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Summary record of the 2045th meeting

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

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to agree on which activities would give rise to liability even without the "fault" of the State of origin. That was a crucial question, for without such agreement there would always be a dispute over whether the State had complied with its duty of care. For that reason, he disagreed with the Special Rapporteur when he said he did not think that the Commission unanimously accepted the idea that there was a prohibition under international law against acts giving rise to appreciable injury through transboundary pollution (*ibid.*, paras. 9-10). He himself dealt at some length with that subject in his fourth report on the law of the non-navigational uses of international watercourses (A/CN.4/412 and Add.1 and 2), to which he would refer at another time. If the State of origin had failed to comply with its duty of due diligence, it was clear that it was liable for the resulting transboundary harm. But regardless of whether international law prohibited transboundary polluting activities, the State of origin could not discriminate against another State with regard to a potentially damaging activity by so locating that activity that the resulting pollution would affect a neighbouring State more than itself. That principle of non-discrimination, which derived from the sovereign equality of States, had been developed at length by OECD.

49. With regard to article 3 and the question of attribution, the Special Rapporteur had referred, in his oral introduction, to the requirement of a certain minimum participation of the State of origin. That point was also covered by the obligation of due diligence, which implied a certain degree of vigilance on the part of the State of origin, as he himself discussed in his fourth report. The issue was not the attribution to the State of the conduct of private individuals, but the direct liability of the State for a breach of its international obligation to exercise due care. The question for the Commission was whether the State would be liable even if it had not violated that obligation.

The meeting rose at 1 p.m.

2045th MEETING

Friday, 13 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, 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.4/405,² A/CN.4/413,³ A/CN.4/L.420, sect. D)⁴

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Attribution)
- ARTICLE 4 (Relationship between the present articles and other international agreements)
- ARTICLE 5 (Absence of effect upon other rules of international law)
- ARTICLE 6 (Freedom of action and the limits thereto)
- ARTICLE 7 (Co-operation)
- ARTICLE 8 (Participation)
- ARTICLE 9 (Prevention) *and*
- ARTICLE 10 (Reparation)' (*continued*)

1. Mr. McCaffrey, continuing his statement from the previous meeting, said he had difficulty with the title of draft article 3 (Attribution). The term had a very specific meaning in the context of the Commission's work and was also used in article 11 of part 1 of the draft articles on State responsibility.⁶ As Mr. Ago, the then Special Rapporteur for that topic, had explained in his fourth report,⁷ the responsibility of the State of origin had to be regarded as "direct" responsibility and not as attributed—in other words "indirect" or vicarious—responsibility. It was important to bear in mind that point of terminological consistency.

2. With regard to draft article 9, the obligation of prevention had two aspects: one relating to mechanisms and procedures and the other relating to substance. From a procedural point of view, the duty of prevention involved a number of practical steps: assessment of the possible transboundary effects of the activity contemplated; preventive measures on the part of the State of origin to ward off accidents; consultation with those States likely to be affected by the activity; participation by those States in the preventive action; and so on. All those procedures should enable the potentially affected States to protect themselves against the risks they ran, risks that could be very slight in themselves but could well have enormous harmful consequences, as in the case of an accident in a nuclear power-station.

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

² Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

⁴ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook* . . . 1982, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook* . . . 1983, vol. II (Part Two), pp. 84-85, para. 294.

⁵ For the texts, see 2044th meeting, para. 13.

⁶ *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

⁷ *Yearbook* . . . 1972, vol. II, p. 100, document A/CN.4/264 and Add.1, para. 72.

3. With regard to substance, the concept of prevention implied that, whether or not there was prior agreement among the States threatened by the harmful effects of the activity undertaken, the State of origin, namely the State on whose territory or under whose control that activity was carried on, had to take the necessary safety measures: for example, enacting special legislative provisions and regulations, ensuring that they were applied, and setting up supervisory machinery. That, however, gave rise to a delicate point: while it was reasonable to assume that the international community would expect an activity involving risk not to be undertaken without appropriate safety measures, it was difficult to determine exactly what the international community did expect in the matter, and more precisely, in what circumstances it would regard a particular activity as lawful. It was doubtless possible to keep to a few very general principles, as had the drafters of the 1982 United Nations Convention on the Law of the Sea with regard to the environment. But the Commission ought to be able to do better than that, and should indicate expressly what measures the State of origin must take to ensure that all activities undertaken on its territory or under its control would be carried on under reasonable safety conditions.

4. On the matter of the consequences of a breach of the obligation of prevention by the State of origin, if an activity had appreciable harmful transboundary effects, the question arose whether the liability of the State of origin would be the same whether or not it had complied with its obligation of prevention. In his view, there were two levels of responsibility: if the State had taken the necessary precautions, that fact could be regarded as an extenuating circumstance in assessing its obligation to make reparation; if it had not done so, that fact could be regarded as an aggravating circumstance. The question of reparation was undoubtedly a broader one, but it could be agreed that a State which failed in its duty of prevention was not entitled to be given the benefit of the doubt.

