in general. The rules should also be of a general, pragmatic nature.

34. It would be helpful if the Special Rapporteur's third report could be supplemented by a compilation of materials relating to the area in question, similar to that prepared by the Secretariat in connection with succession of States in respect of matters other than treaties. There were a large number of conventions that were relevant to the topic. Also worthy of further study were the Principles of the Declaration of the United Nations Conference on the Human Environment,[6] although he had himself criticized them as having been drafted by economists rather than jurists and as containing contradictions, and although they had not been approved by the General Assembly. It was important to consider those Principles in their totality.

35. Finally, he agreed with the view that, in order to provide the Commission with guidelines for its future work on the topic, the draft articles should begin with a set of general definitions, rather than with the existing draft article 1.

36. Mr. ALDRICH said he had no doubt that the topic under consideration was a valid one, which warranted the Commission's attention. Just as domestic legal systems must have a rule relating to the

[3] For consideration of the texts proposed by the Drafting Committee, see 1694th meeting, paras. 49–50, 51, 52–56, and 57–59, respectively.

* Resumed from the 1687th meeting.

[4] For text, see 1685th meeting, para. 1.

[5] See *Yearbook ... 1980*, vol. II (Part Two). pp. 30 *et seq.*

[6] See 1686th meeting, footnote 4.

duty of care and to negligence, so a similar rule must exist in international law, if the latter was to be responsive to the needs of States.

37. In that connection, he pointed out that the difficulties involved in the relationship between the topic of State responsibility for internationally wrongful acts and the topic under consideration were more apparent than real because, in determining what was wrongful, whether under customary law or in efforts to codify the law of State responsibility, States often based their decisions on a balance-of-interest test and frequently came to the conclusion that a particular action was wrongful because they considered that reparation must be made for it. It would therefore be helpful if the Commission accepted an analysis that permitted it to decide that compensation must be provided even if the wrongful act did not have to be stopped.

38. He had greater difficulty with draft article 1 than with the Special Rapporteur's second report, for reasons relating to the scope of the topic and to the Commission's ability to produce general rules that would act as catalysts to help precipitate out of State interactions sets of specific rules applicable to limited areas, such as space activities or ocean pollution. He was not sure that the general rules that the Commission would be able to formulate would, in fact, serve as very effective catalysts for the elaboration of sets of rules in other areas, because such rules would be produced only when States came to believe that problems in particular areas were urgent and important and needed to be tackled. Indeed, he doubted that the Commission's work on the topic under consideration would significantly hasten the day when specific rules would be elaborated on the question of land-based air pollution, for example, or in other specific areas of the law of liability and negligence. The Commission was, in fact, running a considerable risk in trying to formulate general rules, because such rules would fit in some circumstances, but not in all. Thus, his major doubt about the success of the Commission's undertaking was that it might not be able, on the basis of a relatively narrow set of precedents, to enunciate rules that would suffice for unforeseeable problems of a specific nature that might be encountered in future. Perhaps because of his common-law background, he would feel more comfortable with the idea of trying to distil general rules only when the Commission had a wider range of specific cases on which to base an analysis.

39. One matter of particular concern to him was that, once an area of the law had been developed in specific terms, the general principles which the Commission would elaborate in its draft would not, as the Special Rapporteur had pointed out, really serve any useful purpose with respect to that area. That concern arose as a result of article 1, subparagraph (*b*), which stated that the articles would apply to such other specialized regimes. He supposed that what the Special Rapporteur in fact had in mind was that the articles should apply to the other areas of the law which had developed through custom and to which no specialized regime yet applied. Some revision of subparagraph (*b*) would therefore be useful.

40. In his view, the most serious problem was that of the potential application of general rules to other areas that could not be foreseen. He thought he understood why the Commission had instructed the Special Rapporteur not to concentrate only in the very broad area of the environment, but he would have been more comfortable with an approach limited to that area because he was not at all certain that the principles which the Commission might elaborate on the basis of the *Trail Smelter* arbitration (see A/CN.4/346 and Add.1 and 2, paras. 22 *et seq.*), or an even more far-reaching set of precedents, would really suffice to govern the world's economy and the actions of States (or their failure to act) in economic matters, or to regulate negligence on the part of States in matters relating to the enforcement of anti-trust laws, or to tolerance of terrorism, currency-counterfeiting or unlawful conduct in time of war. It might therefore be necessary further to define the outer boundaries of the topic under consideration, to prevent the rules that would be laid down from being held up to ridicule on the grounds that they obviously did not apply to one specific area or another.

