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Summary record of the 2021st 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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

ferent characteristics. It was a highly specialized task that called for suitable methods and means to be worked out to identify and differentiate between the sources of pollution and evaluate the scope of the harmful effect from each source. Thus arose the technical problem, and consequently the legal problem, of identifying the source of the transboundary pollution that had caused the injury. In addition to the differences regarding the sources of pollution as between the countries of origin, the differences connected with the types of activities had to be borne in mind. In that regard, the Special Rapporteur apparently believed that a State should take action against epidemics or disasters so as to ensure, above all, that they did not extend into neighbouring countries (*ibid.*, para. 26 (b)). The need for international co-operation to combat an epidemic or a natural disaster was undeniable, but it was difficult to see how they could entail liability. Should it not be presumed, in such a case, that the State on whose territory the disaster had occurred was taking, in its own interest and in that of its population, all the measures that were required?

63. The Special Rapporteur, endeavouring to solve the problem of liability without taking full account of existing practice, and doing so before international rules had been worked out, took the view that discretionary assessment by a third party was the only way out of the impasse and that, if third-party involvement in determining the factors for the appraisal was not accepted, no régime would be able to function (*ibid.*, paras. 18-19). It would be remembered that, for a topic analogous to the one under consideration, namely the law of the non-navigational uses of international watercourses, the Commission had decided not to adopt procedures involving third parties. Serious thought should therefore be given to the usefulness of such procedures for the present topic, since it seemed impossible to conceive of any machinery for establishing the facts if there were no scientific rules applicable to each type of activity: regardless of the procedure chosen to settle disputes, liability should be determined on the basis of an objective approach and not empirically.

64. Lastly, it was essential to begin by demarcating the topic in the light of the activities of other competent international organizations. It had already been said that consideration of the question of preventing transboundary injury should, in view of its technical aspects, be left to the specialized agencies. The Commission's aim should be to formulate not general theoretical provisions, but concrete and precise rules to facilitate the settlement of disputes in the light of the interests of all parties, thereby contributing to greater harmony and better understanding between States. Since concepts drawn from the legal systems of the common-law countries had to be used instead of concepts common to international law, it was necessary to work out, first of all, a "scheme of understanding", to agree on a set of notions based on international law and not on municipal law, so as to have equivalent terms in all the languages, and to include definitions of all the basic terms in the articles.

65. Pending the Commission's decision on the way in which it was to continue its work on the topic, he reserved his position on the draft articles.

The meeting rose at 1 p.m.

2021st MEETING

Thursday, 25 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCaffrey

Present: 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.2⁴)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Various cases of transboundary effects)

ARTICLE 4 (Liability)

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

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

1. Mr. BENNOUNA said he was glad that the Commission, in response to the wishes of the Special Rapporteur, had held a fruitful discussion which had thrown some light on a subject that was fascinating in its topical interest, but difficult because of its novelty. The Commission should now fulfil its mandate from the General Assembly by completing the study requested of it.

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.

2. The first question the Commission had to answer was that of the scope of the topic and the field of application of the draft articles, for progress in the preparation of specific texts would depend on the answer to that question. Since the subject-matter was new—and complex, as shown by the very title of the topic—its delimitation raised great difficulties. As both Special Rapporteurs had pointed out, the origin of the topic partly explained those difficulties. The topic had grown out of the discussions on the foundations of international responsibility, during which two facets had been recognized, according to whether the activities were lawful or unlawful. Thus the Commission had started not from precise international realities, but from a theoretical inquiry into the origin of responsibility and the subsistence of State liability without any wrongful act or omission, that was to say without fault. It remained to be decided whether that theoretical distinction existed in the practice of inter-State relations, especially as the aim was to draw up rules of general international law, and no-fault liability had so far appeared only in special conventions relating to particular activities. In that connection, the Special Rapporteur had referred in his second report (A/CN.4/402, para. 52) to the opposition aroused by the concept of strict liability in the Commission and in the Sixth Committee of the General Assembly. While concluding that it had been said, perhaps rightly, that that kind of liability was not based on any rule of general international law, he had continued his research by trying to derive such liability from concepts such as sovereignty, the legal equality of States and justice. Whatever the force of that reasoning, it could be asked, as Mr. Graefrath (2016th meeting) had done, to what extent legal reasoning could replace the will of States, implicit or explicit, to commit themselves to a system of strict liability.

