

Document:-
A/CN.4/SR.2183

Summary record of the 2183rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

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notified State failed to reply, such failure would ultimately be to its disadvantage. Since failure on either score would inevitably arise in the context of reparation, neither should be over-emphasized. An exception for national security and industrial secrets, as in draft article 15, was appropriate.

41. He could not understand the references in draft article 11, paragraph 2, and draft article 12 to an "international organization", which appeared to assume that international organizations "with competence in that area" existed. Care should be taken, in article 12, not to confer on an organization functions that were not defined in its constituent instrument.

42. Draft article 16 was too detailed: there was no need to spell out examples of appropriate preventive measures, which ought properly to be included in the commentary. The same was true of draft article 17. Lastly, draft article 20 should be couched in stronger terms, since a qualified prohibition would merely undermine the efficacy of prevention.

43. Mr. EIRIKSSON said he shared the widely held view in the Commission that the topic should be divided as between harm caused by hazardous activities, and harm caused otherwise. The Special Rapporteur had now submitted a complete set of draft articles. In general, he would prefer less detailed treatment, because of the considerable amount of time required for the Commission to deal with each article. He had been struck by the large number of safeguard clauses, necessary though they might be to render the articles acceptable.

44. The new articles contained in chapters III and IV of the draft were welcome, although he would question the position of draft article 17, on the balance of interests. Equally welcome were the new chapter V, on civil liability, and the new draft article 10, on non-discrimination; the latter provision was, in his opinion, an essential part of the treatment of civil liability. The present topic differed from that of the law of the non-navigational uses of international watercourses in that it was not necessary for the Commission to restrict its treatment of liability. As to the revised articles in chapters I and II of the draft, he would point out that the Drafting Committee already had before it two sets of articles, and some confusion was bound to arise from the presentation of a new set.

45. He welcomed the Special Rapporteur's discussion, in section B of the introduction to his sixth report (A/CN.4/428 and Add.1), of the main questions of principle, as well as the analysis in chapter VI of the concept of harm to the "global commons". Less satisfying were the Special Rapporteur's definition of activities involving risk and the list of dangerous substances in draft article 2. Subparagraphs (a) to (d) of article 2 gave a misleading impression of the articles, which were supposed to be more general in nature. The terms used were highly technical and would raise the expectation of equally detailed provisions in the chapters on prevention and liability. Details of that kind should be left to agreements covering specific subjects to be governed by specific régimes.

46. He agreed with Mr. Razafindralambo that the Commission must proceed with dispatch in dealing with the topic, so as not to be overtaken by events. The Drafting Committee should be given the opportunity to complete its consideration of the first two chapters of the draft. Once the later chapters had been discussed, the Special Rapporteur might decide to present revised articles, reflecting the discussion in the Sixth Committee of the General Assembly. Alternatively, he might propose further discussion of the present articles. Either approach would be acceptable. His own opinion was that the Special Rapporteur, in giving final form to such a complicated topic, had made a major contribution to the development of international law.

The meeting rose at 11.40 a.m.

2183rd MEETING

Friday, 29 June 1990, at 10.45 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/423,² A/CN.4/428 and Add.1,³ A/CN.4/L.443, sect. D)⁴

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he wished to reply to the comments made at the previous meeting by Mr. Hayes, who had expressed concern in particular about the new approach which he (the Spe-

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

² Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1990*, 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 2179th meeting, para. 29.

cial Rapporteur) had adopted and which was, in Mr. Hayes's view, too restrictive. There was in fact no new approach to the topic as a whole: two types of activities still had to be distinguished, activities involving risk and activities with harmful effects. In the case of the former, he had considered that he should clarify the concept of risk and that was why he had added a reference to such matters as dangerous substances and technologies and damage to the environment. Those elements called for special precautions on the part of the operator.

2. The concept of an accident was linked to that of risk. It was an essential concept, particularly where substances and technologies which were both complex and dangerous were concerned. A typical example was that of nuclear power stations, which might very well never cause damage, but none the less presented risks. In contrast, one could refer to an industrial plant which presented no special danger, but which, day after day, polluted a nearby watercourse: in that case, there were harmful effects without there being any accident. There could obviously also be situations in which the two possibilities were combined.

3. Mr. AL-BAHARNA said that his comments on the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) would follow the structure of the report. He would thus start with the Special Rapporteur's suggested additions to chapters I and II of the draft and then deal with the procedural provisions (chap. III) and, finally, with the new chapters IV and V submitted for the Commission's consideration.

4. Draft article 1 (Scope of the present articles) dealt in a single provision with the factors of "risk" and "harm". That had attracted the criticism of some representatives in the Sixth Committee of the General Assembly, where it had been suggested that the draft should be "rationalized by separating the two concepts of risk and harm, with each régime covered in separate chapters" (A/CN.4/L.443, para. 172). The Special Rapporteur's reply was that "the two kinds of activity have more features in common than they have distinguishing features" (A/CN.4/428 and Add.1, para. 3) and, in support of his position, he relied on the Council of Europe's draft rules on compensation for damage caused to the environment (*ibid.*, footnote 8), which brought dangerous activities and activities causing harm as a result of continuous pollution under a single régime. However, the Experts Group on Environmental Law of the World Commission on Environment and Development had recommended a model which made a distinction between activities which created a risk of "substantial" transboundary harm and those which actually caused such harm (*ibid.*, para. 4). It was therefore for the Commission to choose between the Council of Europe's model and that of the Experts Group. Although clarity dictated that separation would be better, the subject-matter was such that a single legal régime might none the less be preferable. Moreover, a single régime would have the advantage of covering borderline cases as well. He had an open mind on the issue, however.

