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Summary record of the 1685th meeting

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

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draft articles or whether it might not be more appropriate to place them in Part 1.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer draft articles 4 and 5 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

1685th MEETING

Monday, 6 July 1981, at 3.30 p.m.

Chairman: Mr. Doudou THIAM

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

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

[Item 5 of the agenda]

DRAFT ARTICLE SUBMITTED BY THE SPECIAL RAPPOREUR

ARTICLE 1 (Scope of these articles)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 1 (A/CN.4/346 and Add.1 and 2, para. 93), which read:

Article 1. Scope of these articles

These articles apply when:

(a) activities undertaken within the territory or jurisdiction of a State give rise, beyond the territory of that State, to actual or potential loss or injury to another State or its nationals; and

(b) independently of these articles, the State within whose territory or jurisdiction the activities are undertaken has, in relation to those activities, obligations which correspond to legally protected interests of that other State.

2. Mr. QUENTIN-BAXTER (Special Rapporteur) said that in preparing his second report (A/CN.4/346 and Add.1 and 2) he had been guided by the Commission's view, which was supported by the Sixth Committee, that the topic should be dealt with in absolutely general terms.

3. One of the most important bases established at the preceding session of the Commission had been that the

topic should be placed in the field of primary rules.¹ The many difficulties experienced by writers on the subject could be attributed to the lack of a distinction between primary and secondary rules. Usually the questions raised had been seen as involving a type of responsibility which was completely foreign to the classical rules of State responsibility. Out of that preconception had grown a very significant doctrinal impasse, in which the notion of strict liability had been seen as competing with the classical rules of State responsibility. In that regard, the distinctions emanating from Part 1 of the draft articles on State responsibility² had made it possible to reduce the real problem of strict liability to a more moderate perspective. Where the nature of an activity was such that the State in which the activity took place ought to have been aware of the possibility of injurious consequences arising out of the activity, or where representations had been made to it by the representatives of other States concerning such injurious consequences, the problem of strict liability scarcely arose. The problem of strict liability was limited to small categories of cases in which damage could not be foreseen and where wrongfulness was precluded, or in which no amount of care on the part of the State concerned could have prevented the occurrence of injurious consequences. However, those were exceptional cases which had, wrongly, been allowed to obscure much larger issues.

4. In the contemporary world, situations in which an activity conducted in one State produced harmful transboundary consequences were common, and it was more difficult than in the past to control or characterize such activities or to define the rights of the parties involved. Some writers on the topic considered it of paramount importance to maintain the traditional view that States were responsible only for consequences that were intended or foreseen and were still allowed to take place, while others, under the influence of municipal law, supported the concept of strict liability, under which certain activities were considered, by their very nature, as giving rise to consequences so harmful that any State allowing them to take place must accept responsibility for those consequences. However, that doctrine was not easily reconciled with the accepted doctrines of State responsibility. There had, therefore, been the strongest possible inducement to admit the doctrine, if at all, only in a very limited number of situations.

5. Great difficulty had been encountered in finding logically satisfying criteria to justify the abnormal admission of the doctrine. Those opposed to it saw it as an assertion of the view that all harm caused across a frontier was wrongful. However, Principle 21 of the Declaration of the United Nations Conference on the Human Environment (see A/CN.4/346 and Add.1

¹ See *Yearbook . . . 1980*, vol. II (Part Two), p. 160, para. 138.

² *Ibid.*, pp. 30 *et seq.*

and 2, para. 37) and the arbitral award in the *Trail Smelter* case (*ibid.*, paras. 22 *et seq.*) and the judgment of the International Court of Justice in the *Corfu Channel* case (*ibid.*, para. 37) had been subjected to doctrinal analysis, and it had usually been felt that the statement that all harm was wrongful was not to be interpreted absolutely.

