Document:-

A/CN.4/SR.2019

Summary record of the 2019th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1987, vol. I

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

The meeting rose at 12.30 p.m.

2019th MEETING

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

Chairman: Mr. Stephen C. McCAFFREY

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

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

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)
ARTICLE 2 (Use of terms)
ARTICLE 3 (Various cases of transboundary effects)
ARTICLE 4 (Liability)
ARTICLE 5 (Relationship between the present articles and other international agreements) *and*
ARTICLE 6 (Absence of effect upon other rules of international law)[5] (*continued*)

1. Mr. CALERO RODRIGUES, thanking the Special Rapporteur for his well-thought-out third report (A/CN.4/405), said that the six articles proposed were based on those submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, in his fifth report[6] and dealt with fundamental concepts. The Special Rapporteur still had doubts about some of those concepts, and it was clear from the debate that the Commission had even more doubts. Even allowing for the fact that only eight of the present members of the Commission had participated since the outset in the consideration of the topic and the fact that half the members had not taken any part in the discussion of the previous Special Rapporteur's reports, there was something wrong when the scope and nature of a topic remained undefined after 10 years of study.

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

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

with that made in paragraph 47 of his fourth report:

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

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

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

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

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

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

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

that, if a State fulfilled its obligations under a given régime but damage none the less occurred in another State, the first State was exonerated, for it had done no wrong and was therefore not responsible or liable.

3. The pre-eminence of rules of prevention was further highlighted by the Special Rapporteur's proposal to reject the provision in the schematic outline (sect. 2, para. 8) according to which failure to comply with procedural rules aimed at the establishment of a régime of prevention did not in itself give rise to any right of action.

4. The Special Rapporteur had continued along the path taken by his predecessor. He maintained, for instance, that the characteristic activities of the topic were those referred to as dangerous; that general predictability of the risk was a requirement for the reparation of an injury sustained in the absence of an agreed régime (A/CN.4/405, para. 15); and that "if an activity does not call for diagnosis of the risk involved and, for reasons that have nothing to do with it, it still causes isolated injury, the option available would be outside the scope of the present topic" (*ibid.*, para. 16). He presumed that that passage meant that, if an activity did not seem to be dangerous, but damage none the less occurred, the question whether the State of origin had an obligation to compensate would fall outside the scope of the topic. He would, however, like to know whether the expression "for reasons that have nothing to do with it" referred to cases of *force majeure* and whether the words "isolated injury"—which he would prefer to replace by "isolated damage"—also referred to the importance of the damage.

5. Basically, he did not believe that liability for damage could be incurred solely where risk was recognized. It was inconceivable that liability, in terms of an obligation to compensate, should be excluded when damage occurred if the possibility of such damage had not been foreseen. Risk, though a useful basis for the principle of prevention, should not be transformed into a basis for liability. The basis for liability, or for the obligation to compensate, should be harm or damage.

6. In his third report (*ibid.*, para. 16), the Special Rapporteur considered the hypothesis in which damage occurred and both the State causing the damage and the State suffering from it were innocent. It was difficult to understand the Special Rapporteur's reference in that connection to an "international agency" that would determine the lawfulness of an activity on the basis of the risks involved. In the first place, the case considered by the Special Rapporteur was one in which there was not even the " 'original sin' of having created the general risk"; and, secondly, the topic was concerned solely with lawful activities. There should therefore be no question of an activity being considered lawful only if it had been classified as such by an international agency.

7. The Special Rapporteur had also made the point that the concept of absolute liability was difficult to accept. Yet, regardless of whether the term used was "absolute liability" or "strict liability", if the obligation to compensate for harm done were not accepted within a well-defined framework, the topic would have no raison d'être. The idea that harm, or damage, must be compensated for had been clearly recognized in the *Trail Smelter* case and had since been accepted in many multilateral and bilateral instruments, as noted in the report of the Working Group established by the Commission at its thirtieth session.[9]

8. It was an inescapable fact, as Mr. Quentin-Baxter had noted in his second report, that "not all transboundary harm is wrongful; but substantial transboundary harm is never legally negligible".[10] The main purpose of the draft articles should therefore be to delimit the legal consequences of harm caused in the absence of wrongfulness. It would also be useful to include in the draft rules of prevention, which, contrary to the opinion expressed by the Special Rapporteur in his third report (*ibid.*, para. 23), would be based on the principle of co-operation. Nevertheless, the essence of the articles should be to establish the legal consequences of transboundary damage.

9. If the rites of prevention were given a pre-eminent role, a situation would inevitably arise in which harm would be compensated for only in the event of failure to comply with the obligation to prevent it. There would then be a situation of wrongfulness, with all the consequences attaching thereto.

10. The significance of the provisions on compensation included in the schematic outline was lessened because they were mixed up with rules of prevention and so did not stand out clearly. His fear was that, if the ideas currently followed by the Special Rapporteur were taken to their logical conclusion, the provisions on compensation might become even less visible and possibly disappear altogether.

