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Summary record of the 2110th meeting

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

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had been misunderstood in the previous draft article 10. In his own view, however, the principle was important enough to be given its rightful place, in some clear form, in the draft articles.

41. In reply to a question by Mr. BEESLEY, the CHAIRMAN said that the secretariat would issue working papers containing the specific drafting proposals which had been made on the topic.

The meeting rose at 11.15 a.m.

2110th MEETING

Thursday, 1 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, 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.4/413,² A/CN.4/423,³ (A/CN.4/L.431, sect. B)⁴

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 1 TO 17⁵ (continued)

1. Mr. SHI thanked the Special Rapporteur for his concise and well-documented fifth report (A/CN.4/423) and commended him on the submission of 17 draft articles, the first nine being revisions of the 10 articles referred to the Drafting Committee at the previous session.⁶

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

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1989*, 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 2108th meeting, para. 1.

⁶ See 2108th meeting, footnote 5.

2. In draft article 1, the Special Rapporteur had extended somewhat the scope of the articles to include activities causing appreciable transboundary harm. It was a compromise formula, adopted to take account of the divergent views expressed in the Commission and in the Sixth Committee of the General Assembly. As he had stated at the previous session,⁷ risk as a basis of liability could exclude activities which, though not involving risk, could cause harm of great magnitude. He agreed with the Special Rapporteur that there should be a limit to liability under the draft articles and that absolute liability should not be incurred. In that connection, the Special Rapporteur had rightly drawn a distinction between activities and acts: liability should be linked to the nature of the activity, and acts, if they were to be covered by the draft, must be linked to an activity involving risk or having harmful effects and must not be isolated and unconnected with any activity.

3. Draft article 7 circumscribed in specific terms the area in which the duty of co-operation arose, namely the prevention and control of harmful effects. The article should, however, like the corresponding provision in the draft articles on the law of the non-navigational uses of international watercourses, also state the fundamental principles of international law upon which co-operation between States of origin and affected States rested. It was gratifying to note that the previous draft article 8, on participation, had been dropped, since participation was implicit in the article on co-operation and the wording of the earlier article had been vague and open to misunderstanding.

4. Under the present draft article 8, which was a revised version of the previous draft article 9, a breach of the duty of prevention was made contingent upon use of the best practicable, available means. He maintained the view he had expressed at the previous session⁸ that failure to take preventive measures did not in itself give rise to liability or to a right of action. Only if such failure resulted in harm, or if harmful effects occurred in spite of the measures taken, could liability be ascribed to the State of origin. The basic issue concerned the kind of legal régime to which the draft would apply. Although the Special Rapporteur believed (*ibid.*, para. 42) that, in the absence of harmful effects, no one would verify whether the means used to prevent such effects were adequate or not, the affected State could, under article 7 on co-operation and under the subsequent articles on notification, demand inspection and verification of preventive measures. If the affected State then found that the preventive measures adopted by the State of origin were not the best practicable and available means to prevent or minimize the risk of transboundary harm, would that failure on the part of the State of origin constitute a wrongful act giving rise to State responsibility? That was a point of some importance and, in that regard, article 8 was vaguely worded.

5. The revised articles were no doubt an improvement and any drafting problems could, of course, be ironed out in the Drafting Committee. He agreed with Mr. Hayes (2109th meeting) that draft article 2, on the use of terms, should be provisional, and that it should be revised thoroughly upon completion of the first reading of the draft.

⁷ *Yearbook . . . 1988*, vol. I, p. 26, 2047th meeting, para. 27.

⁸ *Ibid.*, pp. 26-27, para. 31.