5. In conclusion, he found himself in general agreement with the analysis of prevention contained in paragraphs 105 and 108-109 of the Special Rapporteur's fourth report (A/CN.4/413). The report was a document which called for extensive comment and which was certain to enable the Commission to make progress in its discussion of the topic at the present session.

6. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on the quality of his fourth report (A/CN.4/413) on a very difficult topic, a difficulty illustrated by the lengthy debates held in the Commission. There were a number of points, however, on which he did not share the Special Rapporteur's views.

7. The Special Rapporteur had been wise not to include a list of the activities to be covered by the articles under preparation. As the Special Rapporteur had himself said, such a list was likely to be a hindrance to the application of the provisions adopted and, besides, it would be confined to activities already provided for in other international instruments, such as the carriage of dangerous goods and space activities. Moreover, technological advances would rapidly render the list obsolete.

8. Nevertheless, the Special Rapporteur had apparently set himself the goal of providing "the most complete definition possible of the activities involving risk that comprise the subject-matter of the topic" (*ibid.*, para. 7). That approach was at variance with the mandate of the Commission, which should focus its work on determining the legal effects of the harmful consequences arising out of acts not prohibited by international law. Besides, the Special Rapporteur himself recognized that it was the harm resulting from such activities that was the decisive factor (*ibid.*, para. 5). As for the concept of "risk", although it played a major role with regard to prevention, it did not have that pre-eminence with regard to reparation and compensation. Of course, if the risk was known and nothing was done to prevent it, that fact would have to be taken into account. In all logic, however, if harm occurred, it was because there had been a risk, whether hidden, known or unforeseeable. Accordingly, it was the legal consequences of transboundary harm arising from certain activities that should form the subject-matter of the Commission's study, keeping in mind the aphorism contained in the previous Special Rapporteur's second report: "Not all harm is wrongful but the law is never indifferent to the occurrence or potentiality of harm when it threatens the rights of other States."⁴

9. There was also no doubt that the Commission had to work on the basis of the two principles of prevention and reparation. The Special Rapporteur gave pride of place to reparation, since he stressed the need "to determine whether reparation is appropriate and, if so, what principles and factors might guide the parties in their negotiations to decide what form it should take" (*ibid.*, para. 15). For his own part, he believed that the nature of the accidents referred to in that paragraph had to be construed more broadly.

10. The Special Rapporteur had submitted 10 carefully drafted articles, along with very perspicacious comments. He (Mr. Calero Rodrigues) intended to review those articles, leaving aside questions of drafting but emphasizing that they were based on an approach he did not share.

11. Draft article 1 (Scope of the present articles) appeared more restrictive than the former text, submitted in the Special Rapporteur's third report (A/CN.4/405, para. 6), because of the use of the formula "when such activities create an appreciable risk of causing transboundary injury". The Special Rapporteur explained that change in his comments: he mentioned the case of harm that was outside the scope of the topic (A/CN.4/413, para. 27); he explained that he was dealing only with liability arising from activities involving risk (*ibid.*, para. 47); and he considered that "the activity which eventually caused" the harm created a risk and was therefore dangerous (*ibid.*, para. 45). He himself, however, was not at all convinced that the scope of the draft articles should be limited in that way.

12. The Special Rapporteur expressed doubts as to whether "there is a norm of general international law which states that there must be compensation for every

⁴ *Yearbook* . . . 1981, vol. II (Part One), p. 112, document A/CN.4/346 and Add.1 and 2, para. 40.

injury" (*ibid.*, para. 39). One would be inclined to agree with him had he not proceeded to say that "if the present articles established such a norm, and if a number of States supported them in the form of a convention, the parties would be under an obligation to provide compensation for any type of injury" (*ibid.*, para. 40), and that that solution would correspond "to a degree of international solidarity which is not found in the present-day community of nations" (*ibid.*). By a *reductio ad absurdum* logic, the Special Rapporteur added that, with that approach, "the draft could very well be reduced to a single article stipulating that reparation must be made for all transboundary injury" (*ibid.*, para. 46).

13. That approach to the problem was mistaken: the Commission had a duty to promote the development of international law, namely, in accordance with its statute (art. 15), to prepare "draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". Actually, the topic now under consideration lent itself perfectly to the formulation of international norms. A mere look around was enough to demonstrate that fact. There had, in the past, been examples of compensation being given *ex gratia* for harm caused by lawful activities, on the basis of a sort of moral obligation. It was precisely that obligation that the Commission had to transform into a legal obligation. To that end, the draft articles under consideration should specify in what cases and in what circumstances obligation to make reparation arose, and the problem of risk, whether apparent or hidden, should be left aside.

14. To sum up his position, the scope of the draft as a whole should not be restricted as was done in article 1. The draft should apply to all activities having appreciable harmful consequences and should identify the legal consequences deriving therefrom, even if the risk involved in those activities was not evident. Accordingly, it was preferable to revert to the former text of article 1 as submitted by the Special Rapporteur in his third report (A/CN.4/405, para. 6).

15. Draft article 2 should be reviewed, but the final wording could not be settled until the meaning to be given to each expression became clear in the light of the text of the draft as a whole.

