

Document:-  
**A/CN.4/SR.2222**

**Summary record of the 2222nd meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1991, vol. I**

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87. Mr. JACOVIDES said that he supported the draft resolution and that all members of the Commission could not but recognize the excellent work done by Mr. Ogiso.

*The draft resolution was adopted.*

*The meeting rose at 1.05 p.m.*

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## 2222nd MEETING

*Tuesday, 11 June 1991, at 10 a.m.*

*Chairman:* Mr. Abdul G. KOROMA

*Present:* Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/437,<sup>1</sup> A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR<sup>2</sup>  
(continued)

1. Mr. JACOVIDES, congratulating the Special Rapporteur on the progress achieved in a difficult and challenging area of the law, said that there was sufficient agreement on the underlying principles to enable the Commission to finalize its work on the topic. The final form the draft should take, whether a convention, a code of conduct or some other form of legal guidelines should none the less be decided later, in the light of the views of Governments expressed at the General Assembly or in their written comments. It would also be useful if the results of the Commission's endeavours, and in particular the draft articles prepared by the Special Rapporteur and referred to the Drafting Committee, could be presented to UNCED, to be held in Brazil in 1992. In that way, the

Commission would make a contribution to the global efforts to protect the environment, something which deserved high priority in the United Nations Decade of International Law. In voicing that opinion, he was in no way underestimating the continuing difficulties that would have to be faced. The questions of methodology would, for instance, have to be tackled and an overall assessment made of the status of the item, of the direction it should take, and of the pace at which work should proceed. The approach might not be orthodox, but, then again, neither was the topic, for it was concerned more with progressive development than with codification of the law and should be examined accordingly.

2. One positive element was the response by the Sixth Committee to the two policy questions raised in the Commission's report on the work of its forty-second session.<sup>3</sup> The Commission might wish on the basis of that precedent to put to the General Assembly further policy questions: the resulting interaction between the two bodies would be particularly appropriate in such a new area of the law. That did not, of course, mean that the Commission could simply pass on its responsibility to the General Assembly. There was much legal material and State practice, and also many treaties, particularly regional treaties, which were of relevance to the topic and should be studied first.

3. The Special Rapporteur had rightly urged the Commission to concentrate not on the draft articles he had submitted earlier but on certain important issues. The first of them, a decision on the nature of the instrument could, as the Special Rapporteur had stated at a previous session, wait until coherent, reasonable, practical and politically acceptable draft articles had been developed,<sup>4</sup> after which the Commission could consider whether to recommend that the articles should be incorporated in a draft convention or in some other legal instrument.

4. With regard to the title of the topic, he saw merit in using in the English version the words "responsibility and liability" and in replacing "acts" by "activities"; that would more closely reflect the broadening of the scope to encompass activities involving risk and activities with harmful effects. The fundamental principle underlying the topic was acceptable, though the drafting of certain articles should be re-examined.

5. As to the procedural obligations regarding prevention, the obligation of due diligence should be "hard". Also, in the absence of some form of dispute settlement under Article 33 of the Charter of the United Nations, a compulsory system for the settlement of disputes should be introduced. As he had long advocated, a comprehensive system of third-party dispute settlement must form an integral part of any treaty if the rule of law among nations was to acquire real meaning.

6. The aim with regard to responsibility and liability should be to provide for State responsibility for breach of due diligence and for original State liability where it

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<sup>1</sup> Reproduced in *Yearbook... 1991*, vol. II (Part One).

<sup>2</sup> For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook... 1990*, vol. II (Part Two), chap. VII.

<sup>3</sup> *Yearbook... 1990*, vol. II (Part Two), para. 531.

<sup>4</sup> *Yearbook... 1987*, vol. II (Part Two), p. 49, para. 192.

was not possible to determine individual liability because those who had committed the damage could not be identified. Wherever possible, there should initially be redress against the private individual who was responsible and the State should have only residual responsibility. Liability should be extended to cover the "global commons", as part of the broad objective of protecting the environment. Given the diversity of views on the matter, however, it would be wise to defer a decision until the subject had been further developed. Lastly, the Commission owed it to the international community and to itself to chart its course and it should seek, with the General Assembly's guidance on policy issues, to provide the Special Rapporteur with the basis on which to continue his work.