41. Another problem he had with article 1 was caused by the inclusion of the words "potential loss or injury" in subparagraph (*a*). He had no difficulty in seeing what those words meant in relation to space activities and liability therefor, but he thought that many rules dealing with negligence and liability would not be very applicable to potential loss. That was another reason why article 1 would, in a sense, have to be considered as a tentative proposal until the Commission had made further progress in elaborating general rules.

42. Mr. VEROSTA said that it was quite clear, in the light of the statements made by Mr. Tabibi and Mr. Aldrich, that the Commission would need more material in order to go on with its work on the topic under consideration. The problem was particularly acute in a number of areas, and the Commission would be unable to formulate general rules until it had received further information on those areas.

43. In the modern-day world, States were, for example, continually encountering new problems that involved negligence and the duty of care and arose out of technological developments. When trying to solve such new problems, States were usually reluctant to be tied down by rules, but they had, in the past, agreed to submit to arbitration—as in the *Trail Smelter* case—which would serve as an excellent precedent for the formulation of rules of customary law applicable to different areas within the scope of the topic under consideration. The Commission should therefore confine itself to the formulation of some very general

principles and, perhaps, some procedural rules which might constitute a minimum international standard applicable in those different areas.

44. Although he had considerable difficulties with article 1, on the scope of the articles, he was sure that the Drafting Committee would be able to produce a text that showed clearly the Commission's intentions.

45. Mr. USHAKOV said that he would like to revert to the question of the distinction between primary and secondary rules. In fact, all legal rules were the same, in that they governed the conduct of individuals and communities. It was only for practical reasons that the Commission had made a distinction between primary rules, which laid down an obligation, and secondary rules, which indicated the consequence of conduct not in conformity with such an obligation. But legal rules knew no hierarchy. If the Commission had decided to draw such a distinction, it was because the secondary rules of responsibility came into play only when there was a wrongful act involving a violation of an obligation laid down in a primary rule. The distinction should therefore be maintained purely as a matter of convenience.

46. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, in order to dispel any doubts the members of the Commission might have, he wished to make it clear that he was very happy with the general guidelines they had given him. He was not at all inclinded to urge them to accept article 1, which was, in its present form, much too cryptic and, as Mr. Šahović and others had pointed out, needed a good many supporting texts. He was, in fact, quite content to regard that article as a cryptogram which he had to try to explain, but which had been intended mainly as a guide to help the members of the Commission focus their thoughts on the topic.

47. The preliminary report which he had submitted at the preceding session[7] had, it might be recalled, ended *diminuendo*, stating that a possible course of action would be to confine the topic to the area in which activities undertaken in one State caused physical harm in the territory of another State or in areas which belonged to all States. Although that would be a perfectly reasonable way of proceeding, he could not place arbitrary limitations on a topic which was defined, in its title, in altogether general terms. It had been stated that it would be better to begin by exploring, in general terms, the significance of the topic, and several members of the Commission who had made detailed analyses of the elements of the title of the topic had found that those elements would provide adequate guidelines concerning the breadth of the study, at least at the outset.

48. He had therefore followed that approach and had not attempted, in his second report, to marshal the mass of international practice reflected in international conventions dealing with particular subjects. What seemed to have been required of him, and what he had tried to do, was to go beyond that practice and look at general principles of law. Now, however, he entirely agreed that a counterpart was required and that it would soon be time for him to look at the topic from another angle, taking the mass of State practice and trying to see what it meant.

