Summary record of the 2048th meeting

Topic:
<multiple topics>

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OAS and by the Committee itself, namely: legal issues pertaining to drug trafficking, including principles governing the extradition of drug traffickers, cooperation in prosecutions involving bank accounts, and harmonization of national legislation on drug trafficking; environmental law; the draft additional protocol to the American Convention on Human Rights; international legal problems relating to multilateral guarantees of foreign private investments; improvement of the administration of justice in the Americas; review of the inter-American conventions on industrial property; interpretation and development of the principles of the Charter of OAS, as amended by the 1985 Cartagena Protocol, with a view to strengthening relations between the States members of OAS; the principle of self-determination and its scope of application; the right to information; expulsion and international law; maintenance grants for minors in international law; and returning of minors as between States. In addition, at its seventeenth session, in November 1987, the General Assembly of OAS had called on the Committee to examine why more States were not parties to the 1948 Pact of Bogotá.17

59. The Inter-American Juridical Committee’s work over nearly 50 years attested to the foresight of the founders of OAS, who had acknowledged that specialized legal consultative services were the keystone of the inter-American system.

60. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his statement. The Committee’s work, some aspects of which were related to the Commission’s endeavours, was of great interest not only for inter-American law, but also for international law in general. One example was the Committee’s work on drug trafficking and environmental law. He was convinced that members of the Commission, and particularly the special rapporteurs, would benefit from the information provided by the Observer for the Inter-American Juridical Committee, and that the relations between the two bodies could only be mutually advantageous. As a member of the Commission and as a Latin-American, he welcomed the Committee’s past achievements and its ongoing efforts.

61. Mr. BARBOZA, speaking on behalf of the Latin-American members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement. He was particularly impressed by the size and scope of the Committee’s agenda and the utility of its course on international law. The benefit to be derived from exchanges between the Commission and other international law bodies had been demonstrated once again.

62. Mr. McCAFFREY, speaking on behalf of the Western European and other members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement and asked him to convey to the other members of the Committee his gratitude for the welcome he had received when he had spoken on the Committee’s behalf at the Committee’s most recent session at Rio de Janeiro in August 1987, during which he had been able to acquaint himself with its working methods. He had also spoken to participants in the course on international law organized by the Committee and thought that that procedure should become a regular practice, in so far as time permitted. He was particularly interested in the Committee’s activities in connection with environmental law and hoped that its documentation on the subject would be made available to the Commission, and particularly the special rapporteurs.

63. Mr. PAWLAK, speaking on behalf of the Eastern European members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement, which had provided much food for thought. The problems of Central and South America, as the statement had shown, were very serious and called for very careful consideration by the Inter-American Juridical Committee. They were similar to many of the problems faced by the Eastern European countries, although they occurred in differing degrees. He wished the Committee every success in its endeavours.

64. Mr. MAHIOU, speaking on behalf of the African members of the Commission, thanked the Observer for the Inter-American Juridical Committee for the detailed information he had provided. The Committee’s work programme and the number and diversity of topics it covered were impressive. Those subjects were of interest for international law in general and also of regional, purely intra-American value. Africa, whose legal problems were not without some similarity to those of the American continent, could not fail to follow the work of the Inter-American Juridical Committee with interest.

The meeting rose at 1 p.m.

2048th MEETING
Thursday, 19 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

Visit by a member of the International Court of Justice

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome.
to Mr. Ago, a Judge of the International Court of Justice and a former member of the Commission. Mr. Ago was well known to members for the valuable contribution he had made as Special Rapporteur for the topic of State responsibility. Besides the personal ties by which members of the Commission and the ICJ were bound, the two bodies were both concerned with the rules of international law, the Commission progressively developing those rules and the Court applying them in specific cases. The latter function was exemplified by a recent case that would have far-reaching effects on international organizations and the reaffirmation of the rule of international law in international relations. He asked Mr. Ago to convey the greetings of the Commission to the members of the Court.

2. Mr. AGO, thanking the Chairman for his kind words, said that the collaboration between the Commission and the International Court of Justice was extremely important and a matter of particular satisfaction to him. He wished the Commission every success in its continued work on the progressive development and codification of international law.