7. Mr. MAHIU noted that, in the seventh report, the Special Rapporteur had departed from the usual practice of carrying out an article-by-article analysis and had opted for the method of overall review, first drawing attention to the major problems, then suggesting possible solutions and, finally, seeking some pronouncement from members on the subject. He fully understood the Special Rapporteur's concern to remove any doubts or ambiguity which, if not cleared up, at least in large measure, might prevent the Special Rapporteur and the Commission from establishing the basic elements of the work of codification. That would be particularly unfortunate after 10 years of endeavour. The drawback to the new method was that it could none the less give rise to misunderstanding and cause the general debate to be reopened, something the Special Rapporteur had warned against (2221st meeting).

8. He would be grateful for clarification of the somewhat enigmatic statement at the beginning of the report to the effect that the Special Rapporteur's task was to try to offer alternatives to make viable a possible negotiation, perhaps at a later stage of the development of the topic. He wondered what negotiation the Special Rapporteur had in mind, and in what context and at what stage in the work on the topic it would take place.

9. In an informal paper circulated among members,<sup>5</sup> the Special Rapporteur had indicated the main issues on which he sought the Commission's response. The first question concerned the nature of the instrument, in which connection the Special Rapporteur considered a solution would be premature at that stage and had stated in his report that it was neither possible nor desirable to anticipate the action of the General Assembly. It was quite true that, when it came to deciding whether the instrument would eventually take the form of a binding convention or some other legal form, the General Assembly would have the last word. It was true, too, that when work on the topic had started it had not been thought opportune for the Commission to concern itself with the precise nature of the draft. As the Special Rapporteur had stated at the time, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles, on the basis of criteria

<sup>5</sup> This paper, which summarized the issues raised by the Special Rapporteur in his introductory statement made at the 2221st meeting, was not issued officially as a document of the Commission.

that were scientific, identifiable and logical.<sup>6</sup> Yet the Commission had been working on the topic for 10 years and States themselves had now entered the discussion; they fell into two broad groups, one favouring a binding instrument and the other favouring a code of conduct or set of directives. Perhaps it was time to ask whether the nature of the instrument could have a decisive influence on the progress of the present work. Furthermore, since the Commission was engaging in an overall assessment of the most controversial points in particular, it should be able to determine the degree of acceptability of the draft and hence of its nature. If the Commission was moving in the direction of a binding instrument, the contents and scope of the draft would increasingly lean towards the establishment of the minimum obligations for States: the draft would have to have a low profile, as it were, in order to be politically acceptable. In other words, the Commission would realize that there were bounds that could not be crossed.

10. If, however, the Commission was moving towards the more flexible form of a code of conduct, the content and scope could be more ambitious and new rules that took account of technological progress, the dangers and the challenges, could be evolved. At the present time, the Commission seemed to be thinking more in terms of a binding instrument, which explained the underlying controversy and the difficulty in finding solutions to the main issues. If the position of members on the main issues was determined by the nature of the instrument, would it not be more logical to have a thorough discussion and draw the necessary conclusions rather than to allow any misunderstanding to persist?

11. The second question concerned the scope of the draft. He agreed that it should deal with activities rather than acts, and that the English version should be brought into line with the other language versions, which spoke of "activities". What, however, were the activities in question? Once again, opinions were divided, and the Commission would have to make a choice. It had been suggested that there were three types: activities involving risk; activities with harmful effects; and hazardous activities, as well as a possible fourth category, activities involving unforeseeable harm. In fact, there could never be an exhaustive list because of the infinite variety of activities, and the Commission should not make the mistake of trying to provide for every situation. For the purposes of the draft, there were only two types of activity: those involving risk and those with harmful effects, since hazardous activities were but one component of activities involving risk. Activities involving unforeseeable harm could not be counted as a fully separate category because they necessarily had some link with the others. The two concepts of risk and harmful effects were therefore sufficiently flexible to cover any regime to redress harm suffered in one State by reason of activities carried out on the territory of another State, and the draft should be built around them. As work on the topic progressed, the Commission should consider whether the two groups of activity were sufficiently close to come under a single legal regime or whether the differences justified separate sets of rules. In his view, there were rules common to the

<sup>6</sup> See footnote 4 above.

two kinds of activity but that did not preclude a few rules specific to each activity. In other words, there should be a common basic regime and it would probably be necessary to take account later of any special features linked to risk or to harmful effects.