5. The Special Rapporteur then considered whether the draft articles should include a list of activities covered by article 1, referring again (*ibid.*, para. 15) to the Council of Europe's draft rules on compensation for damage caused to the environment, which defined activities in relation to dangerous substances and the operations for which they were used. The Special Rapporteur appeared to be satisfied with that model, since he described it as "interesting" (*ibid.*, para. 16). Indeed, that solution had the advantage of delimiting the field of application of the articles and the Commission should give serious consideration to whether, and to what extent, it should adopt it. In the Special Rapporteur's view, that would involve the addition of subparagraphs (a) to (d) to draft article 2 (Use of terms) to define "activities involving risk", "dangerous substances", "dangerous genetically altered organisms" and "dangerous micro-organisms". That method was open to question, however, for the matter was too important to be dealt with in a general article on definitions. The Commission should consider incorporating those subparagraphs into a separate article, to come immediately after article 1. Save for that reservation, he was in agreement with the idea of delimiting the scope of article 1 by indicating the activities covered by it.

6. In subparagraph (g) of article 2, the Special Rapporteur extended the definition of "transboundary harm" to include the "cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred in article 1", as well as any further harm to which such measures might give rise. Personally, he wondered whether that addition did not rather belong in article 9, on reparation. Also, the Special Rapporteur invited suggestions from members of the Commission with regard to the definition of "appreciable harm", the subject of subparagraph (h) (*ibid.*, para. 24). The latter provision defined such harm as that which was greater than the mere nuisance or insignificant harm that was normally tolerated. That definition was open to question, and he wondered whether it was necessary to have one at all.

7. In the footnote to draft article 3 in the annex to his sixth report, the Special Rapporteur pointed out that the title of the article, "Assignment of obligations", had given rise to objections, but he had not changed it. He himself had already said that he found that title misleading and he maintained his position.

8. He also still had reservations with regard to draft article 4 (Relationship between the present articles and other international agreements), which was, in his view, not compatible with article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which stipulated that, in the case of successive treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". Should the Commission decide to embody the draft articles in a multilateral convention, article 4 would have to be amended to bring it into line with that provision of the 1969 Vienna Convention. If the draft articles took some other form, article 4 could remain as it was.

9. Draft article 5 dealt with the absence of effect upon other rules of international law, but he would have

preferred that question to be left open. If the Commission considered it expedient to have a provision on the matter, however, the proposed text was acceptable.

10. In the report, in the footnote to draft article 6 (Freedom of action and the limits thereto), the Special Rapporteur suggested the deletion in that article of the words "in their territory", since all activities within the territory of a State were conducted under its jurisdiction. For his own part, he favoured the retention of those words, as they had a far more specific meaning in international law than the word "jurisdiction". In the footnotes to draft articles 7 (Co-operation) and 8 (Prevention), the Special Rapporteur also suggested possible alternative texts, which were acceptable subject to the inclusion, for the same reason, of the words "in their territory".

11. In the footnote to draft article 9 (Reparation), the Special Rapporteur suggested replacing the title of the article by "Compensation by the State of origin" and deleting the idea of restoring the "balance of interests affected by the harm". While he could accept the second suggestion, he could not accept the first, since the concept of reparation, which was wider than compensation, was more appropriate to the topic.

12. The new draft article 10 (Non-discrimination) appeared to mean that transboundary harm had the same legal effects as harm within a State's own territory, and that would facilitate the application of national law in the former case. Although such a provision might be desirable, was it feasible at the present stage of international law? Even the Experts Group on Environmental Law, with which the idea had originated, admitted that an "emerging principle" of international environmental law was involved, as the Special Rapporteur pointed out in the report (*ibid.*, para. 29). Before accepting such a principle, the Commission should examine all its implications for national law and procedures with regard to remedies for tortious acts.

13. In chapter III of the draft, the Special Rapporteur presented the revised texts of the procedural articles that had been the subject of criticism in the Commission and in the Sixth Committee. Article 11 (Assessment, notification and information) was welcome, as was article 12 (Participation by the international organization) because of the role it conferred on competent international organizations, although the word "intervenes" was not entirely felicitous. Article 13 (Initiative by the presumed affected State) prompted some reservations because of its hypothetical nature. Article 14 (Consultations) and article 15 (Protection of national security or industrial secrets) were acceptable.

14. Was draft article 16 (Unilateral preventive measures) really necessary? If the Commission considered it essential, the respective functions and purposes of articles 8 and 16, both of which dealt with preventive measures, would have to be spelt out. In any event, article 16 was a little too detailed and the Commission should examine critically the various elements it contained, since some of those elements—the "best available technology", for instance—did not seem applicable to developing countries.

15. The new draft article 17 (Balance of interests) set forth a number of factors which States might take into consideration in their consultations or negotiations. In the report, the Special Rapporteur confessed to "a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms" (*ibid.*, para. 39). While that might be true, there was no harm in including them in article 17 as they would assist States in controlling the effects of transboundary harm. In principle, therefore, he supported the article, provided that its title was amended.

16. He also supported the text of draft article 18 (Failure to comply with the foregoing obligations), provided that the right of the parties under general international law to institute proceedings was not diminished; that right appeared to be somewhat modified under the present text.

