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A/CN.4/SR.2074

Summary record of the 2074th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1988, vol. I

ticle 12. That State first had to evaluate the situation, as was also provided for under article 12: only then could notification take place. Accordingly, paragraph 1 set forth the general obligation to apply article 12 in different stages. If the State planning the measures considered that they would have no appreciable adverse effects, it would not make a notification. The language used had been chosen after due reflection, and any change could lead to errors. Mr. Eiriksson's second proposal, on the other hand, appeared acceptable. Although there might well be more than two States concerned, article 18 contemplated only a bilateral relationship. Bearing in mind the changes to the same effect made in article 17, the words "the States concerned" would be replaced by "the two States".

107. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 18 [14], as amended.

It was so agreed.

Article 18 [14] was adopted.

TITLES OF PARTS II and III OF THE DRAFT ARTICLES

108. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles proposed by the Drafting Committee for parts II and III of the draft articles, reading respectively: "General principles" and "Planned measures".

The titles of parts II and III of the draft articles were adopted.

The meeting rose at 1.10 p.m.

2074th MEETING

Wednesday, 6 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)* (A/CN.4/384,[1] A/CN.4/405,[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)[5] (*continued*)

1. Mr. HAYES thanked the Special Rapporteur for his very thorough and thoughtful fourth report (A/CN.4/413) and for the draft articles contained therein, the first five of which were revisions of those considered at the previous session.

2. As he saw it, the principle *sic utere tuo ut alienum non laedas* constituted the conceptual basis of the topic. That principle meant recognition that an act, although lawful in itself, could nevertheless be a source of potential or actual harm calling for measures of prevention and reparation. The draft articles provided a means of effective implementation of that principle.

3. He agreed with the Special Rapporteur's conclusion (*ibid.*, paras. 1-7) that it would be not only undesirable, but also impossible to draw up a list of the activities covered by the draft articles. He was concerned, however, at the excessive emphasis in the draft on the "risk" element. "Risk", "appreciable risk" and "activities involving risk" were all defined in draft article 2 and were carried into the substantive articles. The definitions were such that the application of the articles would be significantly limited. Certain passages in the report increased his concern, such as the statements that "the risk referred to is one which involves a greater than normal likelihood of causing transboundary injury" (*ibid.*, para. 30) and that "it is precisely because of the risk created—which is greater than is normal in other human activities—. . ." (*ibid.*, para. 44).

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* Resumed from the 2049th meeting.

[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.

4. In draft article 2 (*a*) (i), "risk" was defined as being confined to the "use" of certain things; that excluded both activities not involving things and activities in regard to things other than their use. The result was a narrow definition which was then carried into the definitions of "appreciable risk" and "activities involving risk". In turn, all three expressions carried that narrowness into the substantive articles. The incorporation of risk in the elements for identification of the activities to be covered would unjustifiably restrict the circumstances in which the obligations under the articles would arise. He therefore urged that the matter should be reconsidered, not least in the light of the principle, referred to in the Commission's conclusions at its previous session, that an innocent victim of transboundary injurious effects should not be left to bear his loss.[6]

5. As to the question whether polluting activities should be covered by the draft, the main consideration was that those activities should not fall between two stools: they should give rise either to the remedies resulting from breaches of international law or to the obligations under the draft articles. He believed, however, that article 1, as drafted, was adequate to catch pollution activities in so far as they were not prohibited by international law. There remained, however, the question of establishing causality, particularly in the case of multi-source pollution or cumulative pollution. The draft articles would contribute to resolving those questions only indirectly and in another part of the future instrument.

6. Articles 6 to 10, forming chapter II of the draft, were in line with the Commission's conclusions at its previous session. He saw the statement of principles in that chapter as a first step to be followed by other provisions containing more detailed elaboration and indications of practical measures. He agreed that chapter II should establish only a few principles, concisely stated. It could be improved by retaining only the substance of articles 6, 7, 9 and 10, and omitting article 8, on participation. That provision could more appropriately be placed in a later part of the draft, where practical measures would be elaborated in more detail.

7. With regard to the relationship between prevention and reparation (*ibid.*, paras. 103-111), he saw those two elements as separate responses to different stages of liability. Both were needed and there was no reason why one of them should either dominate or depend on the other. It was injury, potential or actual, which called for that response. The obligation of reparation arose from the occurrence of actual injury and not as a sanction for failure to prevent that injury. That was not, of course, to ignore that the existence of the obligation of reparation for actual harm would be an encouragement to prevention. In sum, he supported the Special Rapporteur's idea of giving equal weight to prevention and reparation (*ibid.*, para. 105).

8. Turning to the texts of the articles, he found the new version of draft article 1 an improvement on the previous wording (see A/CN.4/405, para. 6). Greater accuracy had been achieved by substituting the term "jurisdiction" for "territory". By omitting any reference to territory, however, the text now referred to activities under the effective control of a State. The wording thus lent itself to the unintended interpretation that it was meant to refer to something close to State acts. It was true that the language had been drawn from Principle 21 of the Stockholm Declaration,[7] but it would be advisable to clarify it, in order to avoid that unintended interpretation.