6. The new draft articles 10 to 17 of chapter III of the draft embodied procedural rules on notification and the follow-up steps. For the most part, they drew on the comparable provisions of the draft articles on the law of the non-navigational uses of international watercourses. He wondered, however, to what extent the two topics should have the same kind of procedural rules. For example, as pointed out by Mr. McCaffrey (*ibid.*), harm caused by activities involving risk was often long-range and it was difficult to assess in advance which States would be affected. In such cases, which State or States should be notified by the State of origin? Mr. McCaffrey had also suggested that some kind of international clearing-house should be introduced—a suggestion with which he himself was unable to agree or disagree at the present stage. One view expressed in the Sixth Committee had been that, under any future convention, a systematic obligation to consult all the States potentially affected should not be imposed on States intending to engage in a new activity, since that would be tantamount to providing a right of veto over their activities. There were other dissimilarities between the two topics, some of which the Special Rapporteur noted in his report (A/CN.4/423, para. 111). A simple analogy between the two topics might therefore not be adequate to provide the basis for the rules in chapter III of the draft. It was a complicated problem and one that merited much thought.

7. Mr. REUTER said that the Special Rapporteur's work on the topic was marked by two qualities. First, even though from the outset some members of the Commission had denied the very existence of the topic, the Special Rapporteur had not allowed himself to be assailed by doubts but had believed in his subject. He, too, believed in the topic, particularly since reading the new draft articles 10 *et seq.* In such a complex topic, the Commission would be well advised to proceed in two directions, asking itself which were the substantive rules it wished to lay down and which procedures it wished to establish. While he agreed entirely that the substantive aspect must be dealt with first, the topic as a whole would be seen in a harsher yet clearer light when it came to laying down the procedural rules.

8. A second quality was the Special Rapporteur's genuine and disinterested desire to do justice to the views of all members of the Commission. In so doing, he necessarily had to deal with the topic at some length, referring in his comments and explanations to the particular positions held by some members.

9. With regard to the fifth report (A/CN.4/423) in general, and as Mr. Ushakov, a well-remembered former member of the Commission, had been wont to say: "What's it all about?" The answer was: transboundary situations which initially involved no element of wrongfulness. In that connection he would pose the question, without seeking to resolve it, whether multilateral transboundary situations, as opposed to a straightforward bilateral situation, were covered by the draft. That, of course, raised the question of procedure, but he wondered whether it did not also raise one of substance. He had in mind in particular long-range air pollution and the 1979 Convention on Long-range Transboundary Air Pollution.⁹ He was not certain that it

was possible in such cases to talk of the same mechanisms and rules.

10. The Commission was in fact riding two horses at the same time, for it was dealing simultaneously with the topic of the law of the non-navigational uses of international watercourses and with the general question of transboundary harm. In that respect, he was not certain whether the articles which the Special Rapporteur had just revised and which dealt with their relationship with existing conventions were sufficient. One possibility might be to allow States affected by a transboundary situation which was covered by the articles on international watercourses the choice of invoking the régime provided for in the articles on the present topic. States in a bilateral relationship could be said to have such a choice, for a party to a treaty could not be prevented from invoking an agreed régime. In that regard, he noted that the Special Rapporteur had raised the problem of whether several régimes could be simultaneously applicable under a treaty, in which case a question of choice almost certainly arose. That, then, was one approach, although it was not entirely satisfactory.

11. Another approach was to apply the Latin maxim *specialia generalibus derogant* and, conversely, *specialia per generalibus non derogantur*, which meant that the purpose of the draft, in the form of a convention, would be to deal with the problem of transboundary situations in the most general terms possible. In other words, it would be what might be termed a residual convention: the substantive rules would be couched in very general terms to provide for minimal solutions, it being left to special conventions to go further. In that case, there would be no choice where the articles on international watercourses were concerned, for wherever such watercourses were involved those articles would apply. The same was true of all the other conventions, including the Convention on Long-range Transboundary Air Pollution. A guiding principle would thus be necessary and, if the Commission decided to adopt that position, he was ready to accept it.

12. One particularly important point was whether the Commission intended to lay down rules that remained faithful to the original situation, in which there was no wrongful act. However, he wondered whether it was possible to do so when laying down rules and, in particular, procedures. His own view, but one on which he would not insist, was that simply in drawing up articles 10 *et seq.* certain elements were introduced which perhaps did not strictly speaking relate to wrongfulness as such but were none the less essential, such as reparation. He would have preferred to use some other term, since reparation was linked to traditional State responsibility. In French, the word *compensations*, in the plural, denoted the ultimate outcome in the form of services or payment in cash or in kind of a situation in which harm had been caused. Unless he was mistaken, "compensation" in English, as opposed to "damages", denoted determination of a sum of money which was the equivalent of something that had disappeared. That was precisely the weak link in the whole analysis. Nor did it reflect the position of the Special Rapporteur in the excellent arguments adduced in his report (*ibid.*, paras. 70-71), which demonstrated that *restitutio in integrum* for the affected State was not possible.