Fourth report of the Special Rapporteur

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)

3. Mr. EIRIKSSON said that the draft articles submitted by the Special Rapporteur in his fourth report (A/CN.4/413) represented a breakthrough in the Commission's consideration of the topic. They made it possible to look forward with confidence to the development of a satisfactory response to the international community's desire for results in an important field. In the light of the draft articles, he joined in the appeal for consideration of the topic to be extended to cover all transboundary harm. He hoped that the Commission and the Special Rapporteur would adopt a bolder approach, since, under the scheme as he envisaged it, the articles would form a separate subgroup of the topic as a whole.

4. Owing to the difficulties caused by the need to avoid any overlap with the topic of State responsibility, and by the strait-jacket imposed by the words "acts not prohibited by international law" in the title of the topic, the Special Rapporteur had had to perform a kind of juridical balancing act on the question whether pollution was prohibited under international law. That was unfortunate, and under the scheme which he and many other members would like to see adopted would be unnecessary.

5. It had been more or less agreed that the scope of the topic should be confined to the physical consequences of harm arising out of acts not prohibited by international law and that transboundary economic harm—including harm caused by cultural influences from a neighbouring country—should be excluded. However, if the scope of the topic was to be restricted in some areas, he saw no reason why it should not be expanded in others. Any overlap with the topic of State responsibility could be dealt with by a "no prejudice" clause along the lines of draft article 5, and also in the guidelines for negotiating reparation under draft article 10. The Special Rapporteur's scepticism about the will of States to accept broader liability for harm was perhaps justified, but the Commission should not ignore the dramatic developments in that field, to which a number of members had referred, as well as the evidence provided by numerous public appeals for action.

6. The articles, as he would like to see them, would have as their core the category of activities which created an appreciable risk of causing transboundary harm—already covered by the draft articles submitted by the Special Rapporteur—but would also deal separately with "other activities causing transboundary harm". The three principles referred to by the Special Rapporteur in paragraph 85 of his report would apply to both categories of activity, but the duties of prevention, co-operation and notification would be confined to activities creating risk. The guidelines for negotiating reparation would differ for the two categories; in preparing those guidelines, the views of Mr. McCaffrey and Mr. Calero Rodrigues (2044th and 2045th meetings) could perhaps be taken into account. In his view, such a system would be more complete than the régime described by the Special Rapporteur (A/CN.4/413, para. 46). The following general changes, which would not involve any radical departure from the present draft articles, would have to be made in order to incorporate his proposed system.

7. First, the title of the draft would be amended to read: "Draft articles on international liability for transboundary harm". Draft article 1 would include a subparagraph (a), referring to "activities which create an appreciable risk of causing transboundary harm", and a subparagraph (b), referring to "other activities which

5 For the texts, see 2044th meeting, para. 13.
do not create such a risk but none the less cause trans-boundary harm". As a consequential amendment, in subparagraph (b) of article 2, "activities involving risk" would be defined as "the activities referred to in article 1, subparagraph (a)". In article 3, the reference to "an activity involving risk" would be generalized to read "an activity referred to in article 1".

8. Draft article 5 would be amended to take account of the question of State responsibility and could read: "The present articles are without prejudice to the operation of any other rule of international law establishing responsibility for transboundary harm resulting from a wrongful act or omission."

9. The words "activities involving risk" and "an activity involving risk" in articles 6 and 10, respectively, would be replaced by "activities referred to in article 1". The commentary to article 10 would provide a detailed explanation of the differences between the guidelines for the two categories of activity giving rise to liability.

10. On more detailed points, with regard to article 1 he endorsed the basic premise that accountability was a territorial matter, although he sympathized with the concern expressed about extraterritorial jurisdiction.

11. With regard to subparagraph (a) (ii) of article 2, he could accept the limitation imposed by the notion of "appreciable" risk, for the reasons stated by the Special Rapporteur. As to subparagraph (c), he could accept the essential physical characteristics of the activities that caused harm, but that did not mean that the harm itself had to be physical: it should include harm to amenities and other legitimate uses of areas. He could also accept the notion of appreciable harm or, in the words of subparagraph (c), an "appreciably detrimental" effect.

12. He agreed that, throughout the draft, the word "harm" should be used rather than "injury" and the expression "State of origin" rather than "source State".

13. He approved of the limitation imposed in article 3 by the reference to knowledge and "means of knowing", but suggested that the article be amended to read:

"The State of origin shall not have the obligations imposed on it with respect to an activity referred to in article 1 unless it knew or had means of knowing that the activity was being, or was about to be, carried on in areas under its jurisdiction or control."