16. Draft article 3 laid down the rule for the attribution of liability. The fact was that liability was not absolute, since a State might well not be in a position to exercise effective control over an activity because it did not know of its existence. Moreover, it was only too true that some States were not in a position to exercise complete control over what happened on their territory. However dubious it might seem in theory, that reality could not be escaped. But the formula "provided that it knew or had means of knowing" was not felicitous and it would be better to say "provided that it knew or should have known". It was also possible to use a negative formulation and say that the State was not bound by the obligation in question if it could establish "that it did not know or could not have known" that the activity was being carried on.

17. Draft articles 4 and 5 did not call for any comment, since they were of a general nature and were similar to the corresponding provisions contained in many international instruments.

18. With reference to chapter II of the draft, entitled "Principles", he urged the Commission not to embark on the formulation of too many principles. At the previous session, Mr. Shi⁹ had suggested taking up only three principles, a concise approach that could well be followed.

19. The principle of freedom of action embodied in draft article 6 could be expressed in a more concise manner by simply stressing the idea often repeated since the beginning of the consideration of the present topic, namely that the articles were aimed not at prohibiting the activities mentioned therein, but at regulating them by means of prevention and reparation. The first sentence of the article was redundant, except that it introduced the second sentence, which none the less seemed to contain a reservation, inasmuch as it mentioned only activities "involving risk". Such a reservation did not appear appropriate when applied to the very general legal principle that one State's freedom ended where another State's freedom began and that the exercise of any activity must be compatible with the "protection of the rights" of other States. The qualification "with regard to activities involving risk" should therefore be deleted.

20. Draft article 7 was a useful provision in that it defined the content of co-operation. However, in paragraph 1, the words "both in affected States and in States of origin" should be deleted, because in its present form the article also appeared to cover activities having harmful effects only in the State of origin. Paragraph 2 could also be deleted, since it was obvious that, where there was co-operation, at least two parties were involved and, in the case in point, those parties could only be the affected State and the State of origin.

21. Draft article 8 too, although it set out the principle of participation, was perhaps unnecessary. The duty of participation in question obviously related to consultation machinery, which was already implicit in article 7 on co-operation. Besides, the modalities of such co-operation would have to be the subject of specific provisions. If the idea in article 8 was to be retained, the substance could be included in a reformulated version of article 7.

22. Draft article 9 established the principle of prevention in terms that were not sufficiently broad. It also had the drawback of introducing the reservation: "an activity which presumably involves risk" and "for which no régime has been established". It would be preferable to retain only the first part of the sentence, which clearly established the obligation to prevent or minimize possible harm, and to add that the obligation applied to activities of all kinds.

23. The same remark applied to draft article 10, on the principle of reparation. There was no valid reason to limit its scope by specifying that the injury must be "caused by an activity involving risk" and that the

⁹ *Yearbook* . . . 1987, vol. 1, p. 167, 2020th meeting, para. 31.

reparation must be settled “in accordance with the criteria laid down in the present articles”. Furthermore, the words “must not affect the innocent victim alone” were lacking in clarity. No doubt the Special Rapporteur had wished to speak of the burden of the harm.

24. Lastly, it was gratifying that the Special Rapporteur’s report marked out the area of study for the Commission and gave a clear indication of the path it should follow. The Commission knew where it was heading in a topic whose viability was now established.

25. Mr. BEESLEY congratulated the Special Rapporteur on the thoroughness of his fourth report (A/CN.4/413) and on his efforts to reflect what had seemed to be the majority view in the Commission. To a great extent, he shared the opinions of previous speakers and, on the points already discussed, preferred the former draft articles, as submitted in the third report (A/CN.4/405, para. 6). He also noted that, in his report, the Special Rapporteur was presenting new substantive provisions, namely draft articles 6 to 10, which were bound to give rise to debate.

26. The Special Rapporteur seemed to have geared his approach not so much to liability for harm, as to assessment of risk, and that accounted for the observations made by Mr. McCaffrey and Mr. Calero Rodrigues, which he himself supported. Again, he preferred the expression “State of origin” to “source State”. Like the Special Rapporteur (2044th meeting, para. 24), he too had difficulty with the term “substances”, in draft article 2 (a), and would suggest some alternative, for example the term “event”.

27. With respect to polluting activities, he wondered, for the reasons explained by the two previous speakers, whether the Special Rapporteur had stated the problem correctly in his report (A/CN.4/413, paras. 8-15). The Commission’s task was the progressive development, not merely the codification, of the law: must it therefore continue indefinitely to debate the question whether there was a positive-law obligation in that matter? In his view, it would be a retrograde step to appear to cast doubt on the existence of such an obligation. In that connection, he drew attention to Part XII of the 1982 United Nations Convention on the Law of the Sea, an uncontroversial chapter covering not only the marine environment, but also the sources of air and land-based pollution, and which had not been challenged by any State, even among the non-signatories.