9. In the light of the definition of "transboundary injury" in draft article 2 (*c*), he feared that article 1 was now not broad enough to cover cases of harm suffered as a result of physical consequences, for instance in outer space, on the high seas, or on the sea-bed, unless there was a follow-on harmful effect actually in a sphere of jurisdiction of another State and not merely affecting persons in that jurisdiction. He was assuming that "jurisdiction" was not the term to be used in respect of an area where only rights were enjoyed, such as outer space or the high seas. The Special Rapporteur had discussed that question in his report (A/CN.4/413, para. 51), but perhaps not fully enough.

10. On the question of terminology he agreed that the word "harm" would be an improvement on "injury". He had no preference as between "source State" and "State of origin". Lastly, he thought an attempt should be made to find a more suitable term than "spheres" or "places".

11. He understood the reason for including the words "or had means of knowing" in draft article 3, as explained by the Special Rapporteur (*ibid.*, paras. 69-70). As the provision was based on the presumption that a State had means of knowing unless there was proof to the contrary, he could accept it. There was a real possibility, however, that an innocent victim of an activity causing transboundary injurious effects would have to bear the loss; further thought should therefore be given to the danger of leaving such a lacuna.

12. Article 6 could usefully be redrafted to follow Principle 21 of the Stockholm Declaration more closely and to secure greater conformity with draft article 1.

13. He had already suggested that the substance of article 8 should be accommodated elsewhere in the draft. If that was not acceptable to the Special Rapporteur, article 8 could be amalgamated with paragraph 1 of draft article 7, paragraph 2 of which did not seem necessary.

14. Draft article 9 should be shortened, ending with the word "activity". The first sentence of draft article 10 did not seem to convey the Special Rapporteur's stated intention (*ibid.*, para. 112). Broadly, the article should state, first, that harm must be followed by reparation by the State of origin to the innocent victim, and secondly, that the nature and extent of reparation must be determined between the States concerned in accordance with criteria to be laid down elsewhere in the draft articles.

15. Finally, the articles could be referred to the Drafting Committee for consideration in the light of the discussion.

[6] *Yearbook . . . 1987*, vol. II (Part Two), p. 49, para. 194 (*d*) (iii).

[7] See 2044th meeting, footnote 8.

16. Mr. BENNOUNA, after congratulating the Special Rapporteur on his skilful treatment of an extremely difficult topic, said that in his view four concepts constituted the foundation of the draft. The first was the obligation to negotiate. As stated by the Special Rapporteur in his fourth report, the draft was intended "to encourage States to work out agreements regulating the activity, and, in the interim, to establish certain basic, general and minimally exigent duties" (A/CN.4/413, para. 5). The aim was to formulate a framework agreement of the same type as the draft articles on the law of the non-navigational uses of international watercourses, and the progress already made on that topic would have a positive influence on the present work.

17. It was not surprising that the obligation to negotiate should have taken shape in situations giving rise to obligations of a very general character—of a so-called "soft law" type—and in situations in which new rules were emerging as a result of technical progress. The States concerned had to be encouraged to adjust their respective interests by agreement, on the basis of general principles and considerations of equity. The ICJ had taken that view in regard to the development of the new law of the sea in the *North Sea Continental Shelf* cases[8] and the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case.[9]

18. The second basic concept was that the obligation to negotiate was triggered by the identification of an activity involving risk. In his report, the Special Rapporteur stated:

> . . . The present draft relates to the point where a State, having identified within its borders an activity involving risk, realizes that the continuation of the activity places it in a new situation, together with other States which may be affected. (*Ibid.*, para. 4.)

Once the activity involving risk was identified, a number of specific questions arose on which the draft articles were silent. One was whether the identification of the activity should be left to the State of origin; another was whether a distinction should be made between existing activities and new activities.

19. The third basic concept was that the activity involving risk was defined by reference to its potential harmful consequences. With reference to activities connected with technological developments, the Special Rapporteur pointed out that "the lack of legal regulation of such activities is one of the major shortcomings of the international legal order" (*ibid.*, para. 46). The activity as such was not regulated by international law, but its possible effects in the event of appreciable harm would be governed by that law. The matter thus fell within the realm of the progressive development of international law, as was indicated by the title of the topic. There again, the Special Rapporteur appeared to be rather hesitant on certain questions. One was whether the activities should be more precisely defined, in particular those whose effects were cumulative or continuous and in respect of which some threshold might have to be set. Alternatively, provision could be made for a procedural mechanism enabling the States concerned to identify the risk.

20. The fourth basic concept, in the words of the Special Rapporteur, was that risk "may be regarded as forming a continuum with injury" (*ibid.*, para. 44). In the first stage, so long as the harm was only potential, the focus should be on preventing and minimizing the risk. When harm actually occurred, the right to reparation arose. The responsibility of the State which had created the risk was engaged, but it could be mitigated in the light of that State's subsequent conduct.