12. The third question concerned prevention, an area in which the Commission was concerned with primary rules, namely, with setting forth the obligations incumbent on States with respect to activities undertaken on their territory. In that connection, the Special Rapporteur had identified two types of obligations. The first type involved procedural obligations under which the State of origin was required to assess the transboundary impact of its activities and subsequently notify or consult the State that might be affected by the risk or harmful effect. Establishment of those procedural obligations perhaps was the most fundamental aspect of the draft. Since the activities in question were not prohibited by international law and States were thus free to act without external interference, the States that were potentially in danger remained unaware of any risk or harmful effects until such time as actual harm had occurred. In consequence, those States had no possibility of making preparations; they could act only when the harm was actually taking place, in other words, when it was already too late. With all due respect to the notion of State sovereignty, such an inequitable arrangement seemed difficult to accept. Appropriate procedures were therefore needed to enable the State involved to be aware of potential risks. Yet, implicitly, any procedures established for notification or consultation would not prevent States from carrying out their activities. In his opinion, the principle of establishing such procedures was beyond doubt. The point was to find a means of reconciling the State's obligations with its right to undertake any activities not prohibited by international law, but ensure at the same time the protection of States at risk. Such a compromise would not be easy to achieve and would require on the part of the Commission an approach that was both creative and realistic.

13. The second type of obligation consisted of legislative and administrative measures designed to minimize risk and harmful effects. In general, most activity that might involve risk or give rise to harmful effects was already regulated by States, and further obligations were not necessary unless the objective was to harmonize the existing prevention norms or make them more rigorous. In that case, new constraints would be needed, including the possibility of prohibiting an activity, something that raised two issues: the threshold above which the affected State could request prohibition of an activity and the mechanism by which disputes between the State of origin and the affected State with regard to the threshold could be settled.

14. It was not clear whether such a threshold could apply to activities involving risk. Needless to say, harmful effects above a certain threshold were unacceptable and should lead to prohibition, but it was difficult to imagine prohibition of an activity solely as a function of risk. In that domain, there might be a distinction between activities involving risk and activities with harmful effects. The establishment of a threshold could be based on an agreement between the States concerned or on interna-

tional norms. Failing that, and if prohibitions were limited solely to activities with harmful effects, ways and means would have to be envisaged of settling disputes.

15. The issue of reparation involved determining whether the victims should seek compensation from the State on the territory of which the harmful activity was taking place or from the operator, i.e. the person carrying out the activity. There were, in theory, three possible solutions: (a) sole liability on the part of the State; (b) sole liability on the part of the operator; or (c) joint liability, where the State had primary liability and the operator had residual liability or vice versa.

16. The solution assigning sole liability to either the State or the operator was difficult to accept and could in some cases mean no reparation. Article 3 of the draft signified that a State was not responsible for a private activity where it might, in good faith, be unaware of the risk or the harmful effects. For example, many States, including the most developed, had been unaware for a number of years of the final destination of some of their waste products. In such cases, victims had not been able to seek redress from the State of origin and had been unable to obtain compensation. The solution assigning sole liability to the operator also had drawbacks: the harm might be so substantial as to result in insolvency on the part of the operator, thus leaving the victim without adequate compensation or even with no compensation at all.

17. The equitable solution was therefore a type of joint liability, but it was still to be determined whether primary liability should be assigned to the State or to the operator. In making such a determination, account should be taken of whether or not the State had had obligations and of the type of activity that had caused the harm. State obligations were essentially those of prevention; therefore if the State had failed to respect one of those obligations, and harm had resulted from that fact, the State should bear primary responsibility. The draft articles supplemented those on State responsibility for wrongful acts. However, the present draft differed from the other one in two ways: the State of origin was liable only if harm had actually occurred and the operator was assigned residual responsibility.

18. Where there was no failure by the State to respect its obligations, primary responsibility should be assigned to the operator. The State should then be assigned residual responsibility, in particular in the case of partial or total insolvency on the part of the operator. In general, it was for States to take any additional measures necessary to regulate the relationship between the State and operators with respect to liability.