11. The draft articles were generally acceptable to him, but would require careful redrafting. It had been suggested that they should contain a list of the activities to be covered; but if they were to have any meaning at all, they should remain general in character and apply residually to cases not covered by other international instruments.

12. Mr. HAYES thanked the Special Rapporteur for his reports and expressed particular appreciation for his qualities of lucidity and patience, which were so valuable in dealing with such a complex subject. It had rightly been said that it was difficult to pin down the topic, and that was due at least in part to the lack of customary international rules of a general nature. Existing law on the subject derived mainly from treaties and judicial and arbitral decisions which tended to deal with specific problems and were not so much concerned, as was the Commission, with introducing coherence into the subject. That could be achieved only by adopting a conceptual basis, which was a *sine qua non* for the development and codification of any topic but would be difficult in the present case because the topic was new and its practical importance had increased rapidly in recent years. The international community could therefore not afford the luxury of waiting for further

[9] Document A/CN.4/L.284 and Corr.1, paras. 21-22, reproduced in *Yearbook . . . 1978*, vol. II (Part Two), p. 151.

[10] *Yearbook . . . 1981*, vol. II (Part One), p. 117, document A/CN.4/346 and Add.1 and 2, para. 59.

developments in State practice to provide the basis for codification of the topic as a whole.

13. In seeking an appropriate conceptual basis, the previous Special Rapporteur had adopted the principle *sic utere tuo ut alienum non laedas*, which had been endorsed by the present Special Rapporteur and which, in his own view, provided an adequate legal foundation for the development of the topic. Such a conceptual basis also served to distinguish the topic clearly from that of State responsibility by underlining the primary nature of the rules with which the topic was concerned, as compared with the secondary nature of the rules of State responsibility. In that connection, he had found the present Special Rapporteur's explanation of the various aspects of the difference between the two topics extremely persuasive. The conceptual basis provided by the *sic utere tuo* principle also led to a régime based on strict liability, which was, in his view, essential if the problem was to be solved.

14. The schematic outline was likewise based on the principle, developed in section 5, that a State must use its property in such a way as not to harm the interests of another State. The Special Rapporteur saw injury, actual or potential, as the unifying element of the topic which led naturally to the duties of prevention and reparation, and it could therefore be said to be in the nature of a subtheme deriving from the basic *sic utere tuo* principle. There were a number of decisions which, together with various instruments, collectively revealed an emphasis on prevention of injury and reparation in the event of injury. He had in mind, for instance, the decisions in the *Trail Smelter, Corfu Channel* and *Lake Lanoux* cases, as well as the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, the 1972 Stockholm Declaration, particularly Principle 21 of that Declaration, the preamble to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1974 Charter of Economic Rights and Duties of States and the 1982 United Nations Convention on the Law of the Sea. Many relevant examples of State practice had, moreover, been cited in the Secretariat survey (A/CN.4/384, annex III), which referred, for instance, to what had been done with regard to the series of nuclear tests at *Eniwetok Atoll* and in the *Christmas Islands*; the arrangements between the United States of America and Mexico in the *Peyton Packing Company* and *Rose Street Canal* cases; the Canada-United States arrangement concerning the *Gut Dam Claims*; and the Netherlands-United States arrangement in the *Island of Palmas* case. The recent *Sandoz* case in Switzerland could also be mentioned. Sections 5 and 6 of the schematic outline, which reflected an emerging trend, were consistent with those decisions and instruments, inasmuch as the balance-of-interests test had been incorporated in the duties of prevention and reparation.

15. Strict liability was the basis on which a solution to the fundamental problem should be approached and the schematic outline and the third report (A/CN.4/405) provided for a modified version of strict liability. The schematic outline encouraged States to establish a régime for activities involving risk and only in the absence of such a régime would reparation be determined in the manner proposed in the outline. Even then, the matter would be settled through negotiations, which would take account not only of the extent of the injury, but of many other factors, including the shared expectations of the States concerned, the efforts of the State of origin to comply with its duty of care—a significant modification of strict liability—and the balance of benefit and loss.

16. The place of strict liability in State practice was exemplified in English internal law by *Rylands* v. *Fletcher* (1868), which had set a precedent that had been followed in many common-law countries, including Ireland (see A/CN.4/384, para. 363). The principle it had established had also been incorporated in the codes of many civil-law countries. Strict liability was an element of many multilateral and bilateral conventions, including those dealing with the carriage of nuclear and other dangerous substances, damage caused by aircraft and pollution. Moreover, there was now a tendency to apply the "polluter pays" rule. Thus, although there was no customary rule of international law on strict liability, the concept was not unknown in international law. That should suffice to dispel any concern at the thought that the Commission might propose that a modified form of strict liability, as set out in the schematic outline, should form part of the progressive development of the law on the topic. The very logic of the topic called for such an element, and it would in any event constitute a residual rule.