3. Furthermore, the analysis had been clouded by certain terminological difficulties connected, in particular, with the term “liability”. The Special Rapporteur had explained that “liability” took no account of the lawful or unlawful character of the act and related only to injury, deriving from it the primary obligations of prevention and reparation: that was the prevention-reparation continuum which was presented as the very heart of the topic. The Special Rapporteur had also emphasized (A/CN.4/402, para. 8) that the criterion for unity of the topic was injury, whether it was injury already done and calling for reparation, or the prevention of injury, that was to say potential injury, which was simply risk. On that basis he had drawn a distinction between the type of liability now being studied by the Commission, in which the condition for liability was injury, and the general régime of responsibility in which the condition for responsibility was the breach of an obligation, in other words a wrongful act. It might be thought that the two subjects were quite separate and that the one now under study completely excluded wrongful acts.

4. But it was there that the difficulty arose, for the Special Rapporteur had not reached that conclusion, since he had not excluded wrongful acts *a priori* from the scope of the topic. Indeed, he had taken the view that the obligations to inform and to negotiate were sufficiently well established in international law for their breach to give rise to wrongfulness (*ibid.*, paras. 67-68).

Then, distinguishing between acts and activities, he had said that, since the wrongfulness of certain acts did not make the activity itself wrongful, there was nothing to prevent the Commission, when it considered establishing a régime of liability for injurious consequences arising out of activities not prohibited by international law, from also considering acts which were inseparable from those activities and were wrongful because they were incompatible with certain established obligations—the obligations to inform and to negotiate—and that the Commission would not be going beyond its terms of reference if it included in a treaty régime obligations concerning the establishment of a régime the breach of which gave rise to wrongfulness. It could be seen that, as the Special Rapporteur’s reasoning developed, the specificity of the topic faded away, since injury as a unifying factor was no longer required as a condition for liability. It could then be understood why certain members of the Commission were reluctant to accept the prevention-reparation continuum, the logic of which was not that stated at the outset.

5. In those circumstances, the Commission had two options for delimiting the topic and trying to restore its uniformity: either it could confine itself to prevention, as Mr. Yankov (2019th meeting) had proposed, leaving reparation to the general régime of responsibility; or, as Mr. Mahiou (2018th meeting) had proposed, it could deal only with injury, but real injury, leaving potential injury out of account. Neither of those proposals removed the difficulties, however. For if the Commission dealt only with injury, it would be necessary to agree either on the activities to be covered or on the seriousness of the injury, since there could be no question of “strict” reparation of any injury whatsoever. But the Special Rapporteur had emphasized the difficulty and the disadvantages of drawing up a list of activities. As to appraisal of the seriousness of the injury, that also raised technical problems, concerning for example the threshold above which pollution was no longer acceptable, and also legal problems, when it was necessary to determine liability where there were several sources of pollution. The Special Rapporteur had mentioned a third possibility, which would be to entrust the assessment of the seriousness of the injury to a third party; but that solution also raised difficulties, since it would be necessary to define the powers of the third party. The last possibility considered—recourse to existing international organizations—was also liable to meet with some obstacles, since the operation of those organizations was governed by a charter, on to which it would be difficult to graft a multilateral convention.

6. With the topic defined as it was, the Commission had thus reached a theoretical deadlock: either it could include liability for wrongful acts within the framework of prevention, which would be going beyond its terms of reference; or it could work within the general régime of responsibility, which would make it necessary to reformulate the topic. But it must be admitted that, when removed from the general régime of responsibility, the topic was rather a slim one in the present state of international relations. It might even be asked whether the Commission’s work would not be too early or too late: too early because the study of the general régime of responsibility had not yet been completed; too late

because there were already a number of technically elaborate special régimes that must be taken into account. He therefore considered that, either at the current session or at the next session, the Commission should propose to the General Assembly that it amend the title of the topic in accordance with one of the approaches mentioned—injury or prevention—so as to give it the unity and coherence it lacked at present.

7. Although it was difficult to comment on the draft articles submitted so long as the Commission had not taken a decision on the approach to be followed, he would say that article 1, in particular, raised many difficulties. First, as had already been said, it was necessary to define the “activities or situations” falling within the scope of the draft. The Special Rapporteur had made a considerable effort to define them in his comments, although he recognized that many problems remained, concerning the relativity of risk, the notion of a threshold, etc. But he also admitted the uncertain character of a general definition and said that an agreement between States would be needed to determine the activities in question. Hence there was a vicious circle. Moreover, the parallel with internal law drawn by the Special Rapporteur in his third report (A/CN.4/405, para. 20) did not seem pertinent, for it was well known that the roles of jurisprudence in internal law and in international law were not comparable.