17. Draft article 19 (Absence of reply to the notification under article 11) called for two comments: first, he was sceptical about the presumption of acquiescence that would flow from failure to reply; and, secondly, it would be preferable to speak of a "reasonable time" rather than of a "period of six months".

18. Draft article 20 (Prohibition of the activity) appeared to go too far. Such prohibition might be either too late or too costly and the obligation should be less stringent.

19. The Special Rapporteur was proposing two new chapters of the draft: chapter IV on liability and chapter V on civil liability. So far as the first of those concepts was concerned, liability and reparation were well known in both national and international law. The Special Rapporteur considered that it might be possible to introduce into the chapter on liability "a concept of reparation which, as opposed to the classical one involved in liability for wrongfulness, did not entail total restitution to eliminate all the consequences of the act which caused the harm" (*ibid.*, para. 44). In that connection, the wording of draft article 23 (Reduction of compensation payable by the State of origin) was open to question. While it might be true that, following diplomatic negotiations, a State might accept compensation in an amount that differed from the actual loss suffered, it was doubtful whether States would accept that as part of international law. The fact that the rules set forth in chapter IV were of a residual nature did not give the Commission licence to depart from the accepted meaning of concepts of law. It should therefore re-examine article 23.

20. With regard to draft article 24 (Harm to the environment and resulting harm to persons or property), paragraph 3 added a reservation to paragraphs 1 and 2 which was unfounded, because a legal right did not depend on the means by which it was claimed. Similarly, the statement that "In the case of claims brought through the domestic channel, the national law shall apply" was of doubtful validity. He therefore proposed the deletion of paragraph 3.

21. Chapter V of the draft was probably the most controversial, since it gave victims of transboundary harm unrestricted access to the courts of the State of

origin. That principle was embodied in draft article 29 (Jurisdiction of national courts), which widened the rule of "non-discrimination" laid down in article 10. Under article 29, the State of origin could even be required to change its procedural laws; such a provision would not really be practicable. As the Special Rapporteur stated in the report, "this is a progressive provision and might not be acceptable in a global instrument such as the one now under consideration" (*ibid.*, para. 66). The same comment applied, *mutatis mutandis*, to draft article 30 (Application of national law). He suggested that the Commission tone down those two articles.

22. Mr. AL-QAYSI recalled that, during the consideration of the topic at the Commission's previous session, he had made two preliminary comments: first, that the frontiers of the topic had gone somewhat beyond those originally conceived for it, thus further compounding its complexity; and, secondly, that the Commission should therefore accept some measure of uncertainty and ambiguity until its work had proceeded further and it had a clearer picture of the subject. Fortunately, the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) served to a great extent to bring the picture into sharper focus, and the Special Rapporteur was to be congratulated on the report, which showed what painstaking efforts he had made to take account of differing views that were often hard to reconcile. The report was striking in its clarity and proved that the Special Rapporteur had striven to be realistic. Like Mr. Calero Rodrigues (2181st meeting), however, he thought that the richness of the report would require more time than the members of the Commission had available at the current session for it to be studied in-depth. He had thus been unable to examine it fully, although the statement he had made at the previous session had helped him to consider the proposed changes to the draft articles. He would therefore comment only on what appeared to be the essential points in chapters I to III of the draft.

23. The Commission now had a solid foundation on which it could progress in its work at a reasonable pace. It must not lose sight of the fact that its work on the topic had already been overtaken by other institutions or of the fact that it had spent a number of years questioning the viability of the topic, only to reach the stage of drawing on the work of those other institutions.

24. With regard to the points on which some members of the Commission had expressed misgivings, his first reaction was that it could not be said that the Special Rapporteur had departed radically from his earlier approach. Paragraphs 3 and 11 of the report made it clear that the Special Rapporteur had maintained the conclusion he had reached earlier, namely that the consequences of the two kinds of activities, those involving risk and those with harmful effects, should be brought together under a single legal régime. Between those two paragraphs, the Special Rapporteur discussed another model which would accord different legal treatment to the two types of activities and drew attention to the two major difficulties to which that model would give rise for the Commission's work. On that point, the Spe-

cial Rapporteur concluded that he was open to whatever preference the Commission might express.

25. Moreover, he could not see any attempt in the report to narrow down the concept of harm to mean that an activity causing harm must be one which had involved harm from the beginning. The Special Rapporteur, having pointed out that the main difference between the two types of activity lay in the field of prevention (A/CN.4/428 and Add.1, para. 12), went on to illustrate that difference. Thus, for the first type of activities—those involving risk—the cardinal point was the prevention of incidents: no harm or incident had yet occurred. For the second type of activities—those with harmful effects—there were two sources of harm: first, an incident or accident in the course of an activity involving risk which triggered harm; and, secondly—and it was there, with reference to Mr. Hayes's comment (2182nd meeting), that he thought the misunderstanding had arisen—the harmful effects caused by the normal operation of an activity or, as Mr. Tomuschat stated in an article soon to be published on the subject, the harm arising from the normal activities of an industrialized society inasmuch as they are likely to produce significant transboundary effects. The latter activities caused harm which was regarded as tolerable, but its cumulative impact could have significant transboundary effects. Subparagraph (f) of draft article 2 should be seen in that light, not as signifying that harm had been present from the beginning of the activity.