19. In conclusion, it was time for the Drafting Committee to begin its work on the articles, so that the general debate could come to an end and give way to an approach that would lend concrete shape to the ideas proposed thus far. He hoped that, at the next session, the Special Rapporteur would focus solely on the chapter on prevention and, in so doing, would review existing conventions and State practice, thus enabling the Commission to produce a final chapter. At UNCED in 1992, the Commission should demonstrate its interest in environmental issues by offering a review of its work on inter-

national liability and on the non-navigational uses of international watercourses.

20. Mr. BEESLEY said that, for the moment, he wished not to embark on substantive matters but to congratulate the Special Rapporteur on the flexibility and open-mindedness with which he had always approached the topic and which was reflected in the seventh report. The two statements that the Commission had just heard would provide an excellent foundation for its work.

21. While some considered the topic to be a new branch of law and one that had burst on the scene unexpectedly, he had never viewed the matter in that fashion. There were, in fact, a wide variety of relevant precedents to be found in both conventional and customary law. Grotius might well be regarded as the first environmentalist, as the term had come to be understood, when he had said that the seas could not be exhausted by any of the means known to man. The ensuing debate had led to the establishment of one of the fundamental principles of international law, namely, the freedom of the high seas, linked with the concept of a circumscribed State sovereignty extending in ocean space to a relatively narrow distance from the shore. With certain exceptions, that system of law had been in use for some 300 years. Implicit in Grotius' statement was the notion that, if the oceans could in fact be exhausted by man's activities, then those fundamental principles needed to be re-examined.

22. Some members of the Commission had been involved for many years in an attempt to elaborate new rules of law in that field which were not based on the either/or concept of freedom of the high seas or State sovereignty. In his opinion, the new law-of-the-sea convention was based on the concept of rights and duties that went hand in hand—the hallmark of any system of law, however primitive or sophisticated it might be.

23. The Commission had been considering the topic of international liability for the past 10 years. Everyone was in agreement that the topic did encompass some principles of environmental law, either those that already existed or those that needed to be elaborated. A frequently cited principle was one that stated that the innocent victim should not be left to bear the cost. It was a sound principle and one he endorsed, yet it was neither a new idea nor adequate. If the Commission was genuinely concerned about the innocent victim, it needed to go beyond that principle, and he believed that it had, in fact, already done so, regardless of the debate on whether liability should be founded on appreciable harm or foreseeable risk.

24. In attempting to set down principles of international liability, the Commission had not only to take into account past precedents and contemporary thinking but also look to possible problems in the future. Noteworthy among the established decisions and principles were the *Trail Smelter*<sup>7</sup> case, for which the first decision had been handed down in 1938; the *Lake Lanoux* case,<sup>8</sup> which was

cited by some as having environmental consequences and for which a decision had been handed down in 1957; the 1958 Convention on the High Seas, which contained some provisions the sole purpose of which had clearly been to embody environmental principles; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water;<sup>9</sup> the Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies;<sup>10</sup> and the current draft Code of Crimes against the Peace and Security of Mankind.

25. The Commission should be very clear about its objectives: was it attempting to establish the principles which led to liability or was it addressing the circumscribed subject of limiting liability? Most likely, it would have to achieve both objectives. In its thinking on the topic of liability, the Commission would do well to return to basic concepts. It was difficult, for example, to improve on Stockholm Principle 21, of 1972,<sup>11</sup> which in his view reflected customary law as it had existed at the time. The principle had been the subject of intense debate; it had finally been unanimously approved at the Stockholm Conference on the Human Environment and subsequently endorsed by the United Nations General Assembly. Principle 21 had been linked with Principle 22: Principle 21 had postulated the responsibility of States not to damage the environment of their neighbours, and Principle 22 that States should cooperate so as to develop both substantive and adjectival law.

26. As a contribution to UNCED, to be held in Brazil in 1992, the Commission might wish to reaffirm Principle 21 and to remind the Conference that the principle had formed the basis for the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, concluded in 1972, and that Principle 21 and the Convention had been the basis for Part XII of the United Nations Convention on the Law of the Sea. Principle 21 could then be assessed and, if found appropriate, might provide a basis for elaborating further principles.