8. The term “control” was not without difficulties either. For it had to mean that a State exercised not exclusive jurisdiction, but concurrent jurisdiction—for example, in the exclusive economic zone or when a ship was passing through the territorial waters of a foreign State. It was therefore necessary to regulate the operation of those concurrent jurisdictions and the responsibilities deriving from them, which might introduce endless complications, especially if the scope of control was to include the question of multinational companies raised by Mr. Graefrath. He wondered whether it would not be wiser for the Commission to avoid entering into that area and confine itself to activities in the territory of the State, which would involve only the well-defined notion of territorial sovereignty.

9. Article 4, which referred to areas within the control of the State of origin, should be harmonized with article 1, which referred to activities or situations occurring within the control of a State, which was not the same thing. Article 5, on the relationship between the present articles and other international agreements, seemed insufficient to protect the special régimes established by particular conventions, the balance of which might be upset by the general convention. The commentary should give some explanation of the expression “do not specify circumstances in which . . .” in article 6. Did it mean that wrongful acts might be covered implicitly or that any reference to a wrongful act was excluded? The latter was not the case according to the Special Rapporteur’s comments, which referred to obligations of prevention whose non-fulfilment might be punished.

10. In conclusion, he thought that the Commission should fix a modest objective and that, if it succeeded in drafting only a small number of articles, provided they were coherent it would have done much for the progress of international law.

11. Mr. BEESLEY commended the Special Rapporteur for his approach to the topic and the way he had built on the work of his predecessor. Questions fundamental to the work of the Commission and its future had been raised. One principle on which there seemed to be no disagreement was that the Commission should ensure that its work was relevant to contemporary events and the future development of international law. There seemed to have been some suggestion that the body of customary or treaty law did not provide a sufficient basis for codification of the present topic. That point should not be determinative, however, for the progressive development of the law in the area was long overdue and any decision to postpone consideration of the topic or to delete it from the agenda would be regrettable.

12. He was also troubled by the continuing references to the novelty of the subject and the paucity of precedent. One of the relatively few cases which had gone to arbitration was, of course, the *Trail Smelter* case, the facts of which had arisen in 1938, although the case itself had not been decided until 1941 (see A/CN.4/384, annex III). In that case, which concerned the emission of noxious fumes from a privately owned smelter in Canada allegedly causing damage in the United States of America, the arbitral tribunal had held that Canada was responsible in international law for the conduct of the smelter. It had further held that, to avoid any damage, the operation of the smelter should be made subject to measures of control and that, if damage did occur, an indemnity would be payable to the United States. The interesting point was that one of the parties in that case had been a major power and thus capable of influencing customary international law by practice. Another precedent was the *Gut Dam Claims* case (*ibid.*), which had also been settled by arbitration between the United States and Canada. The dispute concerned a dam built by the Canadian Government which had allegedly caused the water level of Lake Ontario to rise, with resultant damage to property of United States citizens. Once again it had been held that Canada was liable to compensate for the damage caused.

13. Although the findings of those two cases did not constitute binding customary international law, he was prepared to consider them as reflecting a limited amount of State practice, since no substantial precedents had been cited to show that there was no liability in such cases.

14. So far as the duty not to cause harm was concerned—as distinct from the duty to accept liability—some further indications of State practice could be found, first of all, in the 1909 Treaty between Great Britain and the United States relating to boundary waters (*ibid.*, annex II), which he regarded as a landmark treaty since it recognized the obligation of both parties not to pollute the waters between Canada and the United States. The Stockholm Declaration,⁶ adopted by the United Nations Conference on the Human Environment, had also developed certain legal principles, and at least one Government had stated that it would consider itself bound if Principles 21 and 22 of

⁶ See 2017th meeting, footnote 6.

the Declaration were invoked. Principle 21 asserted the sovereign right of States to exploit their own resources pursuant to their own environmental policies and laid down that it was the responsibility of States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; Principle 22 proclaimed that States should co-operate in the further development of international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of those States to areas beyond their jurisdiction.