He further suggested that the title of the article, "Attribution", should be replaced by "The basis of obligations under the present articles", in keeping with the recognized distinction regarding scope dealt with in articles 1 and 3, respectively.

14. Draft article 4, though clear in intention, might require some redrafting. Draft article 6, particularly the first sentence, required redrafting, though the meaning was clear from the Special Rapporteur's comments (ibid., paras. 92-95). He endorsed the comments made by Mr. Calero Rodrigues (2045th meeting) and Mr. Shi (2047th meeting) on draft articles 7 and 8.

15. He had some doubts about the phrase "and for which no régime has been established", in article 9, and thought that the word "presumably" might be unnecessary in view of the definition of risk in article 2 (a). He could accept the use of the word "reparation", in article 10, for the reasons stated by the Special Rapporteur, and—as a concession to reality—agreed that the article should simply provide that the amount and nature of the reparation were to be determined by the parties to the negotiations.

16. If the Commission could work along those lines, it might well be possible to prepare, and eventually submit to the General Assembly, draft articles forming the basis of an instrument that could become a landmark in the progressive development of international law.

17. Mr. MAHIOU said that the Special Rapporteur's fourth report (A/CN.4/413) marked a turning-point in the work on the topic, because it advocated a new and more specific approach with a view to delimiting the topic. The core of the report lay in paragraphs 37 to 47, in which the Special Rapporteur explained his approach and, more particularly, the respective places of risk and harm in the system of liability he proposed. From those paragraphs it was clear that he had opted for liability for risk. Risk thus became the central element around which the Commission was invited to construct the régime of liability.

18. The question therefore arose whether risk provided a sufficiently solid foundation to bear that régime. For his part, he was ready to endorse the Special Rapporteur's approach, although he appreciated that it did not solve all the problems. Indeed, he doubted whether it was possible to do so. The Commission should not set itself an impossible task and try to cover everything that fell outside the sphere of State responsibility, but should seek to deal with what was essential. That would be difficult enough.

19. In his view, liability based on risk presented three definite advantages. The first was that the notion of risk made it possible to pin-point the topic and its limits. The topic had, after all, been on the Commission's agenda for 10 years, and it was no use continuing to wander aimlessly around in such a broad field as liability. What was needed was an anchor, and the Special Rapporteur had rightly endeavoured to convince the Commission that risk would provide a better one than harm, although he had followed the idea of his predecessor, the late Robert Q. Quentin-Baxter, in recognizing the continuum of risk and harm.

20. The second advantage of the notion of risk was that it gave greater unity and coherence to the topic and would thus make it easier to define the area of progressive development and codification of the law in that field. Risk, by introducing a clearer line of demarcation, made the whole topic more specific, as compared with that of State responsibility. Harm, on the other hand, was common to both systems of liability, and trans-boundary harm could result from lawful or unlawful acts, or indeed from a combination of both. It was in seeking to determine the conditions governing reparation, and hence the origin of the harm caused, that the differentiation appeared. It was therefore necessary to
move back along the chain of causality to the source of the harm, as the Special Rapporteur had suggested, in order to determine liability. If the source lay in a fault, the injured State had to prove the existence of that fault. If the source lay in risk, the injured State simply had to prove that there was a causal link between the source and the harm.

21. The third advantage was that risk went to the heart of the topic, for it was the main source of the harmful transboundary effects of dangerous activities or things. Most harm likely to affect a State, originating in another State, arose from activities or things involving risk. It would be a major step forward, therefore, if the international community could now provide, by way of prevention or reparation, for the consequences of all activities involving risk.

22. He appreciated the concern of those who wished to go further, but the Commission should not be over-ambitious. It was better to start with a hard core of liability arising out of dangerous activities or things not prohibited by international law and, from that point of departure, pave the way for subsequent developments. Once the hard core question had been resolved, it would be easier to persuade States to accept an extension of liability. For all those reasons, he was in favour of considering risk as the basis of the structure of the draft, though he was aware of the limits of that approach. Those limits could be considered further in due course.