13. The question of procedure was very important, but it was by no means certain that Governments would want to

⁹ See 2109th meeting, footnote 12.

go as far as the Commission did. For example, draft article 10 (*d*) was too categorical in tone. Essentially, it was in the nature of a proposal, yet the article, referring to the State of origin, said “it shall”, thus imposing an obligation from the outset. More diplomatic wording was required.

14. With regard to draft article 12, the positions of the potentially affected State and the State of origin should be symmetrical. Hence the procedure laid down in the article should entail more than just a warning. The potentially affected State should also have a right of initiative, perhaps of referral (*saisine*) for the purposes of enforcement.

15. The point to note in connection with draft article 16 was that there were several types of negotiation and that, for negotiations to take place at all, the parties must be willing to engage in them. An obligation to negotiate would be rendered sterile if positions were too rigid at the start. Clearly, it was very difficult to express an obligation to negotiate in an acceptable form. In the case of multilateral transboundary situations in particular, the Commission should, in any event, introduce the obligation to pursue a settlement under the auspices of an international organization: there would then be a much greater likelihood of a successful outcome to the negotiations. The draft might provide that each party could suggest that consultations take place in the context of an international organization, which could lend its good offices. The wording should not be too peremptory. Again, in the actual negotiations the parties must be required to provide grounds for their positions and proposals.

16. The end result should be a solution of *compensations* (in the sense in which he had already used the term), perhaps in the form of reciprocal assistance, which could well include money payments and probably some special régime. However, the Special Rapporteur proposed that the ultimate settlement must represent a balance of interests. For his own part, he thought it essential for any reference to “reparation” to be avoided and for the form of language to reflect the idea of a community of interests between the States concerned. It was equally important not to use the expression “innocent victim”, since in fact both parties might be innocent.

17. Mr. BEESLEY congratulated the Special Rapporteur on the profound thinking evident in his fifth report (A/CN.4/423) and on the originality of his approach, which in part reflected the novelty of many of the concepts which came into play in the field of international liability. Of course, some of those concepts, such as the law of tort and nuisance, were more familiar in some legal systems than in others, a factor which was possibly the source of some of the difficulty in arriving at a generally acceptable text. It should be noted that the Commission’s mandate was to develop international law within the parameters established by the terms of reference of the topic itself, which did not refer to “licit” or “illicit” acts but rather to “acts not prohibited by international law”.

18. The fifth report represented a major effort to move on from the almost “theological” approach of the early stages of the work on the topic towards its more practical aspects by elaborating concrete articles. The Special Rapporteur had responded to the perceived need to make a specific reference to the environment as a proper subject

for inclusion in the draft and to reflect the growing awareness of new conceptual approaches to the “global commons”. A further issue addressed by the Special Rapporteur was the need to reflect two schools of thought within the Commission, namely the approach which took risk as the basis for liability, and the approach in which liability was based on harm. The Special Rapporteur had also accommodated the concern to avoid being unduly specific on such questions as the precise standards which might be applied in cases involving the environment, thus confining the draft articles to a global framework agreement, leaving precise standards for specific protocols or standard-setting agreements.