17. There were two aspects to the exercise of State sovereignty. On the one hand, a State had the right to engage in lawful activities, particularly in its own territory, without having to answer to another State. On the other hand, a State had the right to enjoy the benefits of its own facilities and assets without any interference caused by the activities of another State. While those two rights were not absolute, the instances of potential for conflict between the two had been growing and, as such cases continued to increase, it would become less satisfactory to resolve them by a series of limited arrangements. Presumably, therefore, in giving the Commission a mandate to study the topic, the General Assembly had considered that a global approach was required and the Commission could not do less than respond with appropriate draft articles. The schematic outline and the draft articles submitted by the Special Rapporteur would require careful consideration. He trusted, however, that the Commission would approve the general thrust of the schematic outline, which pointed in the right direction, and endorse a régime that would require a State not to refrain from or prohibit activities that were lawful and beneficial, but to ensure that such activities did not cause injury to others.

18. With regard to the draft articles themselves, he agreed that, so far as the nature of the activities to be covered was concerned, article 1 was modified by article 4 and the relevant parts of article 4 should therefore be transferred to article 1. The relationship between the two articles should also be considered. It was unnecessary, in his view, to refer to "situations", since the word "activities" was adequate. The questions raised regarding the suitability of the word "control" would have to be resolved, since some word was necessary to

cover the circumstances referred to in the commentary. It was clear from articles 1 and 4, taken together, that both private and State activities were covered, as indeed they should be.

19. Article 2 on the use of terms should perhaps be considered in detail at a later date. Article 3, a new provision, provided some useful clarifications. Article 4, despite its link with article 1, did have a raison d'être, since it introduced the concepts of knowledge and appreciable risk. A further explanation of the meaning of the words "means of knowing" might, however, be required. Did the knowledge test also apply to the presence of risk? He shared the view that it would be best to leave consideration of the role of international organizations until later.

20. He basically agreed with Mr. Calero Rodrigues's comments on the inclusion in the draft of a list of the activities to be covered. It should be borne in mind that the articles would in effect serve as residual rules to deal with matters that were not subject to existing agreements between States. In future, when States came to deal with the problem, they would actually draw up a list of activities covered in their own case. Any list prepared would, moreover, soon be out of date because of the rapid pace of development.

21. Mr. ROUCOUNAS said he had noted with satisfaction that the members of the Commission who had spoken on the topic had all referred to the basic issue of the theoretical approach to the draft, which the Special Rapporteur had also described in his introductory statement (2015th meeting). In dealing with such a complex topic, it was essential to agree on the major directions to be taken and not give in to a common temptation in today's world, namely "pragmatism", which pushed back general theories on all fronts and also led to the intellectual impoverishment of society.

22. The first major direction, which had been defined by R. Q. Quentin-Baxter and which was still valid, was that liability in the context of the draft articles did not stem from wrongfulness and that any conclusion to the contrary would have very serious consequences for the Commission's work. In the case of responsibility for wrongful acts, a State's responsibility was engaged, even where no injury had occurred, if that State had violated a primary rule of conduct, whereas the draft articles under consideration dealt with precisely the opposite situation, in which injury occurred even though the State had not violated a rule of conduct. The question whether such injury must be compensated for was, moreover, not a matter of abstract speculation. All activities that had been going on in the past few decades in such areas as nuclear energy, mining and outer space had been leading inexorably towards international regulations based on the idea of risk. The issue was then to establish primary rules by means of an intellectual exercise which would link reparation to injury without making any value-judgment, but which would at least be based on the assumption that the conduct in question was lawful. One safe way of doing that was obviously to draw up treaties in specific areas. Although few treaties of that kind had been concluded to date, they were of considerable interest to the Commission, as were the instruments adopted by international organizations in that regard, and he hoped that the Secretariat would update its very useful survey of State practice (A/CN.4/384) and include in it an analysis of doctrine.

23. The special rapporteurs had thus defined the Commission's task as that of formulating a general set of primary rules which would establish a *continuum* between prevention and reparation that would be strengthened by the unifying criterion proposed by the present Special Rapporteur, namely injury. It would probably require painstaking efforts to prove that that approach was consistent and legally relevant and he had been most intrigued by what Mr. Calero Rodrigues had suggested in that regard. The approach outlined by the special rapporteurs was thus quite useful, for the issue would be not only to "pin-point" the cases which would not be covered by the régime of responsibility for wrongful acts, but also to establish a legal framework governing cases which might be doubtful either because there were no precedents in international relations or because the dividing line between lawfulness and wrongfulness was not clear and the State concerned might not want it to be. Mr. Quentin-Baxter himself had, moreover, pointed out in his third report that the phrase "acts not prohibited by international law" had been chosen "to make it clear that the scope of this topic was not confined to lawful acts".[11]