21. In draft articles 1 and 2, risk was defined by reference to appreciable transboundary harm. He saw no reason to qualify the risk as "appreciable", since it was, by definition, a risk capable of causing appreciable harm.

22. He suggested that, immediately after draft article 2, a new article should be inserted stipulating who would be responsible for identifying the risk. Provision should be made not only for notification by the State of origin, but also for the affected State to approach the State of origin and request an explanation from it, as in the draft articles on international watercourses.

23. In draft article 3, he approved of the reference to "areas under its jurisdiction".

24. Draft articles 7 and 8, on co-operation and participation, should be supplemented by more precise provisions specifying in concrete terms the obligation to negotiate.

25. Draft article 9, on prevention, should be expanded. Draft article 10, on reparation, was placed too early in the draft.

26. He believed that the framework agreement under consideration could encourage States to be more directly concerned about the risks inherent in technological developments, and to conclude agreements designed to prevent harmful effects and ensure reparation when they occurred. The Special Rapporteur's decision to make the notion of risk the centre of the topic had the great advantage of providing a criterion for the distinction between responsibility for wrongful acts and liability for activities that were not prohibited. Responsibility, in the first case, was based on fault; liability, in the second case, was based on risk. In both cases, the chain of causality had to be investigated in order to ascertain which of the two régimes was applicable.

27. He agreed that the draft articles should be referred to the Drafting Committee for consideration in the light of the discussion.

28. Mr. BEESLEY said that one apparently basic point of divergence among members of the Commission was the scope of the topic, and whether it would be too restrictive if it were confined to cases in which appreciable risk of harm was evident from the outset. He had been struck by how little might actually separate the two schools of thought on that issue, which he did not regard as mutually exclusive. Those who advocated the appreciability of risk as an all-embracing concept delimiting the scope of the articles also recognized that there might be some obligations under international law in respect of accidents that occurred even though the risk was not regarded as appreciable or even

[8] *I.C.J. Reports 1969*, p. 3.
[9] *I.C.J. Reports 1974*, p. 3.

foreseeable. At the same time, there was concern that obligations covering both appreciable and non-appreciable risk, couched in general terms, could result in a régime that was too onerous for the State of origin and too limiting of State sovereignty.

29. Conversely, those who called for liability in situations where appreciable transboundary harm was caused even though the risk was not appreciable or foreseeable had conceded that the obligations need not be the same. Relatively few members had demanded a rule of strict—still less of absolute—liability. Indeed, as had already been pointed out, the topic was bounded by the limits set by the concepts of appreciable harm and physical consequences. It was, however, feared that to impose duties to consult, to co-operate and to prevent harm before any appreciable risk of harm became evident would be tantamount to placing all activities under those procedural obligations. Yet many of the worst transboundary catastrophes could arise in situations where there had not been much advance appreciation of the risks involved, and in such cases the question of liability could not be dismissed on the grounds of non-foreseeability.

30. Human foresight left something to be desired if one considered, for instance, the *Titanic*, which had been said to be unsinkable; nuclear radiation, which had been said to be harmless except in massive doses; and mercury emissions into Minamata Bay, which had been thought to pose no threat to human health. The same applied to *post facto* assessments of pre-accident risk as a standard of liability. Whether the expression "foreseeable" risk or "appreciable" risk was used, in practice the line drawn was often arbitrary; a person who suffered injury as a result of risk deemed to be marginally less than appreciable would suffer just as much as a person injured as a result of a risk deemed to be marginally more than appreciable. Nevertheless, the Special Rapporteur had rightly underlined the importance of appreciability of risk, and the principles enunciated in the draft articles were certainly the correct ones to apply in cases where risk was appreciable.

31. It was in that context that he welcomed Mr. Eiriksson's proposal (2048th meeting, para. 7), which involved broadening the scope of the articles by amending draft article 1 so that it would cover not only situations that created an appreciable risk of transboundary harm, but also, in a subparagraph (*b*), "other activities which do not create such a risk but none the less cause transboundary harm". Under the terms of that proposal, the duty of prevention, which involved co-operation and notification, would apply only to activities involving appreciable risk, and a separate chapter would be drafted to deal with activities within the scope of subparagraph (*b*). The relationship between the present topic and that of State responsibility could be dealt with in a "without prejudice" clause and, if necessary, different guidelines for negotiating reparation in the two situations could be elaborated. He looked forward to the comments of other members, in particular the Special Rapporteur, on Mr. Eiriksson's proposal.

32. It was becoming increasingly clear that the law in interrelated fields could no longer be compressed into watertight compartments. That applied, in particular, to the law of the topic under consideration, the law of State responsibility and the law of the non-navigational uses of international watercourses. There was therefore a need to harmonize and dovetail the law in those areas: to stop the progressive development of the law in any one of them pending developments in the others would be counter-productive and unacceptable.