23. The Special Rapporteur had said (ibid., para. 39) that he did not believe there was a rule of general international law which imposed an obligation to make reparation for harm; but he had also intimated that such a rule might possibly exist if reference were had to risk, for he seemed to deduce (ibid., para. 44) that an obligation arose a priori for States on the basis of the notion of risk. That very subtle reasoning was based on the idea of a continuum of risk and harm. Thus there was what might be termed a potential obligation based on the existence of risk, which became an actual obligation as soon as harm occurred. In the existing state of international law, however, an obligation linked to risk was more a matter for progressive development of the law than for its codification, for it was hard to find any rule based on an obligation related simply to risk. None the less, he would favour such a development of international law, provided it was delimited by risk.

24. He would submit, however, that there was a more solid basis in international law for the attribution of responsibility relating to risk. One of the fundamental principles of relations between States was good-neighbourliness, a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.† The principle of good-neighbourliness went beyond mere geographical proximity and had larger implications. An example was to be found in the arbitral award of 17 July 1986 in the Gulf of Saint Lawrence case.† Paragraph 27 of that award stated that, while the concept of neighbourliness was generally used to designate a situation of geographical proximity, it was used more specifically in legal language to characterize situations of proximity which, because they threatened to create constant friction, required continual collaboration on the part of nationals or public officials of two or more States whose activities overlapped in a single geographical area. Thus where, in the interests of good-neighbourliness, States refrained from creating situations that might be injurious, the element of risk was clearly involved.

25. As to the nature of risk, which the Special Rapporteur analysed in his report (ibid., paras. 24-31), it was clear that one could expand or reduce the scope of liability according to the definition of risk adopted. The Special Rapporteur proposed three criteria to help define appreciable risk: it must be identifiable by virtue of the physical characteristics of the thing or activity concerned; it must be related to a general activity, not to a specific case; and it must be objective, not dependent on the point of view of a single party, be it the State of origin or the affected State.

26. Those criteria were useful in preventing the notion of risk from remaining unduly abstract. But, in his search for precision, the Special Rapporteur had met with a serious difficulty relating to the notion of hidden or imperceptible risk; he acknowledged that difficulty in the report (ibid., para. 27), where he stated that hidden risk might be outside the scope of the draft. He himself was inclined to agree with that analysis, because the definition of risk as it now stood was clearly inadequate. For example, if major injury was inflicted in a situation where no perceptible risk could be discerned, would the affected State alone be required to bear the burden? Such a position would be extremely difficult to justify, especially as some legal systems already attributed responsibility for such events. Of course, internal law and international law were not really comparable, but the logic underlying the liability régime in some countries could be applied to the Commission’s reflections on hidden risk. Linking liability with dangerous activities or things was already a good beginning, and the Commission could go further into the problem in the future.

27. Another deficiency in the draft articles became evident in connection with activities whose injurious effects occurred by accumulation or with the passage of time. An example could be drawn from another topic on the Commission’s agenda, that of the law of the non-navigational uses of international watercourses. Suppose affluents from country A and country B ran into a river that passed through country C; that country A discharged pollutants into its affluent in reasonable amounts, and subsequently country B began to do the same; and that, when the waters of those affluents reached country C, the acceptable level of pollution had been exceeded. What could country C do? Was country A exonerated because its activity was not injurious in itself? Should country B bear the full responsibility for

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

‡ For the text of the award (in French), see Revue générale de droit international public (Paris), vol. 90 (1986), pp. 713 et seq.
28. He endorsed the new version of draft article 1 and approved of the Special Rapporteur's strategy of limiting the scope of the draft to risk and omitting any reference to the concept of "territory". He particularly approved of the incorporation in article 1 of language used in the 1982 United Nations Convention on the Law of the Sea, and suggested that that approach should be taken a step further. The phrase "activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State" should be replaced by "activities under the jurisdiction or control of a State", which was shorter, clearer and less problematic wording. The reference to "effective control" was not appropriate in article 1 and could cause more difficulties than it resolved.

29. Mr. FRANCIS said that the fourth report of the Special Rapporteur (A/CN.4/413) provided an excellent basis for progress in the Commission's work. The scholarship was of a high order, the content was evocative, and all the elements on which further reflection was necessary were touched upon. The Special Rapporteur was also to be commended for his efforts to accommodate all points of view. He (Mr. Francis) supported referral of the draft articles to the Drafting Committee.