24. That approach was useful also because, by introducing the idea of prevention, it went beyond the framework of reparation and opened up the draft to international co-operation—a welcome development, even though the forms of co-operation had to be considered more carefully. As the two previous speakers had noted, moreover, the further the Commission went in the area of prevention, the more it pushed a number of hypotheses back into the "traditional" régime of State responsibility. If a State undertook, for example, to show due diligence, failure to comply with that obligation would be a breach of a primary rule, or in other words a wrongful act, and the other régime of responsibility would then apply. Moreover, the obligation of reparation itself created international responsibility of States in the traditional sense of the term. The régime which the Commission was now building, and which was in some respects residual, would in some cases also be provisional in nature, because it would cease to apply when activities that had originally been lawful became unlawful by being prohibited and because the system of prevention surrounding lawful activities would be the jumping-off point, in the event of non-fulfilment, for State responsibility.

25. Referring to the draft articles, and in particular to the scope of the draft, he noted that the Special Rapporteur had not proposed any definition of the term "activities" in article 2. In his own view, the meaning of that term had to be spelled out at the very beginning and in the text itself. He was, however, not sure that the word "situations" was necessary, since in most cases a "situation" could be understood as the logical and physical consequence of the existence of an "activity". With regard to the cases referred to by the Special Rapporteur in his comments on article 1 (prevention of pests

[11] *Yearbook . . . 1982*, vol. II (Part One), p. 59, document A/CN.4/360, para. 36.

and epidemics, etc.), it must be borne in mind that the competent international organizations, namely FAO and WHO, had very broad powers to lay down rules covering such cases that would be binding on member States. The use of the term "situations" might therefore only give rise to uncertainty. Moreover, the Special Rapporteur had deliberately not included in the scope of the draft injury caused by State acts whose wrongfulness had been precluded by virtue of the grounds set forth in articles 29, 31, 32 and 33 of part 1 of the draft articles on State responsibility (A/CN.4/405, para. 36). Although that approach was quite understandable from the point of view of methodological purity, it was too early, at the current stage, to provide that the draft would not apply in what might be typical cases of strict liability, since it would be a question of making reparation for injury caused by acts whose wrongfulness had been precluded. The Special Rapporteur had also decided that activities which did not call for diagnosis of the risk involved would be outside the scope of the topic, because otherwise the Commission would arrive at a concept of absolute liability "difficult to accept at the present stage in the development of international law" (*ibid.*, para. 16). Such activities could not, however, be excluded without further consideration, since absolute liability was, after all, not entirely unknown in international law and had, for example, been provided for in the 1972 Convention on International Liability for Damage Caused by Space Objects. The Special Rapporteur had also made a major change in the Spanish text by replacing the words *consecuencia material* by *consecuencia física*. He did not appear, however, to be referring only to environmental consequences, since he stated (*ibid.*, para. 40) that the definition could also be taken to cover product liability, which went well beyond the environmental framework. It would be helpful if the Special Rapporteur could provide further clarifications on that point.

26. With regard to the spatial framework proposed in the draft, he urged the Commission to pay close attention to the meaning of the terms used. Although the texts on the law of the sea referred to "land territory" and the "territorial sea", it must not be forgotten, as the ICJ had recently recalled, that a coastal State exercised its territorial sovereignty over its own territory and over the territorial sea. In that connection, it might also be recalled that Kelsen and the Vienna school had defined territory as the sphere of validity of the State's legal order. Care had to be taken to avoid any confusion between the terms "jurisdiction", "territorial competence" and "territorial sovereignty". He also had doubts about the meaning of the term *passage continu* in the French text of the report (*ibid.*, para. 50), which was probably the result of a translation error. With regard to the word "area", it must also be borne in mind that in some cases it denoted the spatial framework of State jurisdiction, and in others the exact opposite (the "Area" in the 1982 United Nations Convention on the Law of the Sea). International law recognized that, beyond their own territory, States exercised "jurisdiction" and "control", which might be neologisms, but were nevertheless useful terms. The term "jurisdiction" had, however, not been used at all in draft article 1. As to "control", he noted that what the ICJ had stated in its advisory opinion of 21 June 1971 on Namibia concerning the occupation of a foreign territory, namely that "physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States",[12] might also apply to the topic under consideration. Further thought should be given to the meaning of the term "control" in private international law and to whether the régime to be established would also apply to the problem of corporations operating abroad. That might be an unwarranted extension of the topic, but the Commission should at least consider the matter.

27. Lastly, the term "transboundary" was too narrow because it appeared to imply the existence of a territorial border and, as a result, the Special Rapporteur had had to clarify its meaning in draft article 3, subparagraph (*a*). That term should be replaced by a less laconic and more appropriate term.