33. In conclusion, he drew attention to paragraphs 15, 16 and 30 of the final statement of the World Conference on the Changing Atmosphere: Implications for Global Security, held at Toronto (Canada) from 27 to 30 June 1988,[10] which had been circulated informally to members of the Commission. New and imaginative approaches to the development of the law concerning the commons or areas beyond national jurisdiction were needed, possibly based on incentives in addition to liability. It was incumbent on the Commission to keep its mind open to such developments, as indeed it had done at the current session.

34. Mr. BARSEGOV expressed gratitude to the Special Rapporteur for his fourth report (A/CN.4/413), which represented a major step forward in solving one of the most complex problems of contemporary life. The Special Rapporteur's particular merit lay in his endeavour to create a concept based on an objective assessment of the existing state of affairs. That approach gave special value to his report, which could well form the basis for the Commission's further work. He was pleased to note the readiness of members to seek the common ground without which it would be virtually impossible, given the lack of normative material and doctrinal studies, to arrive at solutions acceptable to States.

35. The Special Rapporteur recognized in the report that "there is [no] norm of general international law which states that there must be compensation for every injury" (*ibid.*, para. 39). That was a fundamental statement of fact which could pave a realistic way for the development of international law through the creation of norms. There was no disagreement about the need to fill gaps, about the need for the progressive development of international law in the present field, or about the practical significance of the problem of transboundary harm; and no one denied that the solution of that problem under international law would help to consolidate law and order, to enhance confidence and promote co-operation among States, and to prevent the negative consequences of scientific and technological progress and ecological degradation.

36. As members were aware, he had been in favour of studying the problem of strict liability on the basis of concrete normative materials in specific areas of activity—outer space, nuclear activities, etc.—taking into account the conditions peculiar to each field and proceeding from scientifically founded criteria for the assessment of risk, harm, etc. The prevailing view seemed to be that the building should start not with the foundations, but with the roof, for the Special Rapporteur stated in the report:

[10] Text distributed to the Second Committee of the General Assembly in document A/C.2/43/2 (3 October 1988).

. . . the aim of the present articles is precisely to place us at a stage prior to the drafting of detailed agreements concerning specific activities. Such agreements would in fact constitute the next stage, arising out of the general obligations laid down by the articles. (*Ibid.*, para. 4.)

The Commission was obviously free to follow such a course; but if it wished to start by laying down general obligations concerning harm resulting from a lawful activity, and thus to encourage States to conclude concrete agreements on liability for transboundary harm in specific fields, the best course would be to draw up general recommendations to which States could refer for guidance in their treaty practice. The matter was, of course, one for States to decide, and he had no doubt that they would arrive at the right solution.

37. One of the problems raised by the Special Rapporteur with regard to the present topic concerned the definition of the legal nature of strict liability and the topic's relationship to that of State responsibility for wrongful acts. The fundamental difference between the two forms of responsibility lay in their legal nature. Unlike responsibility for unlawful acts, the form of responsibility under consideration related to acts that were not prohibited. That was why he thought it would be preferable to use the expression "lawful activity" in the title of the topic.

38. It was also necessary to have a clear understanding of what the Special Rapporteur meant by the reference in draft article 1 to the "jurisdiction of a State". Acts performed by a State within the confines of its territory were carried out not on the basis of any jurisdiction vested in it by international law, but on the basis of its sovereignty. The reference to jurisdiction in international law could be construed as a delimitation of the frontiers of national jurisdiction between States, but had nothing to do with an assessment of the lawfulness of an activity, unless it was directly prohibited by an international convention.

39. In the desire to establish a general obligation to make reparation for injury, the lawful nature of the conduct had been lost from view. Where an obligation was violated under the primary rules of international law, the question of wrongfulness might arise. Hence, once the primary rules of conduct were established, the consequences of a regulated activity no longer fell within the sphere of strict liability. The question therefore arose as to the legal nature of the obligation to make reparation for injury arising out of a lawful activity.

40. According to the concept of strict liability as proposed, activities involving risk that could be connected with a source of danger greater than usual provided the first link in the chain, and transboundary harm the last; neither risk, nor an activity involving risk, nor injury *per se* could serve as the basis for strict liability. The key element, according to the Special Rapporteur, was the causal link between risk (or an activity involving risk) and injury. It was not altogether clear, however, what that link was. At a number of points in his report, the Special Rapporteur advanced the idea that, to create an obligation to compensate for transboundary harm, it was sufficient to establish a causal link. For instance, he stated:

. . . in order for the result to be attributed to the source activity, and with it possible liability, the sole requirement is that the chain of cause and effect should remain unbroken and that each link should be unquestionably connected to the previous link, so that the chain may be followed back to the source activity. (*Ibid.*, para. 52.)

Following the causal link to its logical conclusion, it had to be recognized that any activity which caused appreciable harm as its direct consequence would have to be regarded as wrongful. The harm in such a case might be, for instance, the consequence of criminal negligence resulting from the use of a source of danger that was greater than usual.