49. With regard to the comments made by members of the Commission, he said that he fully agreed with the observations just made by Mr. Ushakov concerning primary and secondary rules. He himself assigned no absolute value to the distinction between those two types of rules, which were only measures of approximation that made it easier to grasp abstract ideas. He was, however, faced with the fact that the Commission had based its consideration of the topic of State responsibility for internationally wrongful acts on that distinction. Indeed, Mr. Ushakov and others had said that there were only two kinds of obligations, namely, those that arose out of wrongfulness and those that were primary obligations. By definition, the rules relating to the topic under consideration did not arise out of wrongfulness. Under the terms of the rules on State responsibility for internationally wrongful acts, they therefore had to arise out of primary obligations. That was not a magic formula that would solve any problem of substance. It was merely a method of proceeding which was not inconsistent with methods the Commission had used in the past.

50. It was, of course, also true that the rules relating to the topic under consideration were, in a quite different sense, secondary rules. They had to be, because anyone who was requested to deal with a topic of unlimited generality, theoretically affecting the whole range of international law other than that contained in secondary rules, would obviously not begin to lay down substantive obligations in the rules he was formulating. All that could be done in such a case was to formulate general rules of a predominantly procedural nature, which might facilitate the ascertainment and application of particular primary rules.

51. That led him to the basic question of what the rules being formulated were intended to do. Clearly, they were not concerned with cases in which something was prohibited. They were concerned, rather, with cases in which something was conditionally authorized—or, in other words, not with a prohibition on freedom of action, but rather with freedom of action within limits that took account of the interests of other subjects of international law.

52. The first question that arose was whether there was need at all to deal with situations in which relations between States could not be controlled wholly by rules of prohibition. He had argued—and he did not think that a detailed survey of State practice and conventions was necessary to support his assertion—that life in the modern-day world was much too

[7] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2.

complicated to allow States simply to regulate their relations in terms of what could and could not be done. In his view, States had to adjust their activities so that, in terms of Principle 21 of the Declaration of the United Nations Conference on the Human Environment, they preserved their freedom to use their own resources as they wished while taking care not to diminish the capacity of other States to do the same.

53. If that proposition was considered from the point of view of a set of rules and of a relationship to State responsibility, it would have to be said that there were areas where primary rules other than those to be produced for the topic under consideration required States to proceed with caution. That was the area with which he was dealing, and Mr. Yankov (1687th meeting) had referred to it as a "twilight zone," while others had called it a "grey area." The fact that he himself did not think of it as a twilight zone was beside the point, because the main question was whether that area was needed at all or whether relations between States could be dealt with simply in terms of a cutting-off line where everything stopped. He found that those who were inclined to question the existence of the grey area did so from diametrically opposed starting points: some believed that all harm of a substantial nature was wrongful and that, therefore, the development of the topic under consideration could only, as it were, water down the liability of States for causing harm; others began from the opposite assumption, that merely to cause harm or to allow an activity to cause harm invoked no rule of law at all and that it had to be shown in some other way that the activity in question was wrongful.

54. In his view, neither of those extreme positions was correct. It was not the case that customary international law allowed a State to conduct its activities as carefully as possible and then have no further regard for the consequences of those activities in the territory of other States. Nor was it the case that all transboundary harm was wrongful. His basic assumption was, therefore, that there was an area in which the activities of States must be regulated not simply in terms of prohibitions, but in terms of the establishment of conditions that would allow such activities to be carried on. The aim, as enunciated by a number of representatives in the Sixth Committee, was that maximum freedom of action should be preserved for sovereign States within their own borders and in relation to the activities they carried on outside their borders, while attempts should be made to minimize the harm caused beyond those boundaries and to provide reparation when harm nevertheless occurred.

55. One lesson that had been brought home to him by Mr. Barboza (1687th meeting) was that he had placed insufficient emphasis on the question of thresholds. Insignificant harm obviously did not entail legal responsibility of any kind. There were degrees of harm that simply had to be tolerated, and sometimes the thresholds could be very high indeed. It was a matter of obvious concern to countries that had endured chronic pollution of a particular kind ever since the Industrial Revolution and were only gradually gaining awareness of its dangerous consequences that emphasis should be placed on common measures of improvement, not upon liabilities in respect of individual events that occurred. When dealing with a subject such as chronic pollution or looking at the relationship between developed countries, which had, as rightly pointed out, caused most of the world's pollution, and developing countries, which had to carry on economic activities for their own survival, the question of thresholds took on tremendous importance. Before legal account could even be taken of harm, a threshold must be set, and that was something with which he would have to deal much more carefully in a possible third report.