6. Once it had been accepted that not all loss or injury caused beyond national frontiers to another State or its nationals was automatically wrongful, the nature of the problem changed, and it became necessary to determine what harm was wrongful and what happened in cases in which the harm caused was not sufficient to be considered wrongful. It would be a very curious reflection on customary international law if it were to provide merely that the harm must lie where it fell, except where otherwise stipulated in special arrangements. Consequently, in his report he had given pride of place not to the concept of strict liability, but to the question of the standard to be applied in judging situations arising from the exercise of legitimate activities which, in particular circumstances, caused conflict. To reach a judgement solely on the basis of the quality of the activity of a State would be tantamount to concluding that, as long as the activity was not prohibited and as long as it was carried out with due care, the State was without responsibility for any harmful consequences. That attitude could be tempered, in particular, by placing emphasis on the concept of rising standard of care. If in determining the care required it became necessary to consider the effects of one State's actions on another State, then the position of the acting State was no longer the sole consideration. The acting State must, in discharging due care, take account of the interests of the other State. If, on the other hand, a judgement was to be made on the basis of a violation of sovereignty the exactly opposite view was arrived at. That view was reflected in the position of the Government of the United States of America in the *Trail Smelter* case.

7. Between those two extremes lay the procedure of balancing of interests, in which every real interest was taken into account. That would mean neither that the freedom of States to conduct activities within their own borders must always prevail over the harmful consequences caused beyond those borders, nor that States were always liable for transboundary harm generated by activities conducted within their borders. There were numerous examples of regimes, many of them developed since the Second World War, which relied on a balance of factors. In some regimes for dealing with cases of the flow of rivers and non-navigable watercourses, those factors were set out in detail, and always with the proviso that they were not exhaustive, so that it became necessary for States to adjust factors. A similar approach should be adopted in situations that involved both the right of a sovereign State to be free to undertake or permit activities which it considered profitable within its own borders and the right of other States to be free of the threat of activities

which might give rise to harmful consequences. Consequently, some kind of balancing test appeared to be called for.

8. However, such a test could not achieve a true balance of interests if what was to be permitted or not permitted depended solely on the fixing of a point of wrongfulness below which the acting State would be free of all responsibility and above which it would be held responsible for a breach of an obligation. Such a situation would not be particularly conducive to the development of rules for the regulation of activities that caused transboundary harm, but would lead to a situation in which individual sovereign States insisted on their own right to assess the degree of harm that would render an activity unlawful. Naturally, the assessments of acting States and harmed States would differ. If in dealing with such situations States were prepared to accept that it might not, for the time being, be scientifically, technically or economically feasible really to rid an activity of all possibility of harmful consequences, it might be possible to provide for some measures of prevention in order to alleviate the possibility of harmful consequences, or for a system of compensatory benefits for the activities of the harmed State, or, in marginal cases, for a scheme of compensation.

9. Generally, States did not ask other States to carry their duty of prevention to the point where the activity in question was crippled. That was particularly apparent in conventions regulating the carriage of oil by sea, where the need to place some onus on the carrier was balanced by recognition that, beyond a certain level, the cost of prevention would tend to cripple an essential public service.

10. In his report he had suggested that, once it was recognized that not all harm was wrongful, it must also be recognized that any substantial harm was not legally negligible and created an interest of a kind which was always recognized when questions of transboundary harm were arbitrated. If the content of an obligation was then to be considered, account must be taken, in order to assess how much harm was permissible, of Principle 23 of the Declaration of the United Nations Conference on the Human Environment (see A/CN.4/346 and Add.1 and 2, para. 37).

11. In all cases, the aim should be to seek a balance between freedom and licence. The acting State could not be allowed total freedom—nor could the situation be governed solely by prohibitory rules. The scale of values to be applied was more complex than the single scale of right and wrong. The point at which an activity became wrongful must be determined by reference to the amount of harm that could be tolerated by the community of interests. That point was a shifting one, as was made clear in the major international conventions. The fixing of a point of wrongfulness on a scale also involved establishing the conditions under which an activity could be carried out without entailing wrongfulness. Negotiation of that

kind involved more than a simple scale of right or wrong; it involved achieving a true balance of interests.