41. In the relationship between risk and harm as it had been outlined, the role of situations of *force majeure* had not received sufficient attention. He noted that the Special Rapporteur spoke of *force majeure* as "a supplementary cause: a cause which is not part of the normal chain of causation" (*ibid.*, para. 28). But it was precisely the presence of *force majeure*, in activities involving risk from which harm ensued, that confirmed the lawful character of those activities. Were it otherwise, and were the harm to occur as a result of the natural and normal consequences of an activity involving risk, then, logically, the activity should be included among wrongful acts. In reality, *force majeure*, which could not be foreseen or prevented, formed, as it were, a watershed between responsibility for lawful and for unlawful activities. *Force majeure* placed a risky activity beyond State control, and that ultimately resulted in transboundary harm ensuing from lawful activities. It transformed an abstract notion of risk into concrete harm, which not only had no direct causal link to the corresponding lawful activity, but actually conflicted with that link, in that it deprived the State of origin of the possibility of making positive use of the results of its lawful activity. Thus, if the risky activity did not fall outside the bounds of lawfulness, it could give rise to harm only in the event of *force majeure*.

42. Accordingly, if the Commission did not intend to go beyond the framework of the topic, it must think in terms of compensation for harm caused as a result of a lawful activity throughout which the State did not wish harmful consequences to occur and did its utmost to prevent such consequences. Such an understanding of strict liability would be in line with national practice and legal doctrine. However, what was valid within the national boundaries of a State could cause difficulty in the context of inter-State relations. The question therefore arose whether responsibility could be attributed to a State for something it had not done, or had not intended to do, and had been unable to prevent. It was clear that further work on the subject was needed. In the process, it would be correct not to substitute harm for risk, but to identify the relationship between all the elements involved in the concept more precisely in the light of its public function.

43. Referring to the initial and final links in the chain, he noted that a certain degree of risk was inherent in any lawful activity, just as a certain degree of harm was unfortunately unavoidable. If responsibility were to be attributed for any injurious consequences whatsoever, then everyone would be responsible to everyone else. That would be like holding responsible every member of

the Commission who smoked on the grounds that, in consuming oxygen, he impaired the health of others.

44. The Special Rapporteur's wish to introduce the concept of "appreciable risk" was understandable: in his words, it was intended to avoid the creation of an "unacceptable situation" in which "virtually any new activity would have to be subjected to scrutiny by States which might be affected" (*ibid.*, para. 29). That was why another "threshold" was established below which there would be no liability (*ibid.*, para. 30).

45. The Special Rapporteur acknowledged that quantification was virtually impossible in that area. He might have yielded to the temptation to give up the idea of risk altogether and might have confined himself to actual harm, but fortunately he had not, for a number of reasons. First of all, he wished to base his conception of that special kind of responsibility on notions developed in various legal systems, such as aggravated risk, and to ensure that that conception was as realistic as possible. He also wished to find a basis for co-operation. But how was it possible to co-operate in the prevention of something that did not yet exist?

46. Draft article 6 was the corner-stone of the concept devised by the Special Rapporteur; in it, the notion of co-operation in preventing injurious consequences in the form of transboundary harm was based on the presence of risk. The Special Rapporteur was right in conceiving the goal of the draft articles as being not simply to ensure equity in compensation for harm, but also to avert injurious consequences in the form of pollution, etc. And such a goal could never be achieved without co-operation.

47. The provisions of draft article 7 on co-operation reflected, in his view, a high level of civilization and a deep understanding of the vital interests of mankind. Article 7 occupied a key position in the draft articles and in the solution of the problem as a whole. It testified to the wisdom of both the Special Rapporteur and the Commission, and to the possibility of operating on the level of the highest human values, both in terms of respect of equity and concern for the interests of all affected parties, and in terms of ensuring further progress for human civilization. He would therefore categorically oppose the deletion of article 7.

48. The Special Rapporteur had not closed his eyes to the very important fact, in the context of human development, that the sort of activity covered by the draft articles was useful "not only to the State in which it was being carried on . . . but also to the State which was accidentally affected by the damage" (*ibid.*, para. 113). He had also recognized that "the measures of prevention adopted could impose a heavy financial burden on the State of origin, a factor to be cited at the time of reparation". As he explained, "activities based on modern technology and involving risk make perpetrators and victims of us all" and "are being carried on in nearly all countries", so that "today's affected State might be tomorrow's State of origin" (*ibid.*).

49. The Special Rapporteur had adopted a balanced approach to the establishment of a régime for reparation for damage in situations where there was no agreed treaty régime, either bilateral or multilateral. He proceeded on the assumption that the country in which a disaster took place "must not be left to bear 'alone' the injury suffered as a result of an activity involving risk" (*ibid.*, para. 112). The injury must be assessed "not by the exact amount of specific damage caused by the accident in question, but by the amount of damage in relation to other factors": accordingly, the victim would "have to bear the resulting injury to some extent" (*ibid.*).