56. When he spoke of the scale on which there was a point of intersection between harm and wrong, leaving wrongfulness on one side and taking account of an area in which acts not prohibited by international law must be regulated, he was not referring to a threshold, because nothing at all appeared on his scale if the requirements of the threshold had not been met. Once those requirements had been met, however, there were two possible situations: one in which the activity was wrongful and must stop, and the other in which the activity was conditionally authorized, although wrongfulness might exist as a result of a failure to observe the conditions under which the activity could be carried out.

57. That was his basic approach and, according to it, he was doing exactly what anyone must do who was trying to draw up an absolutely general set of rules. Like Mr. Ago, he had had to postulate that there were other relatively clear-cut primary obligations which brought the obligations of his own set of rules into play. Without those other primary obligations, his topic indeed did not exist. If it was not wrongful to cause transboundary harm or if the causing of such harm could always be dealt with in terms of clear-cut rules relating to the violation of sovereignty, his topic did not exist. However, if such means were inadequate to respond to the needs of the present-day community of nations, then he believed, in principle, that his topic did exist.

58. Turning to article 1, he said he wished to explain that, when he had referred in subparagraph (*a*) to "activities undertaken within the territory", his basic idea had simply been that the Commission was dealing with man-made situations, not with situations in which the harm suffered was purely a consequence of nature.

59. When he had used the word "jurisdiction", he should perhaps have used the word "control", but his intention had been to show that the jurisdiction of States was based primarily on their territorial limits but also on their control over their own nationals, their own ships, and their own expeditions in areas that were the common heritage of all mankind.

60. The words "beyond the territory of that State" had been used to denote the fact that what was at issue were transboundary problems.

61. The use of the words "actual or potential loss of injury" had caused the members of the Commission great difficulties, but he regarded those words only as a marker, as something that had to be taken into account at some point in the future. If the Commission were to take the case of the Three Mile Island nuclear power station, which was, fortunately, located well within the territory of the United States, and to suppose that that installation was located much closer to an international border, causing real or imaginary anxieties and containing dangers that could spread across that border, it would be better able to understand what was meant by actual or potential loss or injury.

62. The reference at the end of subparagraph (*a*) to "another State and its nationals" was merely intended to indicate that the articles would not deal with relations between a State and its own nationals.

63. At the beginning of subparagraph (*b*), the rather inadequate words "independently of these articles" had caused a great deal of trouble to many members of the Commission, but, basically, those words were a safety net. He was not by any means suggesting that, in a set of general articles, an attempt was being made to guide the world. He was only saying that, where there were obligations and those obligations had not been reduced to rules of thumb, there was a duty to make those obligations real in particular cases.

64. When he had referred to "legally protected interests" in subparagraph (*b*), he had, of course, been referring to rights—not to the right to have an activity stopped but, rather, to the right to carry on an activity with due care for the rights of others. A pre-existing rule that was best applied on a basis of give and take, rather than on the basis of the cut-off point of prohibition, was thus necessary to the operation of the rules being formulated.

65. It was, of course, true, as the Commission had recognized at the preceding session, that the area of transboundary harm was perhaps the only one in which such rules could be best formulated. Without rules, there could be no obligations, but the set of articles being elaborated might not actually provide basic rules. Often, in customary law, basic rules would not have emerged in a shape that would enable them to be automatically applied. For example, several members of the Commission had said that what was being discussed was an area in which matters were proceeding towards rules of prohibition but had not quite reached that point, and they had referred to the example of cases in which nuclear test activities of various kinds might simply be prohibited. The more common situation was, however, the one in which the elaboration of a regime would supply a great many detailed rules. For example, with regard to the law of international watercourses, there might, as Mr. Reuter had pointed out, be rules that stated exactly how much contamination or interference with flow would be tolerated. At that point, detailed rules of wrongfulness would take the place of the topic under consideration, as Mr. Aldrich had rightly noted.