26. Referring to the method of drawing up a list of activities involving risk, which some members had said might be too restrictive, he said that, from a theoretical point of view and aside from the problem of how to draft article 2, such a list could serve as a criterion for the determination of risk. The drafting of the concept was, however, quite a different matter. In that connection, since the Commission was seeking to establish a global model, a general definition comprising two elements, namely a higher probability than normal of causing transboundary harm and the perceptibility or foreseeability of the harm, would be useful as an umbrella clause, and an indicative list of dangerous substances would give greater precision to the central concept of "appreciable" or "significant" risk. In that way, it should be possible to dispel the doubts which had been expressed thus far and to do justice to the Special Rapporteur's sound reasoning, which was motivated by a desire to achieve precision and flexibility. In his own view, it was not impossible to express the concept of risk in a specific provision. Subparagraphs (a) to (d) of article 2 could be recast in a shorter form, with cross-references to detailed annexes, and the Special Rapporteur could perhaps be authorized to consult experts before finalizing the text. He (Mr. Al-Qaysi) had advocated that solution at the previous session.

27. As far as prevention was concerned, the explanation given by the Special Rapporteur at the previous meeting in reply to the doubts expressed by Mr. Calero Rodrigues—namely that subparagraph (m) of article 2 would be amended by deleting the words "or harm"—helped to clarify the meaning of the concept of prevention in the context of the draft articles.

28. In subparagraph (g) of article 2, he would prefer the term “significant” to the term “appreciable”. He approved of the specific reference to harm to the environment.

29. As to subparagraph (k) and the choice between the terms “incident” and “accident”, he would prefer “incident”. He nevertheless wondered why the Special Rapporteur, in the definition of the term “incident”, had not used the word “occurrence”, which was found in the source material from which he had drawn (see A/CN.4/428 and Add.1, para. 24 *in fine*). It should also be noted that one of those sources, namely the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (*ibid.*, footnote 39), referred in its definition of the term “incident” to the “grave and imminent threat” of damage (art. 1, para. 12). The Special Rapporteur had not used those two adjectives in subparagraph (k) although he stated in the report that the definition used in the 1989 Convention might be the “most appropriate” one for the Commission’s draft (A/CN.4/428 and Add.1, para. 24 *in fine*).

30. For draft article 8 he preferred the alternative text suggested by the Special Rapporteur in the annex to the report, in the footnote to that provision.

31. With regard to draft article 9, he was surprised that harm was characterized as “appreciable”; other provisions, such as subparagraphs (e), (g) and (h) of article 2, referred to “[appreciable] [significant]” harm. The same wording should be used in article 9. In any event, the alternative text suggested in the report, in the footnote to article 9, was better because it used the term “compensation” rather than “reparation”, in accordance with a decision which, if his memory served him correctly, the Commission had taken after lengthy discussion at the previous session.

32. He welcomed draft article 10, but was surprised that the second sentence differed somewhat from the corresponding provision of the text on which the Special Rapporteur had relied, namely article 20 of the “Principles specifically concerning transboundary natural resources and environmental interferences” formulated by the Experts Group on Environmental Law of the World Commission on Environment and Development (*ibid.*, para. 30). It was not clear why the Special Rapporteur had referred to “the nationality, domicile or residence of persons injured”, which might involve a question of conflict of laws and of the choice of the applicable law.

33. Turning to chapter III of the draft, on prevention, he welcomed the simplified procedure proposed by the Special Rapporteur. Draft article 11 was reasonable and, in any case, better than the previous article 10 (see A/CN.4/423, para. 72). The arguments contained in paragraphs 32 and 33 of the sixth report (A/CN.4/428 and Add.1) were relevant, but he would like some clarifications. What was meant by the expression “public interest”? Did it mean the interest of the international community or the interest of more than one State? If the latter, could it mean the interest of two States only?

34. Draft article 12 was quite satisfactory. He wondered, especially in the light of article 10 on non-discrimination, whether membership of the international organization was a condition for its intervention. If not, how would the relationship be regulated, especially in respect of costs and expenditure not authorized by the statute or rules of the organization? There was a further problem: what would happen if intervention by the organization involved an activity which the organization was not supposed to carry out in a non-member State? Those aspects of the matter called for further consideration.

35. Draft article 14 introduced the idea of consultation to replace the concept of the obligation to negotiate, as provided for in the previous article 16 (see A/CN.4/423, para. 107), which had, however, offered two alternatives: negotiations or consultations. The question that now arose was what would happen if consultations broke down; the sixth report was not clear on that point. He supported draft article 15 and was glad that its wording had been simplified by comparison with the previous article 11 (*ibid.*, para. 72).

36. Draft article 16 seemed to relate only to the case covered by article 13, where the presumed affected State took the initiative in approaching the State of origin. If the affected State did not act, the State of origin would in any case still have an obligation of prevention under article 8. In any event, that interpretation seemed to be supported in the sixth report (A/CN.4/428 and Add.1, para. 38).

37. He had taken note of Mr. Calero Rodrigues’s doubts as to whether draft article 17 was really necessary in view of the realities of inter-State relations. In his own opinion, however, the article was necessary, because the principle was not new and was to be found in other topics dealt with by the Commission and because such a provision might be essential in the present case, especially in the context of consultations among the States concerned. Its wording was, however, very soft, providing as it did that States “may” take the factors listed into account in their consultations or negotiations, and perhaps it should be made stronger so that it would not be meaningless. He also noted that article 17 referred to “consultations or negotiations”, whereas article 14 dealt only with consultations.

38. With regard to draft article 18 and the crucial point whether non-compliance with the obligations of prevention would give rise to a right of action, he shared the Special Rapporteur’s view that “The mechanisms of liability are activated only if the harm can be causally attributed to the activity in question” (*ibid.*, para. 40).