19. Commendably, the Special Rapporteur had not hesitated to borrow from other branches of law, including those relating to the non-navigational uses of international watercourses, State responsibility and the draft Code of Crimes against the Peace and Security of Mankind. It was gratifying to see the explicit recognition of the interrelationship between those topics, without which the progressive development of international law, as distinct from its codification, would be impossible. The Commission must be eclectic in seeking precedents for its work: accordingly, the Special Rapporteur had not hesitated to avail himself of the useful precedent of Principle 21 of the Stockholm Declaration,¹⁰ which affirmed both the sovereignty and the interdependence of States. Another relevant instrument was the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,¹¹ as well as Part XII of the 1982 United Nations Convention on the Law of the Sea, which contained a whole section on marine pollution. However, the task of progressive development involved much more than simply citing precedents and filling lacunae, and its importance was not to be underestimated. Where precedents were lacking, both national law and State practice could be consulted, an approach adopted as far back as the *Trail Smelter* case.¹²

20. While the Special Rapporteur had not perhaps succeeded in laying to rest all of the long-standing controversies, he had certainly confronted them and raised the right questions, thereby giving the Commission an opportunity to resolve them. In that connection, he noted that the expressions “strict liability” and “absolute liability” seemed so far to have been used interchangeably, whereas his own understanding was that strict liability encompassed all the consequences that flowed from an act, while absolute liability meant liability without limitation of any kind. That distinction merited some attention by the Commission.

21. The major development in the fifth report lay in the shift of emphasis from liability for risk to a combination of harm and risk. Hence risk was not eliminated as a criterion, but a problem of incompatibility still had to be resolved. He would be in favour of separate chapters in the draft on liability for appreciable harm and on the special situations in which risk was involved, but it would pose no insurmountable difficulty to make use of both conceptual approaches. In that respect, the Special Rapporteur’s attempted compromise was laudable.

¹⁰ See 2108th meeting, footnote 6.

¹¹ United Nations, *Treaty Series*, vol. 1046, p. 120.

¹² See 2108th meeting, footnote 9.

22. Although the amendments suggested by Mr. McCaffrey and Mr. Hayes (2109th meeting) were not formal drafting proposals, it might be useful to refer them to the Drafting Committee for consideration. Such a procedure would not be inconsistent with the Commission's established practice. With particular reference to draft article 1, Mr. McCaffrey's proposed changes (*ibid.*, para. 13) eliminated some unnecessary elements, although he himself felt that the question whether the term "territory" was redundant remained open. As for choosing between "acts" and "activities", the Commission need not be unduly concerned, since it was usually possible to differentiate between the two terms in practice.

23. A further point which at first glance seemed merely to relate to drafting but which in fact had substantive implications was the question of perceivable risk, and he would tentatively favour using the expression "discernible risk" instead. He agreed that some way must be found to differentiate according to the degree of seriousness of the risk to which acts or activities gave rise.

24. The word "simple", used in draft article 2 (a) (ii) to qualify examination of the activity, was perhaps infelicitous, but the problem was one to which the Drafting Committee could find a solution. A more difficult issue was how to find a substitute in draft article 1 for the word "places". While inelegant from a legal standpoint, the term at least had the virtue of being readily understood, yet he foresaw it being replaced by "sites", "locations" or even "areas".

25. He agreed with Mr. McCaffrey that the expression "throughout the process" was ill-chosen and with his suggestion (*ibid.*, para. 15) that it would be better to refer in article 2 (b) to "continuing transboundary harm". The Commission must also consider how best to formulate a provision for the situation in which activities carried on within the jurisdiction or control of one State had an impact on a State geographically far removed from the State of origin, or where a number of States were affected.

26. Of equal importance was the question of the "global commons", which was specifically included in Principle 21 of the Stockholm Declaration and was a concept that was beginning to be applied to the atmosphere. It was clear law that a State had sovereignty over its atmosphere up to the point at which outer space began, but there was now a growing tendency to recognize that the atmosphere was also a part of the global commons—i.e. the shared resources of mankind—and it was necessary to reconcile those two concepts of sovereignty and the global commons. The issue was by no means academic, given current concern over the impact of chlorofluorocarbons on the ozone layer and of "greenhouse" gases on global warming, and the question of how liability was to be approached in such cases could not simply be shelved. In the long term it might be possible to proceed to a law-making exercise based on the principle that, where a particular activity seriously degraded the environment and a State or States knowingly and wilfully persisted in that activity, liability might ensue. Serious consideration was also being given in law-making forums to the establishment of compensation funds, which would seem to reflect a "no-fault" approach.