28. Mr. YANKOV said that, in his third report (A/CN.4/405), the Special Rapporteur had made a further effort to consolidate the basic principles which had been enunciated in his previous reports and in those of his predecessor and which were reflected in the proposed schematic outline. The present debate had shown that there were differences of opinion with regard to the doctrine of liability for risk, but that was not at all surprising in view of the complexity and novelty of the topic and the absence of sound legal grounds for distinguishing it from the topic of State responsibility. The Commission had held lengthy discussions on general questions, such as the legal nature of the technique of strict liability, the relationship between prevention and reparation, and the notion of injury, on which he would like to comment.

29. With regard to the legal nature of the principles underlying the legal concept of strict liability, the Special Rapporteur had maintained in his second report that, in the case of injury caused in the absence of a régime, the principles of prevention and reparation constituted general rules of international law, adding that those principles "seem to contain a more peremptory element" (A/CN.4/402, para. 28). Actually, there was no sound basis in customary international law for such a contention. The principles in question could be established only by means of an agreement between the States concerned. Only by such an agreement could the obligation of prevention (comprising the obligation to inform and to negotiate) and the obligation of reparation be brought into play.

30. In the Special Rapporteur's opinion, the obligation to inform and to negotiate was sufficiently well established in international law that any breach thereof would constitute a wrongful act. As he had stressed in his second report (*ibid.*, para. 51), however, there could be various types of mechanisms leading to régimes of varying strictness.

31. The Special Rapporteur seemed not to have taken account of the difference between State responsibility

[12] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 54, para. 118, *in fine*.

for wrongful acts and liability for injurious consequences arising out of acts not prohibited by international law. It was difficult to see what he had meant when he had stated that the two types of responsibility differed "only in degree" (*ibid.*). Where an agreement expressly provided for the obligation to inform and to negotiate, a breach of that obligation would obviously constitute a wrongful act entailing State responsibility, and he failed to see how such responsibility could be equated with liability for physical consequences arising out of acts not prohibited by international law.

32. The Special Rapporteur had also maintained that:

> . . . as prevention and reparation fall within the domain of primary rules, it follows that, if injury is done which subsequently gives rise to the obligation to make reparation, that reparation is imposed by the primary rule in terms of the lawfulness of the activity in question; only if the source State fails in its primary obligation to make reparation does the question become one of secondary rules, with the notion of responsibility for the wrongful act which the State's violation of that primary obligation constitutes. . . . (*Ibid.*, para. 7.)

He agreed with the Special Rapporteur that, where there was an obligation to make reparation, the breach of that obligation would constitute a wrongful act entailing international responsibility. He could not agree, however, that there was a "symbiosis between prevention and reparation" (*ibid.*, para. 6) and that injury by itself justified prevention and reparation (*ibid.*, para. 8). Prevention and reparation could not be treated in the same manner. The obligation of prevention did not automatically entail an obligation of reparation, unless an agreement between the States concerned contained a specific provision to that effect.

33. Referring to State practice in the matter, he pointed out that there were many international treaties that required prevention of injury without necessarily imposing an obligation to make reparation. A number of multilateral conventions set forth the obligation to inform or to enter into consultations and negotiations and dealt with such matters as the type of information to be provided and the procedures to be applied for negotiation and the settlement of disputes. In all cases, the legal foundation of the obligations of prevention and reparation was an international agreement.

34. In his third report, the Special Rapporteur stated that "general predictability of the risk" was "a requirement for the reparation of injury sustained in the absence of an agreed régime" (A/CN.4/405, para. 15). He also pointed out that the potential risk must be "appreciable" (*ibid.*, para. 12). In fact, only a special arrangement could bring the mechanism of prevention and reparation into play. The rights of the affected State and the obligations of the State of origin could not be deduced from abstract rules of logic and justice. In any event, State practice did not support such a postulate, as shown by recently adopted international instruments relating to nuclear accidents, marine pollution and transboundary air pollution.

35. Thus the preamble to the Convention on Early Notification of a Nuclear Accident,[13] adopted by the General Conference of IAEA at Vienna in 1986, referred to measures taken aimed at "preventing nuclear accidents and minimizing the consequences of any such accident, should it occur" and stated that the objective of the Convention was "to strengthen further international co-operation in the safe development and use of nuclear energy". Article 1 stated that the Convention:

> . . . shall apply in the event of any accident involving facilities or activities of a State Party or of persons or legal entities under its jurisdiction or control, referred to in paragraph 2 below, from which a release of radioactive material occurs or is likely to occur and which has resulted or may result in an international transboundary release that could be of radiological safety significance for another State.

Risk was thus determined in relation to the specific activities referred to in paragraph 2 of the article. Article 5 of the Convention listed in a number of categories the data to be provided to IAEA and to the States which had been or might be physically affected by the transboundary radiological release.