12. The basic principle which he had attempted to develop in his report depended on qualifying the scale between right and wrong with the scale of harm and on determining the areas in which wrongfulness, non-wrongfulness and harm could be allowed to go together. That basic principle, if accepted, avoided the necessity of relying on a criterion of abnormality, such as strict liability. The criterion of normality and abnormality, while relevant in certain contexts, was not relevant to the broad topic under consideration, since States tended to regulate their affairs on the basis of a balance of factors. The principle also contained its own safeguards, in that it did not operate as an alternative to the traditional rules of State responsibility, but applied only in areas where such rules existed. It also helped in the application of such rules by breaking them down into smaller and more precise provisions.

13. The basic primary rule of obligation on which the topic hinged—namely, the obligation to protect States from harm arising in the territory of jurisdiction of another State—was essentially the same as that governing the duty of States to negotiate, to disclose information and to take account of representations by other parties. Consequently, the principle might be considered a fairly conservative one.

14. Referring to subparagraph (a) of draft article 1, he said that the term “jurisdiction” was an extension of the term “territory”, in that it applied to ships or expeditions outside the territory of the State concerned and to cases in which the activities of the State could not really be said to have a geographical location. The words “beyond the territory of that State” required the effects of an activity to be transboundary effects, and thus ruled out the difficult question of the treatment of aliens within the territory of a State. Although necessary, the phrase might be inadequate to cover cases such as the *Corfu Channel* case, in which the whole of the harm done and its cause arose in the territory of one State, but where concurrent jurisdictions were the cause of the situation. The phrase “actual or potential loss or injury” had been used because of the difficulty of drawing a line between actual and potential loss or injury. In situations where no action was taken to provide safeguards in respect of a potentially dangerous industry, the danger inherent in the industry might, in itself, amount to loss or injury to the other State. The emphasis placed on loss or injury to another State or its nationals was intended to indicate that the draft articles were not concerned with principles governing the relationship between States and their own nationals.

15. In subparagraph (b), the purpose of the words “independently of these articles” was to make quite clear that what was involved was an auxiliary set of rules which applied to situations where primary rules dealing with harmfulness already existed. The purpose of the current rules was to ensure that those primary

rules were not wholly ineffectual. However, since the principle involved belonged to customary international law, it might be preferable to use the expression “independently of the rules described in these articles”. Finally, the expression “legally protected interests” referred to interests which were entitled to protection.

16. Mr. USHAKOV observed that the words “acts not prohibited by international law” in the title of the English version of the topic had been rendered in French by the words “*activités qui ne sont pas interdites par le droit international*”. If the word “acts” was to have the same meaning as in the draft articles on State responsibility for internationally wrongful acts, it would have to be translated by the word “*faits*”, which denoted both acts and omissions. In his view, the topic under consideration did cover acts and omissions prohibited to States by international law. According to article 1, subparagraph (a), however, the draft articles applied to “activities undertaken within the territory or jurisdiction of a State”; no precise link was established between the activities and the State in question. Consequently, he wondered whether that provision applied to all the activities undertaken within the territory or jurisdiction of a State, irrespective of whether they were conducted by that State or by individuals and whether they were directed against another State or against individuals. In view of the English version of the title of the topic, he even wondered whether account should not be taken of the acts and omissions both of States and of individuals.

17. Mr. QUENTIN-BAXTER agreed that the Commission was concerned with the acts of a State. In the sense used in article 1, however, the word “activities” referred not to the acts of the State itself, but to the activities within the State, or within the jurisdiction or control of the State, in respect of which the State itself had obligations; in other words, it was not intended to describe the activities of the State as such, but rather to describe the circumstances in relation to which the State had obligations. The relation of the State to those obligations was governed by the second limb of the article.

18. In the *Corfu Channel* case, for example, it could not be said that the territorial State undertook the activities that gave rise to loss and damage, but merely that those activities, being within the knowledge of the State, created an obligation upon the State. The obligation in question, of course, related more to an omission than to an act, as was very frequently, though not always, the case.

19. Whether or not the word “jurisdiction” was appropriate was a separate matter. However, the expression “within the territory”, used on its own, would clearly be insufficient, since the State also had responsibility for what its agents did outside its territory—for instance, in relation to expeditions into outer space. That was one context in which the word

"territory" required amplification. Another possible context related to an act that did not have a very obvious geographical location.