28. Mr. McCaffrey had clearly explained why the Commission ought not to base the whole of the draft on the need to assess risk, and had pointed out that low-risk activities could none the less cause appreciable, indeed catastrophic, harm. In fact, the notion of risk, though important in regard to prevention, played a lesser role with regard to liability for harm. For example, an underground nuclear explosion carried out for peaceful purposes by a State—which obviously would not thereby be committing an act prohibited by international law, since such tests were covered by the statute of IAEA—could well have harmful transboundary effects. Similarly, certain activities—manufacture of chemical weapons (not illegal under the 1925 Geneva

Protocol¹⁰), or even a beneficial activity like building a dam—although not unlawful, could cause appreciable harm, whatever the difference in risks. In the *Gut Dam Claims* case between the United States of America and Canada,¹¹ Canada had compensated United States property owners for damage resulting from an alleged consequential rise in the level of the lake, caused by a Canadian governmental entity. In any event, irrespective of the divergent views on the matter, the Commission bore the heavy burden of progressively developing international law. He would be happy to see the topic developed purely as an environmental convention, but he did not insist upon it. However, the Commission was coming to the heart of the matter when it had to consider the various kinds of activities or situations which involved transboundary pollution. He particularly endorsed the conclusions reached by Mr. Calero Rodrigues on the need to establish positive-law obligations, and not merely to emphasize the results of taking inadequate measures or of making a poor assessment of the risk. He would not deny that elimination of the risk was a factor to be taken into account, but was convinced that the notion of risk should not be the focus of the draft articles as a whole. If the risk could be anticipated, it was for the State of origin to prove that it had taken the necessary measures to forestall it; if it could not, any harm which arose might still produce legal consequences.

29. The question of the attribution of liability (draft article 3) merited some reflection. The amendments suggested by Mr. Calero Rodrigues would perhaps resolve some problems in that respect. As the draft articles stood, a situation might in fact arise in which market-economy States would never be held liable for transboundary harm, by contrast with planned-economy or mixed-economy States, simply because the latter type of State participated in the activity in question. The Commission must ensure that such a situation did not arise.

30. As to the degree of diligence, he agreed with Mr. McCaffrey’s remarks at the previous meeting. When attributing to States activities that were carried out by individuals, it was important to begin with the notion of direct liability. Many of the difficulties encountered could be explained by the fact that the Special Rapporteur was emphasizing not the activities or situations that caused harm, but the assessment of risk. In that regard, it was worth recalling Principle 21 of the Stockholm Declaration,¹² which read:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Commission would do a useful job by focusing primarily on harm caused to the environment, but should not lose sight of areas beyond national jurisdiction, such as the high seas, the sea-bed and the ozone layer.

¹⁰ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

¹¹ Arbitral award of 27 September 1968, *International Legal Materials* (Washington, D.C.), vol. VIII (1969), p. 118.

¹² See 2044th meeting, footnote 8.

31. He also quoted Principle 22 of the Stockholm Declaration, on liability and compensation, and wondered whether the Commission's task was as narrowly circumscribed as the Special Rapporteur appeared to believe in his analysis of the subject. What the Special Rapporteur appeared to have expressed was not the majority view, but a position which he felt was capable of leading to consensus. For his own part, he did not believe a perfect consensus should be sought on all matters; if it were, the Commission would never achieve anything. In the present instance, the Commission's mandate should not be confined to drafting a text covering only certain types of risk situations. The actual title of the topic might restrict the Commission to some degree, and it should perhaps be reviewed by the Drafting Committee. The Special Rapporteur's oral introduction (2044th meeting), and the comments made by Mr. McCaffrey and Mr. Calero Rodrigues, were particularly interesting as regards the possible overlap with the topic of State responsibility. Although some members might be concerned that the present topic infringed on areas belonging more to State responsibility, that topic had been on the agenda since 1956, and the Commission could not afford to wait another 30 years before completing a text on protection of the environment. Cases such as *Barcelona Traction* (see A/CN.4/413, para. 38) should not be relied upon, because they dealt with economic matters and not the law of the environment.

32. It was imperative for the Commission to advance its work on the topic, so that it could refer texts to the Drafting Committee and to Governments. In laying down the foundations of the draft articles, it must avoid the dangers of an over-narrow definition, and especially the uncertainty which seemed to prevail in some quarters as to whether the Commission was engaging in a process of codification or of progressive development of the law. He saw no reason for not trying to draft a provision such as article 192 of the 1982 United Nations Convention on the Law of the Sea, which laid down a general obligation, namely: "States have the obligation to protect and preserve the marine environment." By making the requisite drafting changes, the Commission, too, could establish a positive-law obligation. Article 193 of the Convention on the Law of the Sea likewise reflected Principle 21 of the Stockholm Declaration. Indeed, the principles of the Stockholm Declaration had sometimes been seen as a kind of "soft law" which could be changed into "hard law", as had occurred with the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,¹³ which had been negotiated by consensus.

33. The principles set forth in articles 192 and 193 of the Convention on the Law of the Sea were therefore a precedent for the Commission's work. Article 207 of the Convention, on pollution from land-based sources, took a very broad perspective on the matter, and he wished to reiterate what he had already had occasion to say about the duty of States not to cause harm to their neighbours or to regions in which all States had a common interest. He also cited article 210 of the Convention—which was based on the 1972 London Conven-

tion—and article 212 on pollution from or through the atmosphere. The latter article did not cover all kinds of pollution; instead, it stipulated that States must adopt laws and regulations to prevent, reduce and control atmospheric pollution in general, whether or not it originated in the atmosphere linked to the airspace under their sovereignty. He also mentioned articles 213, 216, 222, 225 and 235. All those provisions offered precedents which the Commission could adapt to its present needs, especially since no State had rejected Part XII of the Convention on the Law of the Sea, in which they appeared, and even non-signatory States had declared that it reflected customary law.