36. The General Conference of IAEA had also adopted in 1986 the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[14] which dealt only with the co-operation to be established between the States parties themselves, and with IAEA, to facilitate prompt assistance in the event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases (art. 1). The Convention provided that, in order to facilitate such co-operation, the States parties could agree on bilateral or multilateral arrangements for preventing or minimizing injury and damage which might result in the event of a nuclear accident or radiological emergency. The Convention contained detailed provisions on assistance, the direction and control of assistance, the functions of IAEA, the reimbursement of costs and the settlement of disputes.

37. The 1982 United Nations Convention on the Law of the Sea emphasized the general duty to prevent, reduce and control pollution of the marine environment and to promote international co-operation for that purpose. Article 197 of the Convention dealt with the duty to protect and preserve the marine environment and with general preventive measures, emphasizing that States should co-operate directly or through competent international organizations. Article 194 required States to take all measures that were necessary to prevent, reduce and control pollution of the marine environment; and, under article 198, "when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution" it had a specific obligation to notify other States. The Convention also contained provisions dealing specifically with responsibility and liability, namely article 235 (responsibility and liability for damage caused by pollution of the marine environment), article 263 (responsibility and liability for damage resulting from marine scientific research) and article 304 (general provision on responsibility and liability for damage).

38. Emphasis was thus placed exclusively on prevention as a general duty not to cause harm and on the establishment of international co-operation for the protection and preservation of the marine environment. Reparation for damage was confined either to measures

[13] IAEA, *Legal Series*, No. 14 (Vienna, 1987), p. 1.

[14] *Ibid.*, p. 9.

for compensation under internal legal systems or to measures provided for in international agreements.

39. Another pertinent example was provided by the 1969 International Convention on Civil Liability for Oil Pollution Damage and its amending Protocols of 1976 and 1984;[15] those instruments established uniform international rules and procedures for determining questions of liability and ensuring adequate compensation to victims of oil pollution. Mention might also be made of the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and its amending Protocol of 1984.[16]

40. All those conventions had a number of points in common. First, they laid down the general duty to avoid causing harm and to minimize its adverse effects through co-operation. Secondly, they defined their scope very precisely. Thirdly, they provided for régimes based on agreements among the States concerned.

41. Turning to the draft articles submitted by the Special Rapporteur, he said that article 1, which was a key provision since it dealt with the scope of the entire draft, would require some clarifications. First, there was a gap in the article because it referred only to activities or situations which occurred "within the territory or control of a State". Since the term "control" did not, in his opinion, cover the idea of "jurisdiction", he urged that a reference to "jurisdiction" be included in the article. Moreover, many international instruments, including the 1986 Vienna Conventions already mentioned (paras. 35-36), referred specifically to "jurisdiction or control", and the United Nations Convention on the Law of the Sea contained provisions on jurisdiction over the exclusive economic zone. As to the criteria for "appreciable risk", the Special Rapporteur stated in his third report that "the risk involved must be of some magnitude and . . . must be either clearly visible or easy to deduce from the properties of the things or materials used" (A/CN.4/405, para. 70). Draft article 1 contained no such qualification and referred only to a "physical consequence adversely affecting persons or objects". Clearly there was a need in article 1 for an indication of what was meant by that expression.

42. With regard to article 2, he stressed that the meaning of the term "transboundary effects" in paragraph 5 and of the term "transboundary injury" in paragraph 6 had to be more clearly defined. If the texts of articles 1 and 2 were adequately redrafted, article 3 could be deleted as a statement of the obvious. Article 4 needed further elaboration in the light of article 2, paragraph 6. He had no comments to make at present on articles 5 and 6.

43. In conclusion, he stressed that attention should be focused on prevention and that the question of responsibility should be considered in connection with the topic of State responsibility, where questions of compensation and reparation properly belonged. It was also necessary to draw up a list of dangerous activities.

44. The conclusion of multilateral arrangements should be encouraged as a more appropriate means of solving the type of problems under consideration. It was unrealistic to impose on the State of origin the duty preventively to negotiate safety rules and standards with every potential victim. As recent State practice showed, it was much better to concentrate on the formulation of safety rules and preventive measures through multilateral agreements and, where appropriate, through the competent international organizations.

45. Mr. RAZAFINDRALAMBO, noting that the Special Rapporteur's reports were as clear, well-structured and erudite as those of the late R. Q. Quentin-Baxter, said he welcomed the fact that the Special Rapporteur intended to regard the schematic outline prepared by his predecessor as the main raw material for the topic. He also considered that the Commission had gone far enough in its study of the topic to be able now to make some headway in the formulation of a set of rules. To go on questioning the topic's relevance would thus be a purely academic exercise.

46. There were marked similarities between the present topic and that of the law of the non-navigational uses of international watercourses. In both cases, the aim was to avoid any potential conflicts between the right of one sovereign State freely to engage in activities in its own territory with no outside interference and the right of another sovereign State not to suffer the injurious consequences of such activities without adequate reparation. In both cases, the Commission's task was to find a solution that would ensure a balance of interests based on the sovereign equality of States, and that task was complicated by the need to reconcile the requirements of sovereignty with the principles of justice, good faith and good-neighbourliness.