15. There was, however, another principle, which had been rejected by the Conference on the Human Environment because of a bilateral dispute. That principle read:

Relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction.⁷

That principle had subsequently been reflected in a somewhat watered-down version in resolution 2995 (XXVII) of the General Assembly, which had itself given rise to a second resolution reaffirming that Principles 21 and 22 had not been undermined by the first resolution. Not all United Nations resolutions constituted binding international law, of course; but some did, and being evidence of State practice they could have a significant influence on the development of customary and treaty law. Towards the end of the Conference on the Human Environment, an oil spill from a pipeline had occurred in United States territory and the Canadian Government had invoked Principles 21 and 22, as well as the decision in the *Trail Smelter* case. The United States, in its reply, had said that, in so far as Principle 21 was consistent with customary international law and represented a widely accepted treaty obligation, the United States regarded it as a declaration of international law.

16. Very serious steps were being taken on the assumption that there was an obligation on States not to damage the territory, environment or interests of other States. The 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft,⁸ for instance, was based on the fundamental thesis that States had a duty not to damage each other's environment or the environment beyond the jurisdiction of any State party. Under that Convention, certain extremely important functions had been assigned to IAEA, which had subsequently developed rules and guidelines for the administration of the Convention. Not all States were bound by such conventions, but it was rather an exaggeration to say that there was no basis on which to begin to build rules of law on the topic under study.

17. There was also a vast network of bilateral and multilateral treaties whose stated purpose was to prevent damage being caused by one State to the environ-

ment of another State or States. Some of the most recent of them, such as the 1979 Convention on Long-range Transboundary Air Pollution and the 1985 Vienna Convention for the Protection of the Ozone Layer, had emanated from the Economic Commission for Europe. Such treaties should serve to propel the Commission to the forefront of law-making on the subject, for its role was to shape the law on the topic, not to leave the work to be done by other United Nations agencies until such time as the requisite principles had emerged.

18. A whole range of precedents was also to be found in the 1982 United Nations Convention on the Law of the Sea, which, though not yet in force, had been signed by 159 States. It was a common myth that that Convention had ended up on the scrap-heap because two or three of the major Powers had not signed or ratified it. Those States, however, were the first to insist that the Convention reflected customary international law, except the provisions they did not accept, such as those relating to the deep sea-bed. Article 192, in Part XII of the Convention, for example, provided that "States have the obligation to protect and preserve the marine environment"; and article 193 provided that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". There was also a series of provisions on measures to prevent, reduce and control pollution of the marine environment. So far as terminology and harmonization of language were concerned, no better example could be furnished for the purposes of preparing draft articles on the three interrelated subjects of the law of international watercourses, State responsibility and the present topic. In the light of such precedents, he could not agree that there was nothing on which to build the norms of the topic.

19. A tribute was due to the Soviet Union for the action it had taken following the Chernobyl disaster. But such a disaster might well occur elsewhere, and the proximity of certain peaceful nuclear facilities to the frontiers of other countries had already given rise to disputes. Did the Commission intend to wait until another catastrophe occurred to ascertain the necessary State practice? The interrelationship between the law on international watercourses, State responsibility and the present topic was not a reason for deleting any of those topics from the agenda, but rather for ensuring the necessary consistency in the Commission's approach to them.

20. There were very real issues on which the Commission should concentrate. One was the distinction between the harm caused by acts that were inherently lawful, and the damage done—with consequential liability—by acts that were inherently unlawful. He had an open mind about the words "acts" and "activities", although ideally both should be used according to the context. He had already stressed the importance he attached to recognizing the duty to negotiate where an act or a series of activities was contemplated which could cause harm to neighbouring or indeed any other States—for instance, activities of the kind that might damage the ozone layer. He also attached importance to

⁷ See *Report of the United Nations Conference on the Human Environment* . . . (see 2017th meeting, footnote 6), chap. X, para. 331.

⁸ United Nations, *Treaty Series*, vol. 932, p. 3.

recognition of the duty to take remedial measures, for instance by mitigating the damage, when something unexpected happened that did cause damage.

21. He would welcome further discussion on strict liability versus equitable principles. He was inclined to believe that a fairly strict liability rule should be imposed, since he was uncertain about the desirability of applying equitable principles unless there was a shared interest or resource.

22. As to whether there should be liability for private acts, in some countries many of the most dangerous activities were conducted quite privately. Hence he was not convinced of the need for a distinction to be made specifically for the benefit of the developing countries, which in his view were well informed of their interests in that area and knew how to protect them.

23. He would favour an even bolder approach by the Special Rapporteur, for if the Commission had substantive articles before it, it would have to focus on concrete matters, rather than theoretical questions as to whether positive law accepted a particular concept. In any event, lack of positive law was not an argument for postponing consideration of the topic or for removing it from the agenda. If the Commission did that other organs would develop the law; and what would the Commission's role be then?