66. The basic assumption was therefore that there were broad rules of customary international law that had to be applied with some appreciation of particular circumstances. He was not sure that it could be said that those rules existed in the area of the physical environment, but not elsewhere. There simply was no clear cut-off point between physical factors and economic factors, as had been made clear in the *Fisheries* case[8] and the *Continental Shelf* cases.[9] When drawing up a regime to govern a particular activity, it was not the practice of States to say that harm must stop. Their practice was, rather, to say that a given industry must go on operating, and that there was only a limited amount of extra burden that could be placed on that industry and yet have it survive. The viability of the industry was thus as much a factor as the nature of the harm it was causing.

67. It therefore seemed to him that there were real possibilities that the rules being formulated might have applications outside the immediate field from which examples were being drawn, but by no stretch of the imagination could those rules be used simply to inhibit competition or to impose a rule of causality. There must always be another obligation under reference, namely, care to ensure that the rights of others in relation to that obligation were observed.

68. In conclusion, he said that he would now be quite prepared to try to adopt a convergent approach to the topic under consideration by taking the mass of State practice in the conventional field and trying to see what rules could be extrapolated from that practice. Indeed, he would be quite content to work on the basis of the concept that some activities must carry with them a duty of reparation even if no fault could be proved, and that other activities must be undertaken with regard to a State's duty of protection or care to consider the interests of other States.

69. Sir Francis VALLAT said that the Special Rapporteur should bear in mind the fact that, as in other cases, the Commission should not be a prisoner of the title of the topic it was considering. He might also consider the possibility of sending a questionnaire to Governments in order to marshal material on the topic.

70. Mr. USHAKOV said that every individual had natural duties, in addition to the obligations imposed on him by law. The duty of care was a natural duty; it

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[8] Fisheries case, Judgment of 18 December 1951: *I.C.J. Reports 1951*, p. 116.

[9] North Sea Continental Shelf, Judgment: *I.C.J. Reports 1969*, p. 3.

did not have any legal character. All human activities required a measure of prudence towards others. In his view, it was essential for the Commission to be aware of that distinction between natural duties and legal obligations.

71. The CHAIRMAN, noting that there were no further comments, declared that the consideration of the Special Rapporteur's second report had been concluded.

The meeting rose at 1.05 p.m.

1691st MEETING

Wednesday, 15 July 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/347 and Add.1 and 2)

[Item 8 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 1 (Scope of the present articles),

ARTICLE 2 (Couriers and bags not within the scope of the present articles),

ARTICLE 3 (Use of terms),

ARTICLE 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),

ARTICLE 5 (Duty to respect international law and the laws and regulations of the receiving and the transit State), *and*

ARTICLE 6 (Non-discrimination and reciprocity)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 1 to 6 (see A/CN.4/347 and Add.1 and 2, paras. 49, 211, 217, 225 and 231), which read:

Article 1. Scope of the present articles

1. The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, or with other States or international organizations, and also to official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags.

2. The present articles shall apply also to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, and with other States or international organizations and also to official communications of these missions and delegations with the sending State or with each other, by employing consular couriers and bags, and couriers and bags of the special missions, or other missions or delegations.

Article 2. Couriers and bags not within the scope of the present articles

1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

(*a*) the legal status of such couriers and bags;

(*b*) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the diplomatic mission, consular post, special mission or other missions or delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State facilities, privileges, and immunities in the performance of his official functions;

(2) "diplomatic courier *ad hoc*" means on official of the sending State entrusted with the function of diplomatic courier for special occasion only, who shall cease to enjoy the facilities, privileges and immunities accorded by the receiving or the transit State to a diplomatic courier, when he has delivered to the consignee the diplomatic bag in his charge;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for comunications between the sending State and its diplomatic missions, consular posts, special missions or other missions or delegations, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function;

(4) "sending State" means a State dispatching diplomatic bag, with or without a courier, to its diplomatic mission, consular post, special mission or other missions or delegations, wherever situated, or to other States or international organizations;

(5) "receiving State" means a State on whose territory:

(*a*) a diplomatic mission, consular post, special mission or permanent mission is situated, or

(*b*) a meeting of an organ or of a conference is held;