39. As to what should be done with the draft articles, he considered that the new articles submitted, i.e. those which were not new versions of articles already referred to the Drafting Committee, should not be referred to the Drafting Committee; they required more thorough discussion by the Commission.

40. Mr. GRAEFRATH commended the Special Rapporteur on his sixth report (A/CN.4/428 and Add.1), which represented a major step forward in the progressive development and codification of the law relating to international liability and in efforts to

produce an instrument with good chances of being accepted by States. He noted with satisfaction that the Special Rapporteur had presented a complete set of draft articles that lent themselves to overall consideration. Although they did not solve all problems, they at least made them more visible.

41. The report raised a number of questions and he would confine himself to a few general comments, essentially concerning the scope of the draft articles, the type of activities covered, the harm to be compensated for, the subjects involved and the function of preventive measures.

42. At the previous session, he had expressed regret that the Special Rapporteur had decided not to apply the criterion of risk in determining the scope of the draft articles, for that made it doubtful that they would be acceptable to many States. As he had also pointed out, State practice showed that the so-called "list" approach was by far the most commonly used, the Economic Commission for Europe and the Council of Europe having drawn on it in a number of instruments. One of the advantages of the sixth report was that it duly reflected the latest developments on the subject in the practice of States. The report and the draft articles incorporated ideas and formulations originating from recent multilateral instruments that set the legal standards to be applied by States in the 1990s, including the ECE draft framework agreement on environmental impact assessment in a transboundary context (*ibid.*, footnote 35), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,⁶ the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (*ibid.*, footnote 37) and, to a lesser extent, the draft instruments which had been prepared by non-governmental organizations and which looked at the problem of liability from a different perspective.

43. The major substantive changes in the sixth report were the introduction of a list of dangerous substances and the presentation of more elaborate provisions on prevention and liability. The result was that the extent of the liability States would incur under the future instrument had become clearer. That was a strong wish expressed by a number of representatives in the Sixth Committee of the General Assembly. For example, despite the imprecision inherent in the expression, the representative of one country had accepted the principle of responsibility for "appreciable harm" in the context of international watercourses because of the limited nature of the liability involved, but had refused to accept general State liability for appreciable harm because "It would be another matter to admit imprecision with regard to potentially enormous liability".⁷ That meant that the terms of the liability incurred, no matter how broad, would have to be clearly defined to be acceptable to States. A statement of general principles, although reasonable, was not enough. Seen from

that point of view, the introduction of a list of dangerous substances, in which activities involving risk were defined, was an important step forward. Based on widespread State practice, such a list was intended to apprise States of the substances and activities which would engage their liability and the areas in which special preventive efforts were needed. For that reason, the list would have to be exhaustive. A list that was only illustrative would not limit the scope of the draft and would not meet the requirement of clarity which was absolutely necessary in an instrument involving claims amounting to millions of dollars. On the other hand, in order to make for flexibility, the list would have to be reviewed regularly by experts and, if necessary, amended in accordance with a procedure set out in the future instrument itself. That was the approach adopted by most of the relevant instruments. In that context, it emerged from the report (*ibid.*, para. 17) that the Special Rapporteur was still hesitating on the question of a list of dangerous substances: in the Special Rapporteur's opinion, the list should not be exhaustive and activities not listed, but having the same effects, i.e. causing significant transboundary harm, should be considered as coming under article 1. Such a partial list would serve no meaningful purpose: far from providing for flexibility, it would introduce imprecision and thus defeat its very purpose.

44. If the draft articles relied solely on harm caused, States would be forced to control all types of activity within their jurisdiction to such an extent that scientific and industrial progress would be seriously hampered. On the other hand, if the Commission tried to avoid that drawback by introducing a high threshold of compensable harm, environmental protection would suffer. It was no accident that States had in general chosen to establish a high degree of liability for harm caused in the case of certain activities or as a result of the use or transport of so-called dangerous substances. He did not see how the Commission could depart from that established State practice if it wanted progressively to develop international law.

45. The need for clear and precise legal solutions was not confined to the question of the activities covered: States must not only know which activities and which kinds of harm might engage their liability, but also which methods of compensation might be envisaged.

46. On the question of compensable harm, the Special Rapporteur had adopted a comprehensive approach including material loss and damage to property and personal injury, as well as harm to the environment as such. Compensation was provided for preventive and containment measures, clean-up operations and restorative measures aimed at rehabilitating the damaged ecosystem. He fully understood that approach, which was aimed at establishing the principle of full compensation in order to minimize the growing impact of human activities on the environment. While agreeing in principle with that approach, he drew the Commission's attention to certain problems concerning the definition of harm that still needed to be solved.

47. In regard to liability, the definition of harm played such an important role that all relevant

⁶ See document UNEP/IG.80/3 (22 March 1989); reproduced in *International Legal Materials* (Washington, D.C.), vol. XXVIII (1989), p. 657.

⁷ *Official Records of the General Assembly, Forty-fourth Session, Sixth Committee*, 33rd meeting, para. 69.

instruments contained a separate and very elaborate article on the definition of compensable harm. It was not enough to deal with that problem in the article on the use of terms. He agreed with Mr. Calero Rodrigues (2181st meeting) that the long list of terms in draft article 2 must be revised and that many of the definitions proposed might need improvement. Although the long list of definitions was useful for the formulation of the draft articles, that did not mean that all the definitions would be retained or that other definitions could not be added once the draft had been completed.