34. He expressed some reservations regarding paragraphs 10 and 11 of the fourth report, for the reasons explained by other members of the Commission, notably Mr. McCaffrey (2044th meeting). He tended to share the latter's approach to the two aspects of prevention: procedures and substance. As for whether preventive measures and due diligence would preclude liability where serious harm did occur although the risk had been justifiably judged to be slight, that illustrated the weakness of that approach. In other words, it was the harm that was the decisive factor, and the risk was decisive only as far as the preventive measures were concerned.

35. He agreed with the definition of the Commission's mandate given by Mr. Calero Rodrigues, especially with what he had said about accepting a rule relating to harm without apparent risk, and about restricting the application of the present articles.

36. As to the attribution of liability, for reasons he had already explained he was reluctant to accept the Special Rapporteur's proposals. Although it was desirable to take into account that developing countries sometimes lacked adequate means to know fully what transpired within their territory, too broad an exemption based on the condition that States knew or had means of knowing appeared to weaken the draft generally. Moreover, it was conceivable that future scientific advances would make for better forecasting of the long-term effects of the activities in question.

37. He endorsed the remarks made by Mr. Calero Rodrigues concerning draft articles 6, 8, 9 and 10.

38. With regard to certain drafting points which he also intended to raise in the Drafting Committee, he would point out that draft article 1 made only implicit reference to the environment and, unlike the text submitted in the third report (A/CN.4/405, para. 6), no longer mentioned either "situations" or "physical consequence".

39. He agreed with the remarks made by Mr. McCaffrey and Mr. Calero Rodrigues on draft article 2, and queried whether the term "environment" in subparagraph (a) (i) referred to the State of origin, and whether the expression "appreciable risk", in subparagraph (a) (ii), did not involve some subjective element. The definition of the expression "activities involving risk", in subparagraph (b), was tautological, because it referred back to article 1. Subparagraph (c) used the words "appreciably detrimental", an approach that did not seem to reflect the majority view of the Commission, and it would be preferable to revert to the

¹³ United Nations, *Treaty Series*, vol. 1046, p. 120.

wording “transboundary loss or injury”, used by the previous Special Rapporteur in paragraph 5 of article 2 as submitted in his fifth report.¹⁴ In subparagraph (d), “State of origin” was indeed preferable to “source State”. With regard to the affected State, a distinction should be drawn in subparagraph (e) between situations involving strict liability and those involving absolute liability.

40. With regard to draft article 4, he had already experienced some difficulty with the corresponding text (art. 3) submitted by the previous Special Rapporteur,¹⁵ and wondered whether the provisions under consideration reflected treaty law or in fact contradicted it. Moreover, the use of the expression “subject to that other international agreement” raised some problems. The wording of article 5 was vague, yet the principle itself was perhaps fundamental. As to article 6, he failed to see why Principle 21 of the Stockholm Declaration had been abandoned. There was no criticism to be made of the substance of article 7, except that the purpose of the articles under preparation was not co-operation. Paragraph 1 posed no difficulty and, as far as paragraph 2 was concerned, he would merely refer members to the comments made by Mr. Calero Rodrigues. He had some reservations regarding article 8 and considered that the form of article 9 would have to be modified slightly if the Commission decided that the principle of prevention should be made a fundamental principle. As to article 10, it must be remembered that the instrument now being elaborated should seek to protect potential victims.

41. Mr. TOMUSCHAT congratulated the Special Rapporteur on his fourth report (A/CN.4/413) and his oral introduction, which had brought sharply into focus the guiding principles of the new draft articles he had submitted. The draft articles had the merit of being based on a well-defined concept of liability and its implications, and the central idea of risk had been introduced: whenever appreciable or significant risk of transboundary harm was involved in a human activity, the proposed rules would apply. The entire draft thus revolved around a unitary premise, and it ought not to be too difficult to derive from that premise the rules needed to establish the future régime of liability.

42. Although he was in broad agreement with the new approach proposed by the Special Rapporteur, he wondered whether the Commission should not take a bolder and more comprehensive tack, now that the topic had been differentiated from that of State responsibility. Whereas the rules on State responsibility were for the most part secondary rules, the Commission’s task in the matter at hand was to establish primary rules concerned essentially with environmental law.

43. It was there that a second central concept came into play, alongside the notion of appreciable or significant risk: the idea of transboundary harm, harm being understood in the sense of physical or material harm. In modern legal terminology, it was environmental law which regulated activities that had or were likely to have harmful effects on the physical components of the

human environment: air, water and soil. And it was precisely the impressive growth of environmental law over the past two decades which justified the drafting of a more ambitious instrument, such as a framework agreement. In that connection, he endorsed the comments made by Mr. Calero Rodrigues. Just as the 1982 United Nations Convention on the Law of the Sea applied to the marine environment, could not a similar instrument applicable to the land surface of the globe, and perhaps also to its airspace, be elaborated? The task was not an impossible one as long as the rules proposed were acceptable to States, which of course did not want to forgo their rights of territorial sovereignty. But in any case environmental protection called for a framework which went beyond the idea of risk.