50. Thus the efforts of countries to cope with sources of aggravated risk, not only through prevention, but also through the fastest and fullest possible containment of injurious consequences, must be taken into account; such efforts were demanded not only by a concern for equity, but also by the need to reduce the number of victims and their exposure to injurious effects. It was impossible, in that context, not to mention the tragic events at Chernobyl, and the colossal physical resources and selfless energy devoted to minimizing not only the "national" consequences, but also the transboundary effects. Hence the philosophical basis proposed by the Special Rapporteur for solving the problem of reparation for injury—namely that equitable treatment of one country should not turn into punishment for another which was acting as a pioneer of scientific and technological progress—was extremely important. He congratulated the Special Rapporteur on having adopted a humanistic approach, but was surprised and disappointed to have heard the view expressed during the discussion that that aspect of the problem was not the Commission's concern and that the convention to be elaborated should focus on the victims. The interests of victims of transboundary effects should, of course, be taken into account in developing the concept of that particular kind of responsibility, but the instrument being drafted must focus on the interests of mankind as a whole, on the prevention of ecological degradation and the promotion of further scientific and technological progress.

51. The provisions of draft article 3, on attribution of liability, clearly established that the State of origin had the obligations connected with reparation if it knew or had means of knowing that an activity involving risk was being carried on in areas under its jurisdiction. He shared the view of other members of the Commission that a State could merely ensure that natural or legal persons were brought to account for harm inflicted. One member had said that the member countries of CMEA, unlike the capitalist countries, could answer for everything because they knew everything. He did not think that the Government of the United States of America knew any less about what was going on in that country than the Government of the Soviet Union did with regard to its territory; but that was not the point. What was striking was the failure to take account of the fundamental changes being made in the economy of the Soviet Union and other socialist countries. For example, the Soviet Union had adopted a law on enterprises which gave them full economic independence; that was one of the principal areas of *perestroika* and it had far-reaching consequences.

52. The problem of attribution of liability was especially acute for the developing countries. The

Special Rapporteur said that the primary basis of attribution was territorial, but that there was another necessary condition, namely that "the State should know or have means of knowing that the activity in question is being carried on within its territory or in areas within its control" (*ibid.*, para. 61). He also expressed the view that, in principle, a State was considered to have had means of knowing unless there was proof to the contrary (*ibid.*, para. 70). In other words, a State was normally considered to be capable of knowing that an activity was being carried on. The Special Rapporteur recognized that the responsibilities set forth in the draft "could easily enough be attributed directly to the State of origin by simply tracing the causal chain of events to its territory" (*ibid.*, para. 68). Those propositions, which were crucial to the draft's whole conception, placed the developing countries in a difficult position; for very often they could not know about or control activities carried on in their territory by foreign companies, and it was by no means clear how the provision on "means of knowing" would protect developing countries, as the Special Rapporteur contended (*ibid.*, para. 69). The problem that arose when the entity which bore responsibility was not that with whose activity the injury was linked affected all States; a solution that would cover all such situations should therefore be sought in the draft articles.

53. Mr. Sreenivasa RAO said that the subject of the fourth report (A/CN.4/413) had raised extremely high expectations in the international community. The problems it dealt with were contemporary and highly complex, and their treatment afforded wide scope for innovation. The Commission, being a body entrusted with the progressive development and codification of international law, must try to devise a set of principles which were readily recognizable and which could be applied by States and other entities in concrete cases of harm. While the need for specificity should be the guiding factor in developing those principles, the basic objectives of providing a safe, viable global environment and of preventing and minimizing damage in the context of, but without deterring the pursuit of, development goals must be kept in mind.

54. When the basic objectives were conceived in such general terms, the concept of liability became merely one part of the whole framework. Some speakers, while emphasizing the broader objectives involved, had urged that a realistic attitude be adopted to what could be achieved through the draft articles, and that a pragmatic assessment be made of how much more could be accomplished through other mechanisms: the mobilization of public opinion, the elaboration of laws and regulations of a promotional nature and of international standards, and the establishment of institutional mechanisms that would provide the necessary aid, assistance and skills for managing disaster situations. He thought the Commission should orient its work towards a broader conception of the topic. The aims could and should be set high, but they could be made clear and straightforward and linked to other processes.

55. The Commission need not worry unduly at the present stage about interlinkages with concepts that were related to other topics under consideration; in fact, such connections could be very helpful. That was why he believed that any limiting of the Commission's perspective should be avoided. For example, the concept of appreciable harm could be understood differently in the context of the non-navigational uses of national watercourses than it was in that of the injurious consequences of lawful acts; but any difference in the development of the pertinent concepts could, if necessary, be streamlined at a later, finishing stage in the work.

56. He was not too concerned about what could be treated as a promotional objective as opposed to a strict obligation under the terms of the draft articles, which need not be solely a set of hard-core principles: they could be a combination of general provisions emphasizing the need to achieve certain goals, and strict obligations—for example, not to cause harm. The decision to develop a framework agreement, as opposed to a draft convention, should not be allowed to limit the kind of principles that it would be relevant to enunciate in the draft.

57. Many of the concepts that had already been considered in connection with the topic of the injurious consequences of lawful acts still created more problems than they solved. Of course, that was all part of the process of developing principles in a complex area, and the Special Rapporteur should not be disheartened by criticisms made.