24. Finally, there were a number of theoretical questions he himself wished to raise:

(a) Could the Commission agree that liability for injurious consequences related to liability for serious transboundary events resulting from otherwise lawful conduct, and that State responsibility related to responsibility for acts that were in themselves contrary to international law?

(b) Could members agree that the draft need not be confined to *lex lata* if there was disagreement on what constituted contemporary customary law on the topic, which the Commission was permitted and perhaps even required to develop progressively as well as to codify?

(c) If the Commission could agree on the foregoing, what would be the rationale for leaving questions of reparation to the draft articles on State responsibility?

(d) If there was no objection to the present draft articles being preventative in purpose, how could the Commission justify omitting remedial provisions, leaving aside the question whether or not it should propose strict liability?

(e) Did the Commission agree that its work need not be frozen in time in the period before Chernobyl and Bhopal, and that it was permitted and perhaps obliged to take such disasters into account?

(f) Did the Commission agree that what it was seeking to prepare was not a detailed convention regulating all aspects of the topic, but a general framework convention, or umbrella régime, which would leave some specific issues to be regulated by existing and future State practice, and by bilateral and multilateral agreements?

(g) If the Commission could agree on the need for such a framework agreement, could it accept the conclusion that the draft articles must be substantive and normative?

(h) Whatever the answer to the foregoing question, did the Commission agree that it need not confine itself to acts affecting the territory of other States, but could include acts affecting the international community as a whole beyond national jurisdiction, such as acts affecting outer space or the sea-bed beyond national jurisdiction? Or was it suggested that States had no obligation concerning such areas?

(i) Did the Commission agree that, if there was a need to develop the law on the topic, the task should fall to the Commission? Or should it rather be left to one of the many other institutions and conferences working on the subject?

(j) If the Commission was not able to agree that there was an existing legal duty to make reparation, could it not at least agree that there ought to be such a duty? Alternatively, what would be the rationale for rejecting the need to recognize such a duty?

(k) If the Commission denied the need to develop the law in the present field, how could it explain the vast and rapidly expanding network of bilateral and multilateral treaties directed to the preservation of the environment?

(l) Could the Commission agree that strict liability was not absolute liability and that the distinction must be borne in mind and, if necessary, clarified?

25. Mr. SEPÚLVEDA GUTIÉRREZ expressed his gratitude to the Special Rapporteur, who, in his second and third reports (A/CN.4/402 and A/CN.4/405), had provided the Commission with the information it needed for a fruitful discussion on a difficult topic. The Secretariat's survey of State practice (A/CN.4/384) was also very useful.

26. At the present stage in the debate, the Commission was sailing between Scylla and Charybdis: either it could prepare draft articles generally acceptable to States, which were the potential authors of injury and would have to answer for its consequences, in which case the notions of attribution and the extent of liability might vanish; or it could prepare a text that was legally justified and viable, but which might not be accepted by States because of the obligations it imposed on them. In either case the Commission would be failing in its task.

27. It must therefore try to avoid both those dangers, and to do so it should ask itself a few questions. First, in the present state of international law could States be held liable for their lawful acts which caused damage to other subjects of international law? Personally, he believed that they could and was even convinced that the Commission should not postpone the study of the topic, because international society was prepared to receive proposals for its international regulation and needed such regulation for a peaceful and orderly life. Moreover, if the Commission did not take up the task at once, it might meet with insuperable difficulties later, if only because of technical advances.

28. Next, which States would be interested in the draft articles? Obviously, it would be the weakest members of the international community that would have the greatest interest: first, because transboundary injury, which might have permanent and irreversible effects, could endanger the existence of those States perhaps

more seriously than an invasion or a war; and secondly, because those States needed to know the reasonable limit of their liability in order to avoid being ruined by having to pay reparations beyond their means. But other States also needed rules to define the extent of their liability, so that they could negotiate in order to avoid unproductive confrontations, and so that a State responsible for injury could keep its place in the international community rather than lose the trust of other States.