30. Despite the merits of the report, however, he could not say that he agreed with every aspect of the draft articles. As others had pointed out before him, the Special Rapporteur had confined the scope of the draft within narrow limits. In draft article 1, he had deliberately omitted the reference to "situations" which had appeared in the draft articles submitted in 1984 and had retained only the word "activities". He would urge that the Commission consider reinstating the former wording, because it was more comprehensive than the present text. For example, contamination of a river arising from a deficient sewerage system in an upper riparian State which did not have the technical or financial resources required for pollution control could not be described as an "activity"; it was a "situation" that threatened to persist indefinitely unless corrected.

31. He did not entirely agree with Mr. Mahiou about the draft's emphasis on the notion of risk, because the effect was to leave in a twilight zone transboundary harm originating from activities not involving obvious risk. In principle, the difference between activities involving risk and those involving hazard and ultra-hazardous elements was minimal. A hazardous or ultra-hazardous situation would alert the State of origin to the need for effective preventive mechanisms that would enable it, in the event of an accident, to contain the damage and reduce the extent of reparation. For the affected State, the same situation would cause more extensive damage, and more extensive reparation would be required.

32. Unless the Commission so decided, the Special Rapporteur could not broaden the scope of the articles beyond the confines of the schematic outline or extend it to areas in which prohibitions had already been laid down by international law. In that context, Mr. Beesley's comments (2045th meeting) about the sea-bed beyond national jurisdiction and the ozone layer were most pertinent. Such matters should be given urgent consideration, as should the question whether initiatives could be taken, and if so, by what authorities. He therefore agreed with those members who would like to see the Commission's work cover matters that fell within the scope of the topic but had not yet been addressed. Yet the slow pace at which the work was advancing, and the need to take the latest scientific developments into account, had already caused much concern within the United Nations. If broader aspects of the topic were introduced into the Commission's work at the present stage, its conclusion would be delayed still more. The Commission should therefore pursue its efforts along the lines laid down in the original schematic outline and leave other areas of concern for parallel action at a higher institutional level.

33. Some members had said that the Special Rapporteur had devoted greater attention to risk than to harm. Personally, he could not fault him on his formulation; it had been necessary to focus on risk in order to deal properly with commensurate reparation. But he was not quite satisfied with the expression "appreciable risk" in draft article 1; he wondered how appreciable the risk had to be. For example, with regard to the expression "appreciable harm", tear-gas used by security forces caused passing discomfort, but its effect was hardly comparable with that of toxic fumes. If the eyes began to burn, the harm caused was likely to be appreciable. There, "appreciable" could, he suggested, be taken as meaning more than superficial. However, with regard to "risk", any more detailed formulation would be unnecessary. As the previous Special Rapporteur had pointed out in his preliminary report on the topic:

- It satisfies the internal logic of the present topic that . . . States have a duty to find the specific content of the criterion of "harm" whenever the occasion arises, and to govern themselves accordingly.*

34. Regarding the attribution of liability, he agreed with the Special Rapporteur's basic analysis and conclusions, but entered the caveat that developing countries, notwithstanding the mitigating circumstances mentioned in the report (A/CN.4/413, para. 69), needed to promulgate legislation to protect their basic interests against the consequences of transboundary harm arising from the activities of private enterprises.

35. He suggested that the expression "transboundary injury", as it appeared in draft article 1, tended to widen the scope further than intended. The definition of "transboundary injury" in draft article 2 (c) was over-restrictive and tended to ignore States which exercised authority, but not jurisdiction as such, over an area.

under their control. He thought that the jurisdiction of a State should not be qualified in article 1 by the phrase "as vested in it by international law". Article 2 drew a distinction between ordinary and hazardous activities; but he thought that the least that could be done was for the commentary to make it clear that the definition was all-embracing. To legislate against risk only would be very dangerous. To improve the definition of risk in article 2, he suggested that it should focus on the inherent danger of the substances or things used, or the manner of use, which in the circumstances made it probable or possible that harmful consequences would arise. There appeared to be some contradiction between the identification of "appreciable risk" as defined in article 2 and the manner of identification described in paragraph 82 of the report.

36. As to draft article 5, he was satisfied that the intention was to leave room for situations where harm could be caused by wrongful acts covered by State responsibility. In draft article 9, the inclusion of the word "reasonable" tended to weaken the force of the preventive measures.