58. The draft to be elaborated in the quest for an acceptable code of liability should not become bogged down in a search for acts "not prohibited" by international law; the negative formulation "not prohibited" in the title of the topic should not be allowed to constrict the Commission's thinking, and was, in his view, better avoided, as suggested by other members. There was no need to fear that a gap would be left in international law: the living nature of the law, in both the internal and the international systems, was such that solutions were always found, through creative interpretation of available principles and/or through "judicial innovation".

59. The Commission's main concern should be with the principles covering harm caused to one State by activities in another State. Clearly, liability must be involved, because the rights of others had to be taken into account on a small planet like the Earth. And naturally, harm could not be allowed to go unredressed; the Commission was engaged in the task of determining how it was to be dealt with. That search should be broadened by enlarging the scope of the topic, as advocated by Mr. Calero Rodrigues and Mr. Tomuschat (2045th meeting), Mr. Francis (2048th and 2049th meetings) and Mr. Beesley, to focus not only on the parties immediately involved, but also on the social purpose served by the activity in question. Preventive measures required should not be so costly as to outweigh the benefits of the activity whose harmful effects had to be averted.

60. The situation was, of course, entirely different in the case of highly hazardous activities involving the risk of massive disasters, such as the Bhopal and Chernobyl accidents. What was needed in such cases was a global management approach focused not only on the issue of

liability, but also on such aspects as relief, rehabilitation and international assistance.

61. He agreed with Mr. Tomuschat's suggestion that the Commission should identify a number of subject areas of concern: the draft articles could include the conditions in which liability arose; mitigating circumstances; the type and extent of reparation required; the relationship between cause and harm; the question of the burden of proof; the duty to co-operate, to notify and to share knowledge about the existence of risk; and, as suggested by Mr. Tomuschat and Mr. McCaffrey (2045th meeting), the consequences of negligence.

62. Furthermore, the topic of liability could be built upon generally accepted principles of international law: respect for State sovereignty and territorial integrity; pursuit by States of their rights and interests within the limits of "reasonableness"; accommodation of multiple interests on the basis of common interests; and principles already developed in the fields of the law of the sea, outer space, the utilization of nuclear energy and Antarctica, including the principles laid down in the Stockholm Declaration[11] and in the Helsinki Rules on the Uses of the Waters of International Rivers.[12] In addition, the Commission should aim at a concept of and framework for liability which emphasized the concept of risk essentially in the context of a preventive approach, as suggested by Mr. Tomuschat and Mr. Beesley, linking it broadly to "harm", "injury" or "injurious consequences". In other words, the Commission should view and so limit the concept of liability not as an instrument of punishment, but as a means of promoting preventive measures and common management of activities of general community interest relevant to a new ethic of development, transfer of resources and technology.

63. The concept of appreciable harm had been questioned by several previous speakers on the grounds of its subjectivity. But no matter whether the term employed was "appreciable", "significant" or "substantial", the point at issue was whether the harm exceeded the limits of acceptability established by common consent in the relevant bilateral and multilateral agreements. The existence of such limits or thresholds could not, in his opinion, be ignored, although it did not necessarily have to be spelt out in the body of the draft articles. It would also be appropriate for the Commission to recommend that States should, wherever possible, agree upon such thresholds when drawing up agreements at the bilateral or multilateral level, bearing in mind the nature of the activities concerned. In that regard, competent international organizations and independent commissions had a valuable role to play in the clarification of policies and the identification of applicable standards.

64. As already stated, the basic principle was that no State had the right to cause harm to others in the exercise of its own rights. The concept of liability should be broadly defined to cover not only the State or State authorities, but also other entities operating in a particular area and exercising effective control over their activities. As to the concepts of "jurisdiction" and "control", it should be noted that, in the case of multinational corporations, jurisdiction was a highly sophisticated concept requiring a most careful approach, as Mr. Graefrath (2047th meeting) had pointed out. After all, multinational corporations had, over the years, developed a variety of operating mechanisms which did not neatly fit into the jurisdiction of any one State; indeed, it might be said that a simple view of jurisdiction and control would not do proper justice to matters such as taxation, anti-monopoly questions and liability involving multinational corporations. It was extremely important, therefore, that the concept of jurisdiction should not be framed in such a way as to prevent the Commission from examining the role of multinational corporations even when they were technically within the jurisdiction of States.

65. Moreover, unlike States, multinational corporations were motivated exclusively by the need to make profits. Hence they should take the "risk" and accept liability, particularly since, unlike most States, they had the means to prevent, minimize or manage harm when it occurred in a given case. He therefore fully endorsed the views expressed by Mr. Barsegov, and earlier by Mr. Razafindralambo (2048th meeting) and Mr. Graefrath. Accordingly, draft article 3, in particular, should be reworded so as to cover not only areas, but also activities, under the effective control of the State of origin, the term "State" being understood not to cover the liability of other entities, where it could be shown that they had effective control over an activity. The liability of such entities should also be dealt with directly by the Commission in the draft articles.