27. In some parts of the draft, the difficulties appeared to stem from the language rather than from the underlying

concepts. In the title of draft article 3, the need to choose between "attribution" and "assignment" of obligations could be circumvented by adopting Mr. McCaffrey's suggested alternative: "Determination of liability". It was important to avoid using terms such as "reparation" (art. 9) which might imply that the Commission was developing a branch of other related areas of law, such as State responsibility, under which the term had a specific meaning.

28. The nature of the topic warranted scrutiny of existing precedents, including the decisions of international tribunals, for example in the *Trail Smelter, Lake Lanoux*¹³ and *Corfu Channel*¹⁴ cases. Such precedents would provide the foundation for the "harm-oriented" provisions of the draft. The Commission might also take into account the series of international conventions on highly hazardous activities, such as the 1962 Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, the 1972 Convention on International Liability for Damage Caused by Space Objects and the 1969 International Convention on Civil Liability for Oil Pollution Damage.¹⁵ Those precedents might provide the foundation for a separate chapter in which liability was based on risk. The Commission might also consider the work of law-making conferences and meetings of experts dealing with the problems which the planned framework convention was intended to cover. The sense of urgency felt in other forums with regard to environmental modification and climatic change had already found expression in Recommendations 70 and 71 of the Action Plan for the Human Environment adopted by the United Nations Conference on the Human Environment in 1972.¹⁶

29. The Commission should, in those circumstances, adopt an open-minded approach, with due regard to differing views and also to the work being done elsewhere. The Commission was in a position to make a unique contribution to the progressive development of important questions of international environmental law and ought not to be seen to be abdicating its responsibilities and leaving the matter to other law-making organs. For those reasons, he welcomed the thoughtful spirit of the Special Rapporteur's fifth report and its invitation to dialogue, to which the Commission had responded. Clearly, the level and tone of the debate suggested a spirit of conciliation. He was satisfied that an accommodation could be found, reflecting the need for a separate chapter on each of the two foundations of liability, namely "harm" and "risk", the former based on the decisions of international tribunals and the writings of publicists, and the second taking into account conventions on highly hazardous activities.

¹³ Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

¹⁴ See 2108th meeting, footnote 10.

¹⁵ References to these Conventions are given in document A/CN.4/384, annex I.

¹⁶ *Report of the United Nations Conference on the Human Environment . . . , op. cit.* (2108th meeting, footnote 6), part one, chap. II.B.

30. Mr. TOMUSCHAT said that the present topic was undeniably the most complex on the Commission's agenda. Moreover, it was now clear that the parallel which had originally been drawn with the topic of State responsibility was misleading. State responsibility was mainly confined to secondary rules, whereas the Commission's chief task with the present topic was to draw up primary rules. Those rules centred on protecting the environment, although the draft articles did not explicitly say so, except in draft article 2 (c). The Commission should not shy away from issues of such immediate concern; indeed, if it confined itself to problems described by politicians as "academic", its very existence might one day be called into question. He therefore welcomed the Special Rapporteur's efforts to break new ground in his fifth report (A/CN.4/423).

31. The draft articles themselves were examples of progressive development of the law, although many of the rules proposed therein were based on existing instruments which constituted the fast-developing corpus of environmental law. There was now a profuse growth of such instruments, yet customary rules of sufficient precision were hard to find. The law in the matter must be developed, given the absence of ready-made solutions for the various problems involved. In view of the rapid expansion of environmental law in the past decade, the Commission must also ask itself the difficult question whether there was still a need for a kind of "umbrella" convention. Many legal instruments already set standards which were much more detailed and stringent than the rules proposed by the Special Rapporteur. The relevant EEC law, for instance, was to be found in dozens of specific directives. Yet those instruments did not form a coherent whole. The Commission, by contrast, was attempting to devise a coherent and comprehensive legal framework, albeit one which could perform only a subsidiary function, since specific rules must always take precedence.