37. On the question of reparation, the underlying principles had been brought together in draft article 10, a particularly important article which covered the innocent party, reparation and negotiation. In that regard, he quoted a passage from the previous Special Rapporteur's third report:

... It is at the point of failure to make due reparation—and not until that point—that the procedures available under rules made pursuant to the present topic should become exhausted. Then—as in the case, for example, of the régime established by the Convention on International Liability for Damage Caused by Space Objects—it will be the failure to provide due reparation in respect of a loss or injury, and not the mere occurrence of that loss or injury, that engages the State's responsibility for wrongfulness.19

38. Mr. RAZAFINDRALAMBO paid tribute to the work of the Special Rapporteur. His fourth report (A/CN.4/413) constituted genuine progress towards the elaboration of an international instrument on the topic. As already pointed out, it was a topic which had been on the Commission's agenda for 10 years, since the appointment of the late Robert Q. Quentin-Baxter as Special Rapporteur in 1978. Nine successive reports had been submitted since then, four of them by the Special Rapporteur. Both past and present members of the Commission had thus had ample opportunity to express their views on the general orientation of the topic and its basic principles, as defined by the first Special Rapporteur, and their views were faithfully reflected in the schematic outline.

39. It was in the light of those views, and the views expressed in the Sixth Committee of the General Assembly, that the present Special Rapporteur had considered it an opportune moment to formulate the draft articles afresh in his fourth report. As he explained (ibid., para. 4), the aim of the draft articles was to mark a stage prior to the drafting of detailed agreements concerning specific activities, a stage at which general obligations could be laid down. The report did not exclude a priori the future extension of the topic to other fields. That point was clear from the statement that:... the only obligations are those governed by the general duty to cooperate, namely to notify, inform and prevent. If injury occurs, there is no precisely specified compensation; instead, there is an obligation to negotiate in good faith to make reparation for the injury caused, possibly taking into account various factors such as those set forth in sections 6 and 7 of the schematic outline. (Ibid., para. 6.)

He had much sympathy with the efforts of the Special Rapporteur to improve on the draft articles submitted in his third report (A/CN.4/405, para. 6).

40. He was chiefly concerned with the scope of the articles, as defined in draft article 1. He noted that the Special Rapporteur had eliminated the notion of a "situation". In his third report, that notion had embraced situations arising from human activities in the context of a causal chain of physical events. It was linked to such activities, and was an essential part of the causal connection between risk and harm. Although now omitted from draft article 1, the word "situations" remained in draft article 4, perhaps merely by an oversight.

41. In article 1, the term "jurisdiction" had replaced the term "territory". It had been explained that "jurisdiction" could denote areas larger than "territory". But that change required a more detailed formulation: it would be more accurate to refer to activities "in areas where another State exercises jurisdiction", as in draft article 2 (c). Article 1 referred to "the jurisdiction of a State as vested in it by international law"; he did not find that a very useful formula. It was explained in the report (A/CN.4/413, para. 54) that the expression "under international law" (in art. 2 (c)) made it unnecessary to include the concept of "control". Yet article 1 continued to use the term "control" as an alternative to "jurisdiction". The Special Rapporteur explained (ibid., para. 57) that the definition in article 1 was intended to cover not only activities carried on in territories over which a State had de facto jurisdiction, but also activities carried on by the State itself in any jurisdiction, its own or another. It must therefore be assumed that he was drawing a distinction between the State of origin and the affected State; but the juxtaposition of the two notions of jurisdiction under international law and control would be redundant in the case of the affected State. That was clear from draft article 2 (c), which did not mention control, but only the exercise of jurisdiction by a State other than the one having suffered transboundary injury. If he was correct in assuming that such a distinction had been made, it was a most unfortunate one. In his view, the notion of control would be justified in both cases, that of the State of origin and that of the affected State.

42. The idea of control should also be more closely defined: was it political, legal, economic, or some other kind of control? A definition would not, of course, be necessary if control were taken to refer to the activities and not, like the concept of jurisdiction, to geographical areas. But the precise scope of the term "control" was not an academic question; it had, indeed, been raised in the Sixth Committee. What the Special Rapporteur had in mind was "effective control", indicating that it referred only to the activities. That appeared also to have been the intention of the previous Special Rapporteur in

section 1.1 of the schematic outline, which had been followed by the present Special Rapporteur in article 1 as proposed in his third report (A/CN.4/405, para. 6). As then worded, the article had been clearer, because what was controlled was the territory; but when the notion of jurisdiction had been substituted for that of territory, the article had suffered a loss of clarity, at least in French. To avoid ambiguity, the Special Rapporteur should elaborate on the point in the commentary. It should be made clear that the State of origin was responsible only for activities directly under its control. Many foreign enterprises located in developing countries were outside the effective control of the authorities of those countries, which did not have adequate financial or technical means to control their activities. A noteworthy example had been the disaster at Bhopal in India. Since the concept of control was integral to the system, he wondered if it was really necessary for article 1 to specify that jurisdiction was vested in a State by international law. That was a point for the Special Rapporteur to reconsider.