29. Another important question was whether the type of liability under consideration should be the subject of draft articles separate from those on State responsibility for wrongful acts, or whether it should be covered by those articles? In his view, the two types of responsibility should be studied separately, even though some connections must be made. It had, of course, been argued that the concept of strict or absolute liability would be difficult for States, or at least for a number of them, to accept. Such reluctance was understandable, and difficulties were always to be expected when breaking new ground. Nevertheless, he was still optimistic, for if the Commission prepared a set of draft articles they would, at the worst, have doctrinal value, which should not be underestimated. In that connection, Mr. Roucouas (2019th meeting) had mentioned the value of theory in the formation of modern international law, and it was true that political realities, constantly changing, were not the only influences: theoretical speculations, the inherent principles of any legal order, discoveries by inference and *opinio juris* also contributed to the formation of international law.

30. It had also been said that it was necessary to have an adequate conceptual basis as a foundation for liability. But even if that were so, there was no reason why the foundation should not be derived from the debate, which had resulted in definite progress; it would simply be a matter of systematizing the opinions expressed. The draft had clearly not been rejected as to substance. The different points of view could be reconciled, and it seemed possible to reach agreement on the conceptual basis of the draft, and then on the formulation of various provisions.

31. He was convinced that the Special Rapporteur, who had already taken account of many comments made during previous debates, would be able to find a middle course enabling the Commission to go forward. He hoped that, at the end of the discussion, the Special Rapporteur would harmonize the different trends of thought which had appeared and would reconcile them in a manner acceptable, if not to all members of the Commission, at least to a majority. In any case he still thought it possible to develop a régime of injury and reparation for injury, especially as the report contained the necessary bases for doing so. As to the prevention of risk, it seemed that agreement might soon be reached in the Commission. It was true that the duty to inform States of activities involving risk, like the obligation to negotiate, raised difficulties for some members, but wording could be found to attenuate those difficulties. It must not be forgotten that the rules the Commission was considering were residual rules and that the Commission consequently had some room for manoeuvre in

enunciating them. Moreover, it had been pointed out that the régime contemplated might be provisional, in view of the rapid advance of science and technology, and that might provide some additional flexibility.

32. He wondered whether some of the problems raised by the draft articles were not purely terminological. If that was so, it would probably be possible to define the terms in question and certain important concepts, in order to make their real scope better understood. No doubt the Special Rapporteur would make an effort in that direction. For example, the French expression *responsabilité objective*, which was well known in Latin America, would be more satisfactory than *responsabilité absolue* and might provoke fewer negative reactions. There was no doubt that other formulations could also be improved.

33. On the whole, he could accept the six draft articles submitted by the Special Rapporteur, subject to slight modification of such expressions as “within the control”, which needed to be defined. He would refer to those points when the Commission examined them in detail. In the mean time, he would stress that the Commission could not abandon its study of the topic and should not give an impression of impotence.

34. Mr. REUTER said that, as a teacher, the debate suggested to him three subjects for a thesis or dissertation, around which members of the Commission could group their reflections pending the next session: (a) unintentional violations of the status of State territory and non-territorial space; (b) prevention and reparation relating to damage caused by dangerous objects or activities; (c) corrective or compensatory measures relating to protection of the environment.

35. Mr. PAWLAK said that he would limit his statement to some comments on the scope of the topic and the courses open to the Commission. There was certainly a need for lawyers and States to deal with the consequences arising from the increasingly intensive use of the resources of the globe for economic, industrial and scientific purposes. Activities undertaken in individual States, even if not prohibited by international law, could have injurious effects on other States and their nationals. States were now not only exporting valuable goods and services to other States, but also transferring pollution produced by their steel, aluminium, asbestos and chemical industries. Those activities were not only a result of State policy, but were increasingly due to the action of private entities, including powerful transnational corporations.

36. The Secretariat's valuable study on the topic (A/CN.4/384) revealed that States were becoming increasingly aware of that situation and furnished many examples of treaties containing procedural and substantive provisions whereby the parties accommodated their conflicting interests. Those treaties embodied the principle of good-neighbourliness, the duty of care, and the principles of equity, prior negotiation and consultation, the balancing of interests and the prevention and limitation of injury to other States and their populations.

37. Despite the difficulties involved, he believed that the Commission should proceed with its work on the topic, as he had urged as the representative of his coun-

try in the Sixth Committee of the General Assembly. That work should be continued on the basis of the generally recognized principle *sic utere tuo ut alienum non laedas*, which meant that States had a duty to exercise their rights in ways which did not harm the interests of other States. That principle had found expression in Principle 21 of the Stockholm Declaration.