66. In conclusion, he emphasized that the Commission should not be satisfied with an unchanged structure of inquiry when dealing with the changed structure of international liability. He was confident that the Commission would find the right balance in treating the concept of liability by focusing not only on the State or State authorities, but also on all other entities, such as multinational corporations; by addressing "harm" or "injury" without unduly restricting it to "risk"; by making liability proportional to effective control and, more importantly, to the means available to prevent, minimize or manage harm, injury or injurious consequences; by dealing with such factors as prevention, due diligence, insurance, and global emergency-relief and management schemes; and with a view to promoting the application of science and technology to development in a manner consistent with the basic objective of achieving a safer and sustainable environment from an intergenerational perspective.

67. Mr. KOROMA said that the Special Rapporteur was to be congratulated on his learned, lucid and interesting fourth report (A/CN.4/413) on a topic which complemented the international community's efforts to prevent the pollution of the atmosphere. In that connection, he referred to the conference held at Toronto the previous week to discuss an international law of the atmosphere parallel to that of the sea, and was pleased to note that Mr. Beesley (para. 33 above) had also men-

[11] See 2044th meeting, footnote 8.

[12] Adopted by the International Law Association in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

tioned that conference and had informally circulated a document relating to it.

68. In pursuing its work on the present topic, the Commission had to take account of the objections raised in various influential quarters. Such opposition could not be dismissed as ideological, and the Commission should not slacken in its efforts to dispel doubt by continually bringing its work up to date and taking cognizance of developments in the same field elsewhere in the international community. By doing so, it would demonstrate that the topic was an important and highly relevant one.

69. All members of the Commission were agreed on the primary rule that no State was entitled to cause harm to another State through its activities, whether lawful or unlawful, and that if harm did occur, the State of origin had to make reparation or pay compensation to the affected State. That principle should be formulated as early as possible in the draft, perhaps even before the article on scope. The rule was widely accepted in general international law, in the jurisprudence of the ICJ and in many international legal instruments, and there was no reason to fear that it would stand in the way of the development of science and technology. The actual wording used could, of course, be adapted to accommodate any justified objections.

70. In the introduction to his report, the Special Rapporteur said that the draft related to the point where "a State, having identified within its borders an activity involving risk, realizes that the continuation of the activity places it in a new situation, together with other States which may be affected" (A/CN.4/413, para. 4). The situation thus described was open to several interpretations. The activity might be carried on by a third party without the knowledge of the State in whose territory it took place; the risk might have come about as a result of *force majeure*; or the activity might have involved no risk at first, but have been found to do so later. In any event, the State would be unable to identify such an activity until the harm had been done and the need for reparation had arisen. Accordingly, a State having introduced into its jurisdiction an activity involving risk was liable for transboundary harm.

71. The Special Rapporteur further remarked that, in the present case, the only obligations were "those governed by the general duty to co-operate, namely to notify, inform and prevent" (*ibid.*, para. 6). Without wishing to minimize the importance of that general duty, and while agreeing, in particular, with Mr. Barsegov on the primary importance of preventing pollution, he considered that the principle of liability for compensation or reparation when harm did occur was of greater importance and should not be bracketed together with the duty to co-operate. He hoped that point would be taken up later.

72. In his oral introduction (2044th meeting), the Special Rapporteur had expressed the fear that acknowledgement of the primacy of the rule of compensation for injury might lead to a one-article draft. That need not be the case, and besides, the text being drafted need not necessarily become a convention, but could take the form of guidelines or guiding principles.

73. The meaning of draft article 1 would be clearer if it were amended to read:

> "The present articles shall apply with respect to activities carried on in the territory of a State or under its jurisdiction, or in territory under its effective control, when such activities cause transboundary harm."

The reference to territory was, in his view, essential. By sacrificing it, the Special Rapporteur had intended to ensure that the article covered ships and other objects, such as aircraft, spacecraft and oil installations, while at the same time avoiding the legal fiction that such objects formed part of the territory of the State controlling them. That point could perhaps be met by drafting two separate articles, one dealing with activities within the territory of a State—which undoubtedly formed the main category of activities under consideration—and the other with activities connected with extraterritorial objects under the State's jurisdiction.

74. As to the concept of appreciable risk, the legal basis for liability was the harm caused, not the risk incurred. Risk was a matter of fact, not of law. Moreover, the list of activities involving risk was becoming longer every year; the principle of risk did not, therefore, constitute a sound basis for the draft articles.

75. He fully agreed with the three principles set out by the Special Rapporteur in paragraph 85 of the report (A/CN.4/413); unfortunately, however, the draft as it stood did not appear to be constructed on the basis of those principles. He urged the Special Rapporteur to proceed along the lines of the principles he himself had enunciated.

76. The CHAIRMAN informed members that, during the previous week, the Commission had used its full allocation of working time plus 15 minutes.

The meeting rose at 1.05 p.m.

2075th MEETING

Thursday, 7 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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