43. Previous speakers had maintained that the Special Rapporteur had over-emphasized “risk” to the detriment of “harm”, and had pointed out that significant harm sometimes occurred where the risk appeared to be minimal or non-existent. In his view, however, because the Special Rapporteur had sought to justify a régime of basic, non-binding obligations, he had been correct to identify two successive stages: the *ex ante* stage and the *ex post facto* stage. Most of the obligations he had defined could not be fully justified at the first stage, and to proceed forthwith to the second stage, at which the harm became manifest, would deprive the preventive measures of much of their substance. Under the system recommended by the Special Rapporteur, the risk must exist at the beginning of the causal chain, the harm being simply its culmination. Ultimately, if there was no risk, there was no harm, since, as the Special Rapporteur explained in his fourth report (A/CN.4/413, para. 44), the risk formed a continuum with the harm; harm arising from another cause was not part of the subject-matter. For developing countries, the notion of risk was crucially important, since it offered a vital protective barrier against the harmful consequences of activities pursued on their territory by foreign enterprises, which they had initially been assured would be free of risk.

44. The amended wording proposed for draft article 3, dealing with the attribution of liability, was not entirely satisfactory. The expression “activity involving risk” appeared to reduce the force of the condition laid down in the article. The expression was, in fact, defined in draft article 2 (b) as meaning the activities referred to in article 1. Article 1, in turn, defined the activities contemplated as those carried on under the jurisdiction or effective control of a State, and creating appreciable risk. Logically speaking, that dual condition was therefore contained in the expression “activity involving risk”; but such interlocking references were not wholly felicitous, and for the sake of clarity a more detailed formulation should be attempted, such as the one in draft article 4 as submitted in the third report. He agreed with other speakers that the new draft article 3 raised a question of evidence, and that it was for the State of origin to prove that it neither knew nor had means of knowing of the risk. Accordingly, as the Special Rapporteur explained (*ibid.*, para. 70), there was a presumption that, in principle, a State had means of knowing of the risk.

45. With regard to chapter II of the draft, on principles, he believed that the obligations there set out were the only ones which States could realistically be expected to endorse in the present state of international law and State practice. They were inspired by Principles 6 and 21 of the Stockholm Declaration,11 and emphasized the sovereignty of States over their natural resources. Draft article 7, on co-operation, could, like article 15 [16] of the draft articles on the law of the non-navigational uses of international watercourses (see 2050th meeting, para. 1), be understood to refer to the obligations to notify, inform and prevent. If it was decided to retain draft article 8, on participation, it could form the third paragraph of article 7. In his view, prevention was sufficiently important to warrant a separate article. As to reparation, there seemed to be no justification for the negative formulation used in draft article 10 to relieve the innocent victim of the sole burden. In his view, it would be better to require the State of origin to assume liability for some part of the harm caused by activities carried on within its jurisdiction or under its effective control.

46. Subject to those comments, he saw no reason why the draft articles should not be referred to the Drafting Committee. He congratulated the Special Rapporteur on his efforts to complete the drafting of a set of articles during the Commission’s current term of office.

47. Mr. SEPÚLVEDA GUTIÉRREZ commended the Special Rapporteur for his lucid and thorough fourth report (A/CN.4/413) on a very controversial topic, one on which there were many different views among legal scholars and divergent positions among States. For his part, he felt bound to express reservations on some points in the report, which nevertheless provided an excellent basis for the Commission’s work.

48. In the first place, the title of the topic needed improvement. He found the formula “acts not prohibited by international law” lacking in clarity. It was difficult to see what acts it was intended to cover, bearing in mind the effects of technological progress and the threats to the environment. The amended title suggested by Mr. Eiriksson (para. 7 above) should therefore be given careful consideration.

49. As to the approach to be adopted, like some other members he favoured basing the draft on the concept of harm (*daño*). That formulation would give a clearer and more precise idea of the attribution of liability to the State in which the cause of the harm originated. The concept of risk embodied in the draft articles tended to obscure the concept of liability, as well as that of reparation.