47. He agreed with the Special Rapporteur's analysis of the key role of injury, which not only set the topic of international liability apart from that of State responsibility, but also formed the basis for the twin objectives set by the two Special Rapporteurs, namely the establishment of a régime designed to prevent potential injury or risk of injury, and the establishment of an obligation of reparation in the absence of a régime of prevention when injury actually occurred. States would thus be under an obligation to adopt regulations governing activities which might cause transboundary injury. The Special Rapporteur had also defined the modalities for reparation to be followed in the absence of a régime of prevention. That structure, for which Mr. Quentin-Baxter had been responsible, had not been received entirely unfavourably either by the Commission or by the Sixth Committee of the General Assembly. Mr. Quentin-Baxter had, however, advocated more flexible and cautious rules than those proposed by the present Special Rapporteur, with regard both to prevention and to reparation. He had considered that failure to take one of the steps required to inform the affected State and to set up fact-finding machinery or even to negotiate with that State did not in itself give rise to any right of action, as explained in section 2, paragraphs 6 (*b*) and 8, and section 3, paragraph 4, of the schematic outline. That was, however, apparently not the position that the present Special Rapporteur had adopted in his

[15] For the text of the Convention as amended by its 1976 and 1984 Protocols, see the IMO publication, Sales No. 456 85.15.E.

[16] For the text of the Convention as amended by its 1984 Protocol, *ibid.*

second report (A/CN.4/402). Noting that the obligation to provide information also existed in connection with reparation, the Special Rapporteur had concluded that it would be dangerous to exempt that obligation from the exercise of any right of action. In his view, the best solution would be simply to delete the part of section 2, paragraph 8, of the schematic outline relating to a right of action. That would be tantamount to making the obligations concerning the establishment of a régime binding. It was therefore understandable that doubts should have been expressed by members of the Commission who feared that such a solution would have the effect of blurring the basic difference between liability for risk and State responsibility for wrongful acts and that it did not have a sound basis in the international practice of States or an equivalent in their internal laws.

48. With regard to the regulation of activities which might cause injury to other States, the Secretariat's survey of State practice (A/CN.4/384) had given only examples of activities relating to the physical use and management of the environment. Even in that very specific and limited area, it had been recognized in the survey that "the materials examined . . . demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of the international liability topic" (*ibid.*, para. 10). It was therefore difficult to extrapolate in applying the principles deriving from the study of the environment more or less automatically to the topic as a whole.

49. In internal law, in legal systems which provided for liability for risk—in other words in the majority of countries—only injury caused by authorized activities was taken into account: such liability was characterized as "no-fault", "strict" or "absolute" liability. In those legal systems, there was no binding obligation of prevention combined with a right of action. Although strict liability was based on risk, it gave rise to a right of action only when injury had occurred. All civilian and commercial activity would come to a complete halt if, in cases where it involved risk, the person engaging in it, before undertaking the activity, had to initiate a costly public information procedure or even negotiations with persons who might be exposed to the risk. His country's legal system, which included a principle identical to the rule embodied in article 1384, paragraph 1, of the French Civil Code, provided that an individual was liable only for injury caused by his own action, that of his agent or that of things in his custody. Injury was thus a matter of concern only when it had occurred and when there was a link of causality between the injury and the action of the individual in question or his agent. Consequently, in recognizing the binding nature of the obligation to establish a régime of prevention and, in particular, of the obligation to provide information, the Special Rapporteur was going beyond both internal and international positive law.

50. He was aware that the Special Rapporteur's approach reflected a concern to make the draft more credible and workable and had to do more with the progressive development of international law than with its codification, but that daring approach would certainly not be favourably welcomed by those who would regard it as too great a restriction on the freedom of choice of States with regard to activities carried out within their territory or control which they deemed useful. Like other members of the Commission, he was of the opinion that the question should be reconsidered in order to draw a clearer dividing line between the topic under consideration and that of State responsibility and to make it more acceptable to the majority of States as a set of residual rules.

51. Referring to the draft articles, he said that the new formulations and structures proposed in the third report (A/CN.4/405) represented a definite improvement over the texts submitted by Mr. Quentin-Baxter in his fifth report.[17] Some of the concepts referred to in draft article 1, such as that of "activities", nevertheless continued to give rise to problems. Like his predecessor, the Special Rapporteur was proposing that account should be taken only of specific activities giving rise to a physical consequence. Did that concept encompass radio and television broadcasting activities? In internal law, electric current was regarded as a specific object that could be appropriated and, similarly, radio waves were a physical substance that was just as tangible as factory smoke. There was no denying the fact that, to the extent that they were intended to cause disturbances and even terrorist attacks, some radio and television programmes had disastrous effects on the internal order of the countries where they were broadcast and were an affront to those countries' dignity and honour.