32. The foundation of the draft articles could not yet be taken for granted. The provisions in the revised draft articles 1 to 9, and especially in articles 6 to 9, must be framed with the utmost care. It was on those articles, prescribing what States should do in given situations, that the burden of the topic rested. Draft article 8, on prevention, formulated the most important of those rules, placing a general duty on States to monitor and keep under their control activities carried on in their territory or under their jurisdiction or control. The proposed rule blurred to some extent the strict dividing line between acts of State and private acts which was to be found in part 1 of the draft articles on State responsibility.¹⁷ The same rule was embodied in many existing special régimes, but had never before been formulated in such broad and comprehensive terms. Because of its fundamental importance, it should change places with draft article 7, on co-operation, which was a step subsequent to prevention. Again, the precise legal meaning of the principle of co-operation set out in article 7 was still unclear, although it had had the blessing of the General Assembly in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁸ which

the ICJ, in its judgment in the *Nicaragua* case,¹⁹ had declared generally to embody customary law.

33. Apart from the primary rules, chapters I and II of the draft, and especially draft articles 1, 3 and 8, contained some propositions which might be termed "general qualifiers" of any legal obligation arising under international law. Those propositions defined the scope *ratione temporis*, *ratione territoriae* or *ratione materiae* of the international obligations to be set out in the draft. He doubted, however, whether they should be given such explicit form. In article 1, it was not necessary to state that the articles applied with respect to activities "carried on in the territory of a State or in other places under its jurisdiction . . . or . . . under its control": that was a general rule of international law which applied *pari passu* to obligations to ensure respect for human rights, to combat certain diseases, to promote disarmament, not to permit nuclear proliferation, and so on. Article 1 could therefore be simplified, either by using the wording suggested by Mr. McCaffrey (2109th meeting, para. 13) or by an even simpler form of words such as:

"The present articles shall apply to activities whose operation causes transboundary harm or entails an appreciable risk thereof."

34. Another general qualifier was to be found in draft article 3, relating to the duty of prevention laid down in article 8. The provisions of article 3 ought therefore to be part of article 8. Yet he doubted whether there was anything new in article 3: it merely contemplated a situation which invariably arose whenever a State undertook to combat certain social evils. If the State possessed actual knowledge of the harm, the situation was clear-cut; if it did not, the ordinary obligation of due diligence applied. In that light, the second sentence of article 8 appeared to state the obvious. According to the principle of due diligence, States were bound to take measures corresponding to their undertakings. The only problem was the kinds of measures they were bound to take: those which were both objectively necessary and technically feasible, or those which they could afford to carry out in keeping with their own economic and technical resources? In short, the general qualifiers were superfluous; there was nothing in them that went beyond the general rules governing the extent and the scope of obligations under international law.

35. Another group of provisions, those in draft article 9 on reparation, might be described as an autonomous set of secondary rules. The duty to make reparation or provide compensation derived either from a breach of an international obligation or from other basic principles of international law, especially the principle that the innocent victim should not be left to bear the whole loss. It had been argued that the State of origin might itself be innocent. But where did that leave the "victim" State? If a State could not prevent a hazardous activity being carried on by other States, it should at least be compensated if it was harmed as a result of the risk involved. The principle that the party which benefited from an activity must also bear its burden was a logical corollary to the sovereign equality of States. Nevertheless, he could not agree to the formulation of article 9. It seemed unacceptable that there should be a

¹⁷ See 2108th meeting, footnote 8.

¹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

duty to make reparation or provide compensation simply because transboundary harm had occurred. The underlying justification was not made sufficiently clear. In any event, the rule should not apply to every case of damage; if the risk factor was absent and the State of origin had not been able to foresee the damage, it should incur a duty of reparation only where the damage was serious. In such cases, a simple causal link should be enough to establish liability. Like Mr. Beesley, he was of the view that liability on account of risk and liability on account of serious harm should be dealt with separately.

36. The reference to negotiation in article 9 was awkward. Although negotiation was a standard method of dispute settlement, it should be based on clear guiding principles. Unfortunately he could not suggest an alternative formula at present, since the equity principle was probably too vague.

37. In short, chapters I and II of the draft contained many disparate elements which should be separated and re-arranged.