20. He assured the Commission that in using the word "activities" he had not had in mind the quality of the act itself. The real issue was what the State did or did not do in relation to such activities.

21. Mr. USHAKOV said that he did not see why account should be taken only of activities within the control or sovereignty of a State, and not of omissions.

22. Mr. QUENTIN-BAXTER said that he had used the word "activities" in relation to what people did within the territory of the State, rather deliberately, since the application of the articles would depend upon the nature of the activity in question. The very fact that the activity was of a kind which could become wrongful at a certain point was what would relate that activity to the topic.

23. Mr. REUTER said that, some hesitation notwithstanding, he wished to make three general comments concerning the task before the Commission.

24. First, the draft articles would, basically, be more akin to a legislative programme than a set of specific technical rules (in the English text, the word "should" would frequently have to be used instead of the word "shall"). There probably were, at the national level, codes which embodied only general principles, but the application of those principles was guaranteed by the courts. The situation was different at the international level, for there were few, if any, international courts. Consequently, when faced with enunciating truly general principles, the Commission must bear in mind just how inadequate its effort would be. Although it would be desirable to elaborate conventions for the topic under consideration, the Commission would not be able to do so, and it should not hesitate to draft texts that appeared as guidelines calling for legislative provisions or agreements rather than as specific legal rules. Conventions on the topic already existed, and there would be more to come. That was probably the Special Rapporteur's point of view, since he had stressed the need to formulate equitable rules. The task of an international judge who had to settle, on the basis of equity, matters relating to the limits of a continental shelf or the fixing of damages was a formidable one that could only be further complicated by the problems with which the Commission was now dealing. Consequently, even if the Commission produced texts which it described as articles, it must not shrink from proclaiming that all or some of those texts constituted a legislative programme. Although it was true that, as the Special Rapporteur had pointed out, the Commission must formulate principles which would foster the application of rules, the contrary was also true: rules elaborated by States would have to supplement some of the principles enunciated by the Commission.

25. Second, throughout the preparation of the articles in Part 1 of the topic of State responsibility, the

Commission had taken care not to state primary rules. In his view, however, it had not been careful enough when it had drafted provisions on the exhaustion of local remedies. On the other hand, in the articles concerning the topic under consideration, it would be able to enunciate only primary rules, even if it confined itself to general principles. That was because in order to formulate secondary rules it would have to acknowledge the fact that the only source of responsibility without wrongfulness was strict liability. In that connection, the Special Rapporteur had indicated that, in international law, strict liability could not be justified on the grounds of solidarity among States. The concept of ultra-hazard could not be employed because it was not clear enough in international law. To take strict liability as a basis, for the Commission's present work would be to imply that the articles of Part 1 of the draft on State responsibility were based on some other type of liability. It would then be difficult to say that there existed rules for strict liability in particular.

26. The Special Rapporteur had also pointed out that international law seemed to abhor responsibility without wrongfulness. In the few international conventions relating to that type of responsibility, there were constant references to responsibility for wrongful acts.

27. Third, the main thing that the Special Rapporteur seemed to have in mind was the protection of the environment, an area characterized by the setting of thresholds delimiting the lawful and the wrongful. In that area, certain lawful activities were in the process of becoming wrongful. The problems to which the Special Rapporteur had referred in that connection not only often entailed both types of responsibility, but also concerned particular situations. The draft articles would therefore probably have to comprise two parts: the first embodying very general principles, and the second relating to the application of those principles to environmental problems. In the part relating to general principles, the Commission would have to take care not to give the impression that cases of absolute liability unrelated to technological advances or exceptional modern-day situations could easily arise. In some cases, liability could be clear even when it was not possible to prove a wrongful act by any of the parties involved. If two warships collided on the high seas and no wrongful act could be attributed to either of them, it was the rules relating to the liability of the captains that applied. A case of that kind was of no concern to the Commission.