38. The topic under consideration thus brought into play two potentially conflicting principles of international law: the sovereign right of a State to engage in activities within its own territory, and the duty of a State to exercise its rights in a way that did not harm the interests of other States. Those who invoked the principle of sovereignty to oppose the study of the topic overlooked another aspect of State sovereignty, namely that every State was entitled to use its own territory without any outside interference.

39. He shared the Special Rapporteur's view that the topic was closely related to the duty of the State of origin to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk. In other words, it dealt with "liability", which could be incurred regardless of the lawfulness of the underlying cause, as opposed to "responsibility", which could arise only from wrongful acts.

40. In his opinion, the topic should cover all activities involving risk, not only "ultra-hazardous" activities. There was no valid reason for denying the protection of international law to the potential victims of activities that were not ultra-hazardous. Besides, it was difficult to draw the dividing line between activities that were ultra-hazardous and those that were not.

41. With regard to the obligation to make reparation, the Special Rapporteur had put forward the promising idea that strict liability should be the basis for that obligation, subject to certain mitigating factors.

42. The territorial scope of the topic should be extended to make the term "transboundary" cover not only injury caused in a neighbouring country, but also any injury caused in a country that was not contiguous or in areas beyond the limits of national jurisdiction. He was aware of the difficulties that approach would involve in the present state of international law, but the Commission should respond imaginatively and creatively to the needs of the modern world. Such acts as the massive pollution of the atmosphere or the sea were international crimes, and acts which, although not prohibited by international law, caused catastrophic damage in areas outside national jurisdiction could not remain without legal consequences.

43. In the same context, consideration should also be given to the role of international organizations in the co-operation necessary for the mechanism proposed in the schematic outline, and as subjects of rights and obligations deriving from the provisions of the draft.

44. As Mr. Beesley had pointed out, there would undoubtedly be a need, at some stage, to consult specialists in industry, science and other fields. Nevertheless, the Commission should press on with its work, bearing in mind that the world was becoming increasingly com-

plicated and dangerous. It would probably be well advised to be modest in its ambitions and to concentrate on practical questions.

45. He was in favour of drafting a framework convention, which would certainly be more acceptable to States. Besides, the results of the Commission's work could provide some guidance for bilateral and multilateral treaties, as well as for individual States.

46. The crucial question that would arise was clearly whether, when harm was caused, compensation should be provided for regardless of whether the act was lawful or not under international law. In its consideration of that question, the Commission could be guided by the three criteria it had adopted at its thirty-sixth session, which were discussed by the Special Rapporteur in his third report (A/CN.4/405, paras. 37-41), namely: (a) the transboundary element; (b) the element of a physical consequence; (c) the adverse effects. It was also necessary to harmonize the Commission's work on the present topic with its work on the law of the non-navigational uses of international watercourses and on State responsibility. He reserved the right to discuss the legal and other aspects of the topic in greater detail later.

47. Mr. SOLARI TUDELA expressed his appreciation of the Special Rapporteur's third report (A/CN.4/405) and the survey of State practice prepared by the Secretariat (A/CN.4/384). Not only was the topic a difficult one, but the Commission's study of it was impatiently awaited by the international community, whose requirements were increasing with technological progress. Moreover, the topic was linked with the emergence of a new branch of law: the law of the environment. An initial examination was sufficient to show the mutual benefits and the possibilities of overlapping between the topic under study and that of State responsibility for wrongful acts. Nevertheless, the Commission had received a mandate from the General Assembly which it must fulfil, for otherwise other bodies would step in to fill the gap.

48. However much overlapping with State responsibility there might be, there remained cases of strict liability which belonged exclusively to the present topic and which the Commission should regulate. In that connection, the Special Rapporteur had said in his second report (A/CN.4/402, para. 67):

... In the opinion of the Special Rapporteur, the obligations to inform and to negotiate are sufficiently well established in international law, and any breach of these obligations thus gives rise to wrongfulness. However, all things considered, that does not mean that they cannot be included in the draft.

The affirmation of those obligations in the draft, side by side with rules on prevention, would indeed serve to determine the lawfulness of the activities, but their breach could not be covered by the present draft, for as soon as there was a breach of international obligations, State responsibility was involved.

49. He would find it difficult to accept rules on prevention without reparation: the obligation would then be too incomplete. He unreservedly accepted the idea that the draft was based, as the Special Rapporteur indicated, on Principle 21 of the Stockholm Declaration

(freedom of States to carry out in their territory all activities compatible with the interests of other States), on the principles of prevention and reparation, on the principle that an innocent victim of loss or injury must not be left to bear the consequences, and on the procedural principle authorizing an affected State, if it had not received information from the State of origin on the effects and nature of an activity, to invoke presumptions of fact, indications or indirect evidence.