50. He approved of the decision not to include in the draft any list of activities which caused harm. The greatest possible number of such activities should,  

11 See 2044th meeting, footnote 8.
however, be listed in the commentaries, including even activities not carried on in the territory of a State. A case in point was that of the dumping of toxic substances or nuclear waste in the high seas. There were also some activities, such as those causing acid rain, which originated in more than one State. It had to be admitted that the study of the many factors which produced harm to another State—including a remote State—was still at a very early stage.

51. With regard to the proposed draft articles, he reiterated his strong preference for replacing the concept of “risk” by that of “harm”, which should govern the drafting throughout.

52. Draft article 1 referred to activities carried on “under the jurisdiction of a State” or “under the effective control of the State”. That formulation was inadequate, because there existed other activities and situations that were neither under the jurisdiction of a State nor under its effective control. Article 1 would have to be reformulated to cover those other activities and situations. From that viewpoint, the expression “causing transboundary injury” was not sufficiently precise and should be replaced by a reference to “harm to another State”.

53. In draft article 2, on the use of terms, it should be possible to include more terms in the list. Among the terms defined, he found the expression “the use of things” in subparagraph (a) unduly restrictive. The term “things” would exclude operations or experiments, which could cause appreciable harm to other States.

54. Referring to draft article 3, he stressed that attribution was a key concept with regard to liability. The rule in article 3 should therefore be carefully revised and expanded. The time had not yet come to propose a wording of the article, but the matter should be kept under review. He agreed with Mr. Beesley (2045th meeting) that draft article 4 was unnecessary and could be deleted.

55. He had some reservations on draft article 5, which weakened the concept of liability. The drafting of the article should perhaps be tightened.

56. Draft article 6, the first article in chapter II (Principles), laid down the vital principle of the freedom of action of States. The article should be drafted with the utmost precision, since the recognition of freedom for States should be balanced by recognition of responsibility for their activities.

57. With regard to draft article 7, he agreed with those speakers who had advocated a more thorough treatment of the duty to co-operate by specifying timely exchange of information, consultation and effective international arrangements to avoid harm.

58. Draft article 8 could conveniently be deleted without loss to the draft, as already suggested by some previous speakers.

59. The principle of prevention, on the other hand, which was the subject of draft article 9, was vital. That article should therefore be expanded by introducing references to the notion of harm and to the duty of reparation.

60. Lastly, he had some doubts regarding draft article 10, on reparation. The question of retaining that article in the draft had been raised during the discussion. For his part, he thought it should be included, but carefully revised so as to cover such matters as the obligation to suspend dangerous or harmful activities. Some reference should also be made to means of settlement, either in article 10 or elsewhere in the draft, though perhaps it was too early to discuss that point.

61. Mr. BEESLEY drew the Commission’s attention to two documents of the forty-second session of the General Assembly which were particularly relevant to the present topic, as well as to that of the law of the non-navigational uses of international watercourses. Those documents were the Environmental Perspective to the Year 2000 and Beyond, prepared by UNEP, and the Brundtland Commission’s report, “Our common future”. Both documents stressed the need to safeguard the environment and to develop resources rationally in order to avert a global catastrophe. Both singled out the key role which the progressive development of international law must play in meeting that need.

62. The Brundtland Commission report called for a universal declaration on environmental protection and sustainable development, to be the basis for a convention, and emphasized the need to consolidate and extend the relevant legal principles. To that end, a set of draft legal principles was included in an annex to the report. In resolution 42/187 of 11 December 1987, the General Assembly welcomed and endorsed the report and decided to transmit it to all Governments and all organs, organizations and programmes of the United Nations system. Under the terms of that resolution, it might have been expected that the International Law Commission would have been among the recipients of the report, but that had not been the case. His comments applied similarly to the UNEP study, which contained a call for progressive development of international environmental law “with a view to providing a strong basis for fostering co-operation among countries” (para. 103). Paragraph 7 of General Assembly resolution 42/186 called for special attention to section IV of that study, which was the section containing the call for progressive development of legal principles.

63. He therefore suggested that the Secretary to the Commission should make arrangements for the two documents in question to be made available to members in all the official languages.

64. The CHAIRMAN said that the Secretariat would ensure that those documents were made available.

The meeting rose at 1 p.m.