48. Returning to the question of compensable harm, he pointed out that article 8 of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities contained very precise provisions on the subject, notwithstanding the definition of "damage" already appearing in article 1 (15). Obviously, for the purposes of liability, the definition of the term "damage" and the setting of parameters for compensable damage under that instrument were not the same as in the draft under consideration. It was his understanding that the Special Rapporteur wished to establish the obligation for States to pay compensation irrespective of the activity that had caused the transboundary harm; that meant any activity, whether it had caused an accident or significant harm through pollution and whether it was a State or a private activity. That was a very broad approach that made him wonder why a list of dangerous substances had been introduced.

49. The draft should contain a separate and well-structured article on compensable harm which would cover: (a) loss of life and personal injury; (b) loss of and harm to property and the enjoyment of areas; (c) the cost of reasonable preventive and clean-up operations; (d) harm to the environment.

50. The provision on harm to the environment might incorporate the text of draft article 24. Such a provision should be retained in the draft articles. Recognition of the autonomous value of the environment, which could not be expressed in terms of material harm to property or personal injury, must be achieved by progressively developing the law on the subject. In so doing, it must be borne in mind that payment of compensation for non-material harm to the environment was a relatively new demand and raised a number of legal and political problems, such as the evaluation of such harm, the identification of the subjects entitled to compensation, etc. The political will of States to accept and pay compensation for such harm was still in its early stages. Most international instruments did not recognize harm to the environment and those that did placed limitations on compensation. It would therefore be advisable for the Special Rapporteur and the Commission to analyse the limitations that recent conventions placed on compensation for harm to the environment.

51. For example, the 1969 International Convention on Civil Liability for Oil Pollution Damage (see A/CN.4/384, annex I) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (*ibid.*),

both as amended by their 1984 Protocols,⁸ as well as the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (see A/CN.4/428 and Add.1, footnote 39), recognized only the cost of reasonable measures of reinstatement actually undertaken or to be undertaken. Similarly, a 1989 proposal for a directive of the Council of the European Communities on civil liability for damage caused by waste recognized as reasonable only such measures of restoration the cost of which did not exceed the benefit arising for the environment from such measures and, furthermore, required that the plaintiff must prove the overwhelming probability of the causal relationship between the waste and the damage to the environment. A more cautious approach was thus advisable. That applied above all to the Special Rapporteur's proposal to introduce payments for harm to the environment in cases where the *status quo ante* was not or could not be re-established. Virtually no existing convention contained such a provision. Even the Convention on the Regulation of Antarctic Mineral Resource Activities, from which the Special Rapporteur had taken his idea, provided that the amount corresponding to the compensation determined by an international commission should be paid into a special international fund. The payment of compensation by one State to another for impairment of the environment, as provided for in paragraph 1 of draft article 24, did not find support in international practice.

52. Another question related to the definition of harm was whether to qualify it as "appreciable" or "significant". Referring to subparagraph (h) of draft article 2, he said that he was in favour of the word "significant", which was the accepted term in many international instruments. However, the first element of the new definition of the concept of harm ("harm which is greater than . . . mere nuisance") introduced the common-law concept of "nuisance", which was not sufficiently clear in other legal systems; the second element ("harm which is greater than . . . insignificant harm") appeared to be tautological; and the third element ("harm which is greater than . . . normally tolerated") was problematic, because many countries had long tolerated unacceptable quantities of transboundary pollution. It would be better to define "significant harm" as being situated between serious and minor harm, an approach often used in the law relating to international watercourses.

53. Having dealt with two sensitive areas that required greater precision to facilitate the acceptance of the draft, namely the type of activities covered and the definition of harm, he turned to another difficult problem, that of possible methods of compensation. In his previous reports, the Special Rapporteur had simply stated the general principle of compensation on a negotiated basis. However, none of the many questions that arose in that regard had yet been solved. For example, who were the subjects of the liability envisaged, what was the relationship between a private operator and the territorial State, must the State bear

⁸ See the IMO publication, Sales No. 456 85.15.E.

responsibility for all transboundary harm and should the Commission envisage the type of liability provided for in article 139 of the 1982 United Nations Convention on the Law of the Sea or draw instead on the 1972 Convention on International Liability for Damage Caused by Space Objects? In the final analysis, the answers to those questions would determine the structure, scope and subjects of the obligations set forth in a convention on liability.

54. In his sixth report, the Special Rapporteur devoted two chapters to methods of compensation: chapter IV on liability and chapter V on civil liability. He welcomed that progress because the Commission could now embark on the study of the specific legal problems connected with liability and compensation and clarify for States the extent of their liability. The central issue in that connection was to determine the subjects of the legal relationship and to decide who was entitled to claim compensation and who was obliged to pay. In international conventions, the person or entity liable for compensation for damage was normally designated as the operator. The advantage was that the subject of liability was known in advance, and that facilitated legal action by the victim and the adoption of preventive measures by the responsible subject. The method proposed by the Special Rapporteur in chapters IV and V was that of engaging the liability of the State in whose territory the activity took place. The State would thus be the main legal subject to which all States and natural and legal persons that had suffered harm from any of the activities referred to in article 1 would present their claims for compensation. According to draft article 21, claims and compensation would be dealt with through negotiations; in the system proposed in chapter V, they would be handled through the domestic courts, the State of origin being, in both cases, the sole and principal defendant. The questionable philosophy underlying that approach was that the State benefited from all activities within its jurisdiction and was therefore liable for any transboundary harm they might cause. That was confirmed by the Special Rapporteur in the report (*ibid.*, para. 62), where he also argued that private-law remedies failed to guarantee prompt and effective compensation. Even if true, that was not a legal argument in favour of State liability.