44. As it was necessary to have a true picture of realities and needs, the draft articles should be considered with full awareness of the main kinds of situations to which they were meant to apply. First, the one activity which was inherently dangerous and which man would never totally control was the handling of fissionable material in large quantities, in particular in modern power plants—with civilian applications, of course. The rules the Commission was called upon to establish must deal with nuclear risk. Fortunately, until now only one major nuclear power plant, one of the reactors at Chernobyl, had run wild, but the fact remained that a major nuclear accident anywhere in the world would inevitably have serious transboundary effects.

45. The second situation to be contemplated was that of pollution from motor traffic or from the burning of fossil fuels, which normally had long-range effects. Specific characteristics were present in that sort of situation. The activities which generated it were socially tolerated, at least within certain limits. The pollution thus generated differed from accidental pollution, because of its cumulative and gradual effect, which was not felt immediately. Finally, attribution of such pollution to a given State was extremely difficult, especially in Europe, where there were so many frontiers in a relatively small area. It would appear that the rules needed to cope with that phenomenon could not be exactly the same as those which were suited to deal with other risk activities.

46. The third situation was illustrated by the *Trail Smelter* case (*ibid.*, para. 2), where an industrial complex, situated near the border of two or more States, emitted noxious gases which damaged the environment. Such an activity not only contributed to the general phenomenon of pollution, but also entailed a specific and easily identifiable damage knowingly inflicted on another State. In the same line of reasoning, but going beyond environmental protection proper, the question must be asked whether the draft should cover biological and genetic experiments. He believed it should, in view of the gravity of such risks. States which permitted their scientific communities to enter into that field of research must take adequate preventive measures and must be aware that they could not evade their international responsibility when the experiments led to catastrophic results.

47. The fourth and final category, which differed from the others, was that in which the victim was not

¹⁴ *Yearbook . . . 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

¹⁵ *Ibid.*

another State, with the physical components of its statehood, but the common heritage of mankind, apart from the sea, which was governed by the United Nations Convention on the Law of the Sea. On that subject, he endorsed the comments made by Mr. Beesley and mentioned the case of Antarctica and the different layers of the atmosphere and the stratosphere, particularly the ozone layer. It was not clear from draft article 2 (c), where the expression "transboundary injury" was defined, whether the Special Rapporteur intended to include those areas within the draft articles.

48. Those would appear to be the main factual situations which called for an international régime. It would seem that the Special Rapporteur had taken nuclear risk into consideration, but had not covered continuous, creeping pollution, and that he intended to exclude damage caused by activities which did not *a priori* seem to constitute a risk—in other words, all instances in which the risk was purely accidental.

49. It might be helpful at the present stage to draw a fundamental distinction between situations considered as arising *ex ante*, or at a time when no danger had occurred, and situations characterized by the emergence of harmful effects, hence considered *ex post facto*. In the latter case, the scope of the rules might be broader than in the former. In other words, risk was an excellent guiding criterion for a prospective view; in retrospect, however, actual danger became the main element. In that connection, he was forced to disagree with Mr. Calero Rodrigues.

50. Looking at situations considered *ex ante*, he would establish three rules. The first would of necessity be the rule proposed by the Special Rapporteur in the first sentence of draft article 6, namely that States were masters within their own territory. That rule reflected the basic principle of sovereignty. Every State enjoyed sovereign territorial rights within its borders, but that freedom could not be absolute. Secondly, there should be a clear prohibition on activities which inevitably inflicted "appreciable" harm on other States. On that point, he would go beyond the rule proposed by the Special Rapporteur in the second sentence of article 6 and introduce the principle of territorial integrity. One could imagine, for example, that a dumping site within one State just next to the border of another contaminated the ground water of the second State, or that the construction of a plant that would emit toxic fumes was authorized on the eastern border of the State of origin, with the clear intention of getting rid of the fumes by means of the prevailing westerly winds. For such cases, it would be necessary to specify that no State had the right knowingly and wilfully to inflict on its neighbours the burden of the waste it generated. Thirdly, there was a large group of activities which involved risks but were socially useful: if they were responsibly controlled, those activities must be tolerated. Such was the case with nuclear power plants. In those situations, prevention must obviously be the key concept. The Special Rapporteur acknowledged that fact in draft article 9, the text of which could none the less be refined. To that end, the United Nations Convention on the Law of the Sea afforded many examples of provisions which referred to recognized international standards, whether in international treaties, in

the resolutions and findings of international bodies, or in recommended practices. The same approach could be used for the draft articles under discussion, as prevention must not be left entirely to the discretion of the State of origin: it must be adjusted to more objective standards. An appeal could also be made to States to establish such standards for activities which were generally recognized as being dangerous by their very nature.

51. Cumulative or creeping atmospheric pollution from innumerable individual sources was a difficult problem to tackle, and the Special Rapporteur had in fact declined to do so. The problem could only be resolved globally, by the conclusion of agreements between States.