50. He had no objection to the substance of the six draft articles submitted, but it would have been useful to develop the Special Rapporteur's comments into draft articles. The Special Rapporteur had proposed criteria for determining the amount of reparation, for example, and it seemed that the time had come to have the whole set of draft articles available, since the theoretical discussion on the general part of the draft had created the necessary conditions for examining them. Mr. Shi's idea (2020th meeting) of adopting a working hypothesis was a positive suggestion that would facilitate the Special Rapporteur's task. It would also be useful if the Special Rapporteur could propose a list of dangerous activities in his next report—whether in the form of commentaries or draft articles. The Commission would then consider whether that list should be exhaustive, in which case it would be necessary to provide means of supplementing it, as Mr. Tomuschat (2018th meeting) had proposed. Examples to enlighten the Commission could be sought with the help of UNEP or independent experts.

51. Mr. DÍAZ GONZÁLEZ said that the topic under study could be compared to a play by Pirandello entitled *Six Characters in Search of an Author*, the roles being simply reversed: in the present case it was the authors—the Commission—who were in search of a character, their subject. It was indeed difficult to determine the foundations and parameters of the topic. That being so, a tribute was due to the Special Rapporteur, who, recapitulating the work of his predecessor and taking the schematic outline approved by the Commission as a starting-point, had submitted two extremely important reports (A/CN.4/402 and A/CN.4/405) which could help the Commission to fulfil the mandate entrusted to it by the General Assembly. The Commission had been asked to prepare a set of rules applicable to areas which did not pertain to responsibility for wrongful acts, and the title of the topic itself contained two elements which should be taken into account: first, injurious consequences; and secondly, consequences arising out of acts not prohibited by international law.

52. An initial difficulty related to terminology, and, as everyone knew, it was always difficult to introduce the vocabulary of any particular legal system into international law: the terms used in an international instrument had to be understandable to all those called upon to apply it.

53. Moreover, the foundations of the topic raised certain queries. In his third report (A/CN.4/405, para. 59), for example, the Special Rapporteur based liability on injury, more precisely on appreciable injury, and spoke of the threshold above which a State would be liable. But at what point did injury, or harm, become appreciable? And who could determine whether it was ap-

preciable or not? It was obvious that a State in whose territory injury had occurred as a result of lawful activities could not claim reparation in the absence of fault. Was the basis of liability therefore to be sought in what the Latin-American countries called *responsabilidad objetiva* (strict liability), or in no-fault liability? How could one forget that the developing countries had the greatest interest in not being placed either in the situation of a State to which injury was attributed, when they lacked the means to compensate the affected State, or in the situation of the affected State, which would have difficulty in obtaining compensation? Many members of the Commission had such doubts about the topic, since they were not convinced by the arguments advanced in favour of studying it in its present form.

54. The Commission should not devote itself exclusively to the codification of international law, but should also think of its progressive development. For that purpose it was important that it should seek means of defending the legitimate interests of States, that was to say their rights, and that it should establish the rights that could be exercised by States which acceded to the instrument resulting from the draft articles. The Commission, as a legislative body, had the faculty to draft legal rules, which meant creating law. It should accept that responsibility and not defer its task or leave it to another body. Neither doctrine, nor State practice, nor jurisprudence alone would provide the necessary foundations for preparing a set of draft articles, whether they were to be of a mandatory or of an optional character. The Special Rapporteur was not solely responsible for his topic: all the members of the Commission should assist him in his study. Mr. Beesley had even mentioned the possible assistance of experts, in accordance with article 16 of the Commission's statute.

55. Finally, he considered that the Commission should continue its work without haste and in full knowledge of the subject, perhaps beginning by defining the terms it intended to use and agreeing on the minimum basis for international liability for injurious consequences arising out of acts not prohibited by international law.

56. Mr. KOROMA observed that the Special Rapporteur had asked for guidance from the Commission. He suggested that the Commission should revive an earlier practice, according to which the Chairman had identified the main issues that had arisen during the discussion, in order to facilitate the summing-up by the Special Rapporteur.

57. The CHAIRMAN said that he would be reluctant to encroach on the prerogatives of the Special Rapporteur. Mr. Koroma's interesting suggestion could be considered by the Planning Group of the Enlarged Bureau when it examined the Commission's methods of work.

The meeting rose at 1.05 p.m.