55. The Commission currently had under consideration two reports on similar topics, namely international watercourses and international liability, with one offering exclusively private-law remedies in the implementation part⁹ and the other relying solely on the liability of States. It was therefore reasonable to ask towards which concept State practice was leaning.

56. A review, even a cursory one, of conventions on liability showed that, with the exception of the 1972 Convention on International Liability for Damage Caused by Space Objects, no other instrument provided for the exclusive liability of the State. The Special Rap-

porteur rightly noted in the report that, in the drafting of that Convention, "strategic and security considerations prevailed over other considerations, especially economic considerations" (*ibid.*, para. 63). All the other conventions channelled liability to the operator—or owner or carrier, as the case might be—of the dangerous installation, and provided for compulsory insurance schemes and/or compensation funds. A few rare treaties provided for the civil liability of the operator combined with subsidiary or supplementary liability of the State of origin or flag-State. Only if the insurance or other financial securities provided by the operator proved insufficient did the State have to intervene. That was the system that applied in the field of the peaceful uses of nuclear energy. The overwhelming majority of treaties dealing with civil liability, from which the Special Rapporteur had borrowed many provisions, did not even provide for supplementary State liability. They set a maximum limit for claims and relied on compulsory insurance of the operator and on compensation funds. For instance, the International Convention on Civil Liability for Oil Pollution Damage (see para. 51 above) did not provide for State liability; nor did the 1984 IMO draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea (see A/CN.4/384, annex I) or the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels. Also, the diplomatic conference at which the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities had been adopted had rejected the idea of supplementary State liability and it was not sure that the protocol to that Convention concerning liability, which was still under consideration, would provide for a compensation fund, one third of which would be financed by States.

57. In the circumstances, he believed that it would be difficult, if not impossible, to provide for full compensation by the State of origin when that State was not itself the operator. That would mean that any State would be expected to pay compensation up to an unlimited amount for damage arising out of any of the activities falling within the very broad scope of the draft articles. Moreover, to make the State the sole subject of each and every claim for compensation would raise all cases of pollution to the inter-State level, regardless of their magnitude and particular circumstances.

58. Given the alarming state of the environment, however, and the growing threats to ecosystems and indeed to life on the planet, the Commission must find a way of resolving the contradiction between the private character of most hazardous activities and public responsibility for the environment.

59. The solution might be to define clearly the obligations of States and, where necessary, develop a method of compensation combining operator and State liability. The draft articles could, like article 139 of the 1982 United Nations Convention on the Law of the Sea, impose an obligation on the State to ensure that the operator complied with the safeguards established by the State in conformity with international standards and provided financial guarantees. Should it fail to do

⁹ See chapter III of Mr. McCaffrey's sixth report on the law of the non-navigational uses of international watercourses (*Yearbook... 1990*, vol. II (Part One), pp. 57 *et seq.*, document A/CN.4/427 and Add.1).

so, the State would run the risk of having to pay compensation itself if damage occurred. The draft could even go further than the United Nations Convention on the Law of the Sea and impose a duty on the State in which the harm or pollution had originated to bear such costs as were beyond the operator's financial capacity.

60. A system of mixed liability of that kind would require some changes in the draft, for example in article 28, but would not modify its general structure and thrust. The duties of the State of origin should also not give rise to any dispute. It would, of course, be necessary to add a definition of the term "operator" in article 2, of the kind embodied in all conventions on liability, and to define the liability of the operator in chapters IV and V of the draft. At present, the operator was a "ghostlike" entity in the draft. He was not mentioned in article 2 on the use of terms, or in chapter II on principles, but made his appearance by chance, as it were, in article 20 and in articles 26 and 27, followed by the words "as the case may be". His liability would therefore have to be defined. A system of mixed liability would also have to be implemented.

61. In addition to inter-State claims for compensation, the draft articles would have to impose a duty on the State of origin to ensure that its courts had jurisdiction to receive, on a non-discriminatory basis, claims against the operator or the State by foreign citizens who had suffered damage. In that connection, the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses had presented a text¹⁰ which the Commission might wish to use *mutatis mutandis* for the present draft, and it could also use the new draft article 10, on non-discrimination. To provide for a general duty on the part of States to ensure an equal right of access to domestic courts would be a significant step forward because, contrary to what was stated in the report (A/CN.4/428 and Add.1, para. 62), there were at present many obstacles which prevented private individuals who had suffered damage from instituting proceedings directly before the courts of a foreign State, even where States with very similar legal systems were concerned. Differences in national law, difficulties in presenting evidence and possible obstacles to access by foreign litigants meant that national courts were still an imperfect forum in which to resolve such disputes. The Chernobyl and Basel disasters had highlighted the existing gaps in the system, and that was an added reason for modifying and improving it.

62. In view of the extremely broad range of activities covered by the draft and of its universal character, the establishment of general and universal subsidiary State liability would be an almost revolutionary development. It would be a major contribution by the Commission to the progressive development of the law of State liability.

63. He was not convinced that it would be sound legal policy to deal with all transboundary harm at the level of inter-State relations. It would be more advisable to settle that kind of case, in so far as

possible, at the level of civil law and in accordance with agreed rules of private international law, reserving inter-State relations for disputes that could not be settled in that way. In order to implement such a system, States must ensure that their legal systems provided persons who had suffered damage with remedies that would enable them to obtain adequate compensation from the operator for any significant damage caused by the operator's activities. The liability of the State would come into play when adequate compensation could not be ensured through the civil-law channel and would be met by means of a guarantee, insurance or fund system or by means of an agreement reached between the States concerned for the payment of a lump sum.