52. In the case of situations considered *ex post facto*, the legal framework was slightly different: to the extent that a State violated specific treaty rules, it incurred international responsibility. That might sound like a truism, but in fact it was not. The more the corpus of rules of international treaty law grew, the less room there was for a special category of liability for acts not prohibited by international law. That was why the Commission should not hesitate to enter the field of State responsibility in the classical sense. It was true that liability for unlawful acts and liability for non-prohibited acts were so closely interrelated that it was often difficult to know which of the two categories was applicable. Indeed, the Commission had been unable to draw a clear line of demarcation between the two categories in the entire time it had been concerned with the present topic. But in any event, the ordinary rules on State responsibility would apply if a State did not comply with binding treaty obligations which it had accepted of its own free will.

53. It was more difficult to assess the legal position of States if one relied only on the general principles of international law as they had been codified in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁶ In the case of situations considered *ex ante*, there were certainly instances in which a State knowingly and deliberately inflicted particular and easily identifiable damage on another State, as exemplified by the *Trail Smelter* dispute. To hold the State of origin responsible in such instances was not difficult. The Special Rapporteur, however, seemed to believe that even in such cases State responsibility could not be engaged. For his own part, he would challenge that proposition, and point out that the Commission's mandate included the progressive development of international law. In order to dispel any uncertainty, the Commission should consolidate the rule—based on the principle of territorial integrity—that a State which knowingly inflicted appreciable harm on a neighbouring State incurred responsibility. The drafting of such a rule might be somewhat difficult: the *Trail Smelter* type of situation did indeed stand apart, but its distinctive features could nevertheless be conceptualized and generalized.

¹⁶ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

54. Next, there were instances in which the risk inherent in a dangerous activity had materialized. He had some reservations on the rather loose-knit solution proposed by the Special Rapporteur in draft article 10, which called for negotiations between the parties. There, too, a distinction might have to be drawn: the damage might well have occurred in spite of all the preventive measures taken and, in such a case, the law on State responsibility could not apply, and the situation would call for imaginative solutions. One factor that might be taken into account was the amount of damage sustained by the affected State. One could also model the proposal on private insurance régimes which established an upper limit on financial reparation.

55. But what solution should prevail when due diligence had not been exercised by the State of origin, thus enabling the risk to materialize? In such instances, it would in all likelihood be possible to prove negligence. At the previous meeting, Mr. McCaffrey had stressed the notion of due diligence as a yardstick for compliance with the requisites of prevention. But the Commission was obviously entering a twilight zone in that regard. Under the Civil Code of the Federal Republic of Germany and those of a number of other countries, for example, in such cases one always asked whether due diligence had been observed, and if it had not, the activity was considered unlawful. Yet such simple reasoning did not necessarily apply to international law, and it was doubtful whether it counted among the "general principles of law" which, under Article 38 of the Statute of the ICJ, could be borrowed from national legal systems for incorporation in the corpus of international law. Would not the scope of liability for injurious consequences arising out of acts not prohibited by international law be reduced to the minimum if all instances of lack of due diligence were automatically shifted to the realm of State responsibility? How could the affected State find out whether all the necessary preventive measures had been taken in the State of origin? One could therefore well argue that all instances in which the risk materialized should form a single category, irrespective of whether due diligence had been exercised, with the exception of gross negligence. Mr. McCaffrey's idea that failure to apply due diligence should be regarded as an aggravating circumstance had its merits. It was in line with the comments made by the Special Rapporteur in his report (A/CN.4/413, paras. 108 *et seq.*), explaining the difficulties of determining whether the requirement of exercising due diligence was an autonomous standard or a dependent standard, and whether failure to comply with that obligation automatically entailed liability.

56. The final category was that of unforeseen accidents which caused not only appreciable, but great harm to another State. The maxim that the victim should not be left alone to bear the loss must apply in such cases, irrespective of whether the harm was rooted in an activity whose dangerous nature had been foreseen. Liability could in fact be based on two different premises. Risk was obviously one of them, but there were situations in which it did not come into play. If a State, without violating a rule of international law or engaging in an activity involving risk, caused serious physical harm to another State, the latter should be

compensated for its loss in accordance with the principles of equity. Like Mr. Calero Rodrigues, he disagreed with the Special Rapporteur on that point.

57. Lastly, he pointed out that he had raised fundamental policy questions because, in his view, the draft must rest on clear conceptual foundations if it was to be viable.

58. Mr. BARBOZA (Special Rapporteur), clarifying some of the points raised during the discussion so far, particularly by Mr. McCaffrey, said that there was a clear line of demarcation between the present topic and the topic of the law of the non-navigational uses of international watercourses. In the context of watercourses, appreciable harm resulting from failure to comply with the obligation of due care entailed wrongfulness, whereas, in the topic under discussion, wrongfulness was not involved.

59. Mr. McCaffrey had made four points. First, polluting activities should be subject to an extremely rigorous obligation of diligence, and he had mentioned the idea of prohibition in that connection. Secondly, low risk of major harm (disasters) should be covered by the draft. Thirdly, the principle of non-discrimination, in other words that a State must not treat foreign citizens any worse than it treated its own nationals, should come into play. Fourthly, there should be direct attribution to a State, the State being required to exercise diligence, and any failure to comply with that obligation entailing liability.