38. As to the new draft articles 10 to 17 of chapter III, there was some originality in proposing formal procedures for an environmental impact assessment of harmful activities, although such procedures might not be appropriate for all kinds of activities. The report (A/CN.4/423, para. 108 (b)) mentioned the use of certain fertilizers, car exhaust emissions, etc. The activities in question called for different treatment, in the form of better international regulation, either through multilateral conferences or through the competent international organizations. The multilateral framework was always preferable: bilateral means of settlement should be pursued only where neighbourly relations were jeopardized, for instance by the siting of potentially harmful installations such as nuclear power plants or nuclear waste dumps close to an international boundary. In such cases, the neighbouring State should have a right to object, since there was an *a priori* international element which warranted curtailing the sovereign powers of the territorial State. He would therefore like to see a clearer statement of the scope *ratione materiae* of articles 10 *et seq.* The system proposed by the Special Rapporteur might prove unworkable if couched in terms which covered any human activity; States might simply reject it on those grounds.

39. There was much room for improvement in draft article 10. The phrase "If a State has reason to believe . . ." should be deleted; States were deemed to be aware of what was going on in their territories. The article should begin with the words "States shall". One difficulty was the same as in the case of the draft articles on the law of the non-navigational uses of international watercourses: the need to encourage States to provide information without notifications being treated as tantamount to an admission of guilt. The article would suffice for certain cases, notably for the siting of potentially dangerous installations close to an international boundary. In other cases, it should be for the affected States to lodge objections.

40. Given the nature of the topic, the Commission needed some assistance on the environmental aspects, perhaps from UNEP or ECE. Establishing a dialogue with those bodies would improve the Commission's methods of work. Furthermore, it should be borne in mind that most of the activities contemplated in the draft articles were carried on

by private persons. The draft might therefore include a suggestion that private enterprises should take out insurance when they engaged in hazardous activities, and priority could be given to private rather than inter-State liability.

41. Lastly, the draft articles did not adequately cover harm inflicted on the "commons" of mankind: articles 10 *et seq.* were apparently confined to cases of direct damage to States. That was an additional argument for seeking a contribution from the relevant international organizations.

42. Mr. OGISO congratulated the Special Rapporteur on his excellent fifth report (A/CN.4/423) on an extremely difficult topic.

43. In the course of the Commission's consideration of the topic of State responsibility, it had been recognized that there were areas in which physical harm could arise out of a State activity that was not necessarily a wrongful act under international law. It had accordingly been argued that the Commission should consider the question of international liability in those circumstances as a separate topic from that of the traditional rules of State responsibility. As a result, the present topic was an independent item on the Commission's agenda. It was significant, however, that some members of the Commission had at the time opposed the idea of the topic being taken up as a separate item. At the thirty-fourth session, in 1982, Mr. Ushakov had said that:

. . . There was, indeed, no general rule of international law that imposed a duty on a State to indemnify its nationals, another State or the nationals of that other State for injury suffered as the result of an activity not prohibited by international law which it had carried out. . . .

and had concluded that:

. . . For the time being, it would be Utopian to draw up general rules of international law on international liability for injurious consequences arising out of acts not prohibited by international law.²⁰

44. When the Commission had started its work on the topic, it had done so without any firm assumption that international liability existed for transboundary harm "arising out of acts not prohibited by international law". His own feeling was that the matter fell into a grey area where it was not clear whether liability existed or not. It was certainly not correct to proceed on the basic supposition that there was a principle whereby the State of origin incurred liability for transboundary harm.

45. Two possible approaches could be made to the subject of transboundary harm. The first was to consider that liability existed and, as suggested by the Special Rapporteur, that the notion of strict liability tended to apply. In that regard, as he had repeatedly pointed out, the precedents in the matter of strict international liability related only to a limited field, such as space activities or peaceful nuclear activities. There were no such precedents regarding a possible general principle of strict liability for transboundary harm caused by activities which were lawful under international law. Such a principle might perhaps be considered under the heading of progressive development of international law, but he took the view that the results would be problematic.