64. With regard to prevention, he welcomed the simplified procedure envisaged in chapter III of the draft, but doubted that articles 11 to 20 were sufficiently precise to cover the different aspects of prevention in the context of State liability. The Commission was faced with various kinds of phenomena, which were quite different from each other. There was, first of all, prevention of accidents and harmful effects caused in the course of normal operations, such as chronic pollution of water or the air as a result of normal human activities; there were measures designed to prevent, in so far as possible, accidents caused by hazardous activities; and there were the reasonable preventive measures that were taken after an incident had occurred to minimize damage or prevent further damage, including measures to minimize harm by reducing pollution. He agreed in principle with the definition of preventive measures contained in subparagraph (*m*) of article 2, but considered that it should be improved so as to cover, in clear terms, measures taken against damage caused by chronic pollution.

65. Furthermore, draft article 11 contained a reference to article 1, but still focused on planned activities and related to potential transboundary harm. The procedure provided for in chapter III would therefore be meaningless when it came to minimizing harm or reducing pollution. Even in the case of potential transboundary harm, it had no relation to activities involving risk as defined in article 2. He appreciated the Special Rapporteur's attempt to delimit the scope of the draft by defining hazardous activities by reference to dangerous substances, but that attempt would be ineffectual if there were no consequences with regard to the obligation to take preventive measures. He did not hesitate to conclude that damage caused by an accident which resulted from non-compliance with the provisions on prevention should give rise to responsibility and might justify a claim to stop the activity in question.

66. In his view, chapter III should distinguish between measures to prevent an accident caused by activities involving risk, measures to minimize harm after an incident had occurred and measures to combat the harmful effects of pollution. Such a distinction would allow for a further differentiation in relation to procedures and consequences in the case of violation.

67. Finally, unilateral preventive measures, which were the subject of draft article 16, should come at the

¹⁰ See footnote 9 above.

beginning of chapter III: they were not just intermediate obligations. He favoured the retention of the examples given in article 16 because they demonstrated what should be understood by the liability of States before questions of compensation for damage arose. There again, however, it was doubtful whether a reference to article 1 was sufficient. The Special Rapporteur had not drawn any legal consequences from the list of dangerous activities, but that should be an essential element of the draft.

68. Mr. BEESLEY said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) had been the subject of three differing interpretations. According to one, he had shifted the basis for liability from harm to risk; according to another, he had not done so; and according to yet another, he had followed a middle course. What was the Special Rapporteur's view on the matter?

Organization of work of the session (concluded)*

[Agenda item 1]

69. The CHAIRMAN, introducing the recommendations of the Enlarged Bureau, said that, as was apparent from document A/CN.4/L.444, the Drafting Committee had at the present session dealt with 16 of the 28 draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading in 1986. Since the Commission would not be in a position to conclude the second reading of the draft articles before the end of the session, the question had arisen of the way in which the partial, though substantial, results achieved by the Drafting Committee should be reported to the plenary Commission and to the General Assembly.

70. Accordingly, the Enlarged Bureau proposed that the Chairman of the Drafting Committee should, as was customary, make an oral presentation of the articles prepared under his chairmanship and indicate that, as the second reading of the draft articles had not been concluded and important provisions were still pending, a detailed discussion of the articles adopted so far by the Drafting Committee on second reading would not serve any useful purpose. It was, however, understood that those members of the Commission who considered that it would be useful for statements of a general nature to be made on the orientation of the work would be able to do so. At the present session the Commission would not adopt any of the articles proposed by the Drafting Committee, and would simply take note of the oral report of the Chairman of the Committee.

71. If those arrangements met with the Commission's approval, he understood that it was the intention of the Rapporteur to include in the relevant section of the Commission's report on the present session a passage informing the General Assembly of the stage reached by the Drafting Committee and explaining that the Commission had considered it preferable to postpone a decision on individual articles until the entire set of articles proposed on second reading was before it. The

report would add that, for that reason, the Commission was not submitting any articles to the General Assembly at the current stage, but that it expected to present a complete set of draft articles to the General Assembly at its forty-sixth session.

72. Mr. KOROMA said that he had no objections to the proposed arrangements. However, since the composition of the Commission was to be renewed at the forty-sixth session of the General Assembly, he wondered how the Commission could accommodate the suggestions and comments that would certainly be made by representatives in the Sixth Committee of the General Assembly when the draft articles as a whole were referred to it.

73. The CHAIRMAN said that the Enlarged Bureau had considered that question but had none the less decided that it would be preferable to refer the draft articles as a whole to the General Assembly. If there were no objections, he would take it that the Commission agreed to adopt the arrangements proposed by the Enlarged Bureau.

It was so agreed.

74. The CHAIRMAN said that, as a result of those arrangements, a number of meetings originally reserved for consideration of the draft articles on jurisdictional immunities were available for other purposes. The Enlarged Bureau therefore recommended that the Commission should adopt the timetable for the next two weeks that had been circulated to members. If there were no objections, he would take it that the Commission agreed to adopt the proposed timetable.

It was so agreed.

The meeting rose at 1.05 p.m.

2184th MEETING

Monday, 2 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

* Resumed from the 2151st meeting.