27. It would not be in the interest of the Commission to say that it was starting anew. Rather, it had to take earlier environmental jurisprudence into account. Climate change, for example, had been a matter of concern for nearly 20 years. One of the recommendations of the Stockholm Action Plan for the Human Environment<sup>12</sup> was that Governments should carefully evaluate the likelihood and magnitude of the climatic effects of planned activities and should disseminate their findings to the maximum extent possible before embarking on such activities. Another recommendation was that Governments should consult fully with other interested States when activities carrying the risk of such effects were being contemplated or implemented. The issue of climate change had even been referred to in treaty instruments, among them, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Other treaties and draft codes also

<sup>7</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>8</sup> *Ibid.*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*

<sup>9</sup> United Nations, *Treaty Series*, vol. 480, p. 43.

<sup>10</sup> *Ibid.*, vol. 610, p. 205.

<sup>11</sup> See 2221st meeting, footnote 6.

<sup>12</sup> *Ibid.*

contained provisions relevant to environmental issues. In short, the task of the Commission was to select principles relating to the environment, on the basis of earlier precedents in both treaty and customary law, rather than to assume that there was no existing law.

28. The CHAIRMAN said that, although normally reluctant to speak from the Chair as a member of the Commission, he wished to do so now in response to the questions raised by the Special Rapporteur and in view of the fact that the present quinquennium was drawing to a close and it was appropriate for each member to make his views known on every topic.

29. Without wanting to reopen the debate on issues which went back over 10 years, he thought the time had come to formulate certain basic principles for submission to the Sixth Committee and eventual transmission to the Rio Conference. In that regard, it was regrettable that the Special Rapporteur had not been more bold, assertive and categorical in his latest report. The question of the title of the topic was one point on which the Commission could reach a clear-cut decision without delay. It seemed beyond doubt that the English should be aligned with the other language versions, so that the title should read: "International liability for injurious consequences arising out of activities not prohibited by international law", a change that could in fact have been made sooner. Again, there seemed to be general agreement on the question of the distinction between responsibility and liability. There was a school of thought, outside the Commission, which held that the present topic was not fundamentally different from State responsibility, but the Commission had maintained all along that the two topics were distinct and separate. State responsibility was primary responsibility, whereas liability was secondary or residual responsibility which arose in the event of a breach of the primary responsibility. To go back on that definition would, in his opinion, merely cloud the issue.

30. Another area in which a conclusion could and should be reached was the issue of risk and harm. No one denied that risk played a part in determining harm, but risk alone could not form the basis of liability, which did not arise unless harm had been caused. The same applied to the test of foreseeability; in his view, which he understood to be shared by the Commission as a whole, foreseeability alone did not constitute a basis for liability: it entered into play only if harm had been caused.

31. As to the question whether, in some cases, States should not be held liable for private acts committed in their territory, if an individual was responsible for harm caused it was for the domestic regime to settle the matter between that individual and the State, whether through insurance, a lump-sum payment or some other method. But the topic under consideration was international liability, and it seemed clear that the victim State should not be placed in a position in which it had to conduct investigations to determine who was responsible and who should be sued. The State in which the harmful activity took place should be held responsible in all cases. Lastly, he could not fail to stress the continuing relevance and validity of the principles enunciated in the *Trail Smelter* case.

## Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 8]

### STATEMENT BY THE CHAIRMAN OF THE PLANNING GROUP

32. Mr. BEESLEY, speaking as Chairman of the Planning Group, proposed that the Group should consist of the following members: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Roucounas and Mr. Tomuschat, with Mr. Pawlak (Chairman of the Drafting Committee), attending meetings *ex officio*. Mr. Arangio-Ruiz had indicated that he did not wish to be considered a member of the Group, but would probably attend its meetings. The Group's meetings would in fact be open-ended and all members of the Commission were welcome to participate.

33. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the proposed membership.

*It was so agreed.*

34. Mr. BEESLEY said that a list suggested for inclusion in the Planning Group's agenda would be circulated shortly. A summary of the discussion on each topic had been prepared with the assistance of the secretariat. The list was not intended for submission to the General Assembly, but might be of use to the newly constituted Commission during the next quinquennium.

*The meeting rose at 11.35 a.m.*

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## 2223rd MEETING

*Wednesday, 12 June 1991, at 10 a.m.*

*Chairman: Mr. Abdul G. KOROMA*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.*

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