28. Turning to article 1, he said that the words "obligations which correspond to legally protected interests" towards the end of subparagraph (b) showed clearly that the draft was in fact related to the concept of classical responsibility for internationally wrongful acts. That was, for him, a confirmation of the dual nature of the cases contemplated. The fact that the Special Rapporteur had taken the concept of territory in the broad sense plainly showed that what he had in

mind were problems of pollution, a special area that called for secondary rules. It therefore seemed a foregone conclusion that the Commission would not stay within an abstract framework and that many of the primary rules it would formulate would come close to being secondary rules.

29. Subparagraph (a) of article 1 referred to a physical situation, while subparagraph (b) referred to a legal situation. However, subparagraph (a) stated that the draft articles applied in the event of actual or potential injury. That provision seemed to come more within the scope of subparagraph (b). If reference was made to potential injury, it was because an obligation arose from the fact that the law took so much account of certain legally protected interests that it even prohibited threats to their safety. It was, however, a very serious matter to state as a general rule that endangering legally protected interests was forbidden. In his view, that problem should rather be dealt with in subparagraph (b), since subparagraph (a) applied to material situations while subparagraph (b) added a substantive condition.

30. Last, he shared Mr. Ushakov's view that the title of the topic under consideration should be made less rigid. Most of the activities which the Commission intended to treat were not currently "prohibited by international law", but were on the way to being so prohibited.

The meeting rose at 6 p.m.

1686th MEETING

Wednesday, 8 July 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

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

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

[Item 5 of the agenda]

DRAFT ARTICLE SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 1 (Scope of these articles)¹ (continued)

1. Mr. RIPHAGEN joined with other speakers in congratulating the Special Rapporteur on his second

report (A/CN.4/346 and Add.1 and 2). However, he still had some difficulty with regard to the scope and content of the draft articles to be proposed by the Special Rapporteur. In paragraph 10 of his report, the Special Rapporteur appeared to suggest that the Commission was dealing with an inchoate law which had not yet been developed to the point where situations could be appraised in simple terms of right and wrong. In paragraph 78 of the report it was stated that, in the present age of interdependence, the topic could relate to every aspect of human affairs. While he did not disagree with that statement, he wondered whether it was possible to formulate a single set of rules with such wide coverage. Furthermore, while he agreed fully with the statement contained in paragraph 79 of the report that lawyers often regretted that the community of States still lacked the solidarity to respond to the logic of its crowded and disordered situation, it was again difficult to see how that question could be dealt with in one set of articles. The modern world provided examples of situations in which the economic activities of one State had an impact in other States. To meet those situations, rules had been developed which more or less embodied the idea of interdependence and solidarity. While he fully favoured the development of such rules in specific fields of economic intercourse, in which the balancing of interests mentioned by the Special Rapporteur had a role to play, he wondered whether it would be possible to establish an entire set of provisions. It was to be noted, in that regard, that an enormous gap still existed between the solidarity and the consent of States.

2. Since relevant State practice seemed to be directed specifically towards the area of shared resources, it was very difficult to see how the Commission could develop the concept of the balancing of interests in general rules outside the fields of the environment and of recognized ultra-hazardous activities. Even within the framework of the environment, the balancing of interests was a very complicated matter. It entailed determining whether the activity in question was beneficial, what limitations it could sustain and the relative priorities involved. The balancing of interests was a basic goal of all law, which was sometimes worked out in the form of hard and fast rights and obligations and sometimes in some other form. In the draft Convention on the Law of the Sea,² for example, the balancing of interests was provided for in terms of hard and fast rights and obligations and also in the form of very vague rules, such as that in article 87. Article 59 of the same text contained a typical provision concerning the balancing of interests, whereby conflicts between the interests of the coastal State and any other State were to be resolved on the basis of equity and in the light of all the relevant circumstances and of the respective importance of the interests involved to the parties concerned and to the international community as a whole, leaving

¹ For text of the article, see 1685th meeting, para. 1.

² United Nations, "Draft Convention on the Law of the Sea (Informal text)", A/CONF.62/WP.10/Rev.3 (and Corr.1 and 3).