60. In his own view, the first and fourth points were interrelated. If the draft covered polluting activities, reparation would have to be made for the appreciable harm they caused, whether or not due diligence had been exercised. If it had not, the reparation should be equivalent to the harm caused. If, on the other hand, the State of origin had exercised due diligence, the expenditure incurred for that purpose would have to be taken into account when compensation was granted. Such an approach should be acceptable to Mr. McCaffrey, and there seemed to be no impediment to Mr. McCaffrey using the concept of prohibition in the topic for which he was Special Rapporteur. If he did so, that solution would still be applicable to watercourse cases, by virtue of article 4 of the draft articles under consideration.

61. Attribution of liability was essentially a jurisdictional matter and the proposed system would be seriously disrupted if the requirement was an act of the State, within the meaning of part 1 of the draft articles on State responsibility.¹⁷ Even activities conducted by a State were attributable to it by the very fact that they took place in its territory or under its jurisdiction. Otherwise, attribution would become a question of proof, and that would be contrary to the fundamental rules of causal responsibility, which called for a reliable, clear and easily applicable mechanism. That was precisely what he was proposing in the draft, for the very fact that the activity which had caused damage had been carried out under the jurisdiction or control of a State rendered the State liable. Mr. McCaffrey had criticized the draft as requiring a minimum of partici-

¹⁷ See footnote 6 above.

pation, which was incompatible with jurisdictional attribution; but a minimum of participation was also required in domestic law in matters of strict liability. Human beings were not robots: they must at least know when an activity was dangerous, and they could be presumed to know when the risk was "appreciable".

62. He did agree, however, that low risk of major harm should be covered. Further consideration was required on that point, and the word "foreseeable" might be preferable. As to non-discrimination, whether or not one accepted it as a principle, it was a notion which would have to play an important role in the attribution of liability.

63. Lastly, the question whether, in general international law, there was an obligation to exercise due diligence and a prohibition on causing any appreciable harm was still very much unsettled. In any event, States would decide the matter freely and would accept only those obligations universally recognized in general international law. The only practical result of presuming that such a prohibition existed would be to leave States affected by polluting activities defenceless.

The meeting rose at 12.55 p.m.

2046th MEETING

Tuesday, 17 May 1988, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (continued)* (A/CN.4/L.420, sect. F.4)

[Agenda item 9]

1. The CHAIRMAN reminded the Commission that it had decided to devote a meeting during the week of 16 to 20 May 1988 to discussion of its programme, procedures, working methods and documentation, with particular reference to the issues raised in paragraph 5 of General Assembly resolution 42/156 of 7 December 1987 (see 2044th meeting, para. 1.1). He welcomed the Legal Counsel of the United Nations, whose presence would be particularly useful while the Commission was discussing its programme and working methods, because the Commission's fulfilment of its functions was closely linked with the assistance provided to it by the Secretariat.

2. The meeting was also being attended by Mr. Jorge Vanossi, Observer for the Inter-American Juridical Committee, whom he welcomed on behalf of all members of the Commission. There was no need to dwell on the long-standing relationship between the Commission and the Committee, or on the fact that co-operation with regional codification organizations was mutually enriching. In paragraph 12 of resolution 42/156, the General Assembly had reaffirmed its wish that the Commission should continue to enhance its co-operation with intergovernmental legal bodies whose work was of interest for the progressive development and codification of international law. The Commission and the Inter-American Juridical Committee had common objectives and dealt with some of the same aspects of international law. Both had members from countries with different legal systems and at different degrees of development. The observer for the Committee would make a statement during the session.

3. To facilitate the Commission's discussion of its working methods, he drew attention to paragraphs 3 to 11 of General Assembly resolution 42/156. In paragraph 5, the Assembly requested the Commission to keep under review the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics; to consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute to more effective consideration of its report in the Sixth Committee; and to indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments would be of particular interest for the continuation of its work.

4. He also drew attention to the topical summary of the Sixth Committee's discussion of the Commission's report on its thirty-ninth session (A/CN.4/L.420). Suggestions on the planning of the Commission's future activities, the staggering of consideration of certain topics, and the Commission's methods of work, reporting methods and documentation were set out in paragraphs 251 to 262 of that document.

5. Mr. BARSEGOV said that the Commission had to improve its planning and the methods and organization of its work, since a certain discrepancy was felt to exist between the demands arising as a result of the steadily growing importance of international law and the state of the Commission's work. As a member of the Commission, he was well aware of the difficulties of its task; outside observers, however, took a rather sceptical view of the Commission's efficacy and openly expressed doubts as to its ability to complete the many important instruments on which it was currently working within the present generation's lifetime.

6. The question of staggering the Commission's consideration of topics had been under discussion for a long time. To work on a large number of topics simultaneously meant delaying them all. At the end of a five-year cycle, the Commission's membership changed and special rapporteurs succeeded one another. The same issues had to be considered over and over again. The fact that only three of the six reports due for consideration at the current session were so far available

* Resumed from the 2044th meeting.