52. In an entirely different connection, he regretted that more detailed consideration had not been given to the injurious consequences of a particular type of economic and monetary conduct, which continued to be engaged in in international relations and of which the developing countries were often the helpless victims.

53. In addition to the problems raised in connection with the concept of jurisdiction, the concept of control had to be defined more clearly as far as private activities were concerned because it was a sensitive concept that could involve a number of aspects, especially economic, legal and political ones. It was not a purely theoretical question to ask which of those aspects predominated in the draft. That question had arisen in the case of the activities of multinational corporations, in which it was often difficult to identify the authority that was actually in control. He had in mind, for example, the disaster which had occurred at a Union Carbide factory at Bhopal in India. The mere fact that a multinational corporation which exported investments and technology was located in the territory of a State was not enough automatically to entail the responsibility of that State: the State actually had to be in control of the local subsidiary. He was therefore of the opinion that provision had to be made for the twofold requirement of territory and control. Although such a proposal might give rise to problems in the case of ships, aircraft or other air and space objects, where the two ideas were necessarily dissociated, it was still worth making.

54. Draft article 4, which was a key provision, would be of even greater importance if the Commission followed the Special Rapporteur's position that a right

[17] See footnote 6 above.

of action should be associated with the obligation of prevention and negotiation with a view to the establishment of a régime. He appreciated the Special Rapporteur's efforts to take account of the interests of developing countries by making it a condition for liability that the State of origin either had to know or had to have the means of knowing that an activity might cause injury. With regard to the two other conditions which must, in the Special Rapporteur's view, be fulfilled —namely that the activity in question had to be carried out within the territory of the State of origin or in areas within its control, and that it had to create an appreciable risk of causing injury—he pointed out that that wording appeared to apply only to potential risk, in other words to the stage following the occurrence of any actual injury. Article 4 was therefore likely to give rise to the reservations to which he had referred in connection with the obligation to establish a régime of prevention. He had no particular comments to make on the other draft articles.

55. Mr. AL-KHASAWNEH congratulated the Special Rapporteur on his thought-provoking reports, which, together with those of his predecessor, R. Q. Quentin-Baxter, had enabled the Commission to make great strides in charting the boundaries of a challenging and complex topic. Mr. Riphagen, a former member of the Commission, had described the topic as "the unfinished part of public international law",[18] but account now had to be taken of the fact that it had received a fair amount of approval both in the Commission and in the Sixth Committee of the General Assembly, even if that approval had been only tentative and somewhat tacit.

56. At the same time, it had to be recognized that, despite the progress made, the scope of the topic had been only partly explored and major questions as to its basis in international law and its usefulness remained to be settled.

57. It followed that the Commission was faced with difficult choices with respect to its future work on the topic. In that connection, it should be emphasized that responsibility for those choices lay with the Commission as a whole and not only with the Special Rapporteur. As Mr. Quentin-Baxter had pointed out in 1983:

> . . . a special rapporteur was not an advocate for his topic: his duty was to offer his views on the best way to approach it and to marshal information and relevant arguments. The handling of the topic then became a matter between the Commission and the General Assembly. . . .[19]

58. With such collective responsibility in mind, it had to be decided what choices were open to the Commission. It might, for example, be concluded that conceptual differences were notoriously hard to reconcile and that work on the topic should therefore be discontinued, if only for the sake of rationalization. Yet what was at issue in the present case was the role the Commission should play in responding to the needs of States and of the international community as a whole at a time when the reality of the interdependence of States and awareness of how hazardous the world had become called for inventiveness and ingenuity on the part of the Commission. Assharany, a fifteenth-century Egyptian mystic and jurist, had once said that "the wisest of men are those who can best interpret their times". He himself was of the opinion that, if the Commission could not find ways of responding to the international community's changing needs, other bodies would—not only in the field of the environment, but also in other fields where physical phenomena made themselves felt.

59. To suggest that work on the topic should be discontinued because it had no basis in contemporary international law was not only to miss the point of the work, but also to make the concept of progressive development of the law meaningless, for that concept presupposed the formulation of new rules based on justice and equity, as well as on the rules of logic and morality. Unlike Mr. Graefrath (2016th meeting), he did not believe that international law developed on the basis of approval by States, rather than on the basis of logic and moral precepts. Without wishing to underestimate the principle of sovereignty, he had to point out that it could hardly be the exclusive source on which the Commission's work depended, even in areas where interdependence was less readily recognizable.

The meeting rose at 1.05 p.m.

[18] *Yearbook . . . 1983*, vol. I, p. 263, 1800th meeting, para. 16.

[19] *Ibid.*, p. 260, para. 1.

2020th MEETING

Wednesday, 24 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Stephen C. McCAFFREY

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

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

[Agenda item 7]

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.