46. The second approach was to place the emphasis on prevention, as the Special Rapporteur had in fact done to a considerable extent. International liability would then arise

²⁰ *Yearbook* . . . 1982, vol. I, p. 249, 1739th meeting, paras. 47-48.

from the failure to take preventive measures to avoid certain harmful effects of a State's lawful activity. Liability would result from the violation of rules on such matters as prevention, co-operation and the balance of interests, which could be described as "soft law".

47. Of those two approaches, the second seemed the more appropriate. It would serve to expand the notion of traditional State responsibility into the grey area and could be adopted despite the fact that it had not been envisaged when the Commission had first taken up the topic. Admittedly, it could be argued that lack of prevention, or failure to take the required preventive measures, constituted a wrongful act under international law and was therefore beyond the scope of the subject-matter, but attempts to seek the sources of liability in acts not prohibited by international law could ultimately mean going round in circles.

48. Turning to the revised draft articles 1 to 9 submitted by the Special Rapporteur, he said that the words "throughout the process", in article 1, did not refer simply to the period of performance of the activity which had the harmful effect. As he saw it, "throughout the process" covered the whole of the period during which the harmful effect was suffered, even after the end of the activity which had caused it. Interesting in that connection was the following view expressed by the representative of Austria in the Sixth Committee of the General Assembly and cited by the Special Rapporteur in his report (*ibid.*, footnote 7):

... the concept of liability for acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident, but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions.

That representative had then added that the second situation, namely that of transboundary and long-range impact on the environment, related to the cumulative effect of certain harmful activities, a situation in which liability had two distinct functions: first, to cover the risk of an accident, and secondly, to cover significant harm caused in the territory of other States through a normal operation.

49. In subparagraphs (a) and (b) of draft article 2, the concept of "risk" had been retained notwithstanding certain objections voiced both in the Commission and in the Sixth Committee. The article posed three problems. To begin with, the expression "appreciable risk" should be replaced throughout the draft by "significant risk", which was the expression used in a number of relevant existing instruments, including some mentioned by the Special Rapporteur, such as the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (*ibid.*, para. 80), the annex to recommendation C(74)224 on "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974 (*ibid.*, para. 85) and the 1979 Convention on Long-range Transboundary Air Pollution (*ibid.*, para. 91). It was worth noting that the arbitral tribunal in the *Trail Smelter* case²¹ had used the expression "damage of a material nature", which was close to the meaning of "significant" or "substantial". Since the concept of "risk" was itself not very

explicit and contained some subjective elements, it would be preferable to qualify it with the word "significant".

50. Subparagraph (a) (ii) stated that "appreciable risk" was deemed to include "both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm". Low probability of very considerable transboundary harm could be understood to cover such cases as accidents in nuclear power plants. However, the significance of the other category, "high probability of minor appreciable harm", was not at all clear. Perhaps the idea was to cover harm to the environment caused by an accumulation of small amounts of harmful materials over a long period of time. If that was indeed the intention, it should be spelt out in the article itself by introducing wording along the following lines: "... having a cumulative effect leading to environmental pollution".

51. The Commission's report on its previous session referred to the Special Rapporteur's interpretation of the expression "appreciable risk" as "meaning that it had to be greater than a normal risk".²² If the Special Rapporteur still held that view, he would suggest that the interpretation in question be incorporated in article 2 itself, thereby clarifying the meaning of "appreciable risk", or preferably "significant risk".

52. The definition of "Affected State" in subparagraph (e) covered both a State which had in fact been harmed or was being harmed and a State which might be harmed in the future. The latter case seemed to be encompassed by the idea of "minor appreciable harm" which he had discussed in connection with subparagraph (a) (ii). It was not at all appropriate to treat the two categories of States in the same manner and he would urge that the liability towards a State which had already suffered harm and the liability towards a State which might suffer harm in the future should be treated differently.

53. The title of draft article 3, "Assignment of obligations", was difficult to understand and should be examined by the Drafting Committee.

The meeting rose at 1 p.m.

²² *Yearbook* . . . 1988, vol. II (Part Two), p. 16, para. 62.

2111th MEETING

Friday, 2 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter,

²¹ See 2108th meeting, footnote 9.