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A/CN.4/SR.2223

Summary record of the 2223rd meeting

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

Extract from the Yearbook of the International Law Commission:-
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. Jacobides, 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.

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. FRANCIS said that, before commenting on the important issues set out in the informal paper circulated by the Special Rapporteur to the members of the Commission, he wished to make a few remarks, first, on the Commission’s mandate and the way in which it should pursue its work and, secondly, on how he saw the matter.

2. It was certainly no mere chance that the Special Rapporteur’s seventh report opened with a footnote referring to paragraph 450 of document A/CN.4/L.456, which summarized the position of the Sixth Committee of the General Assembly on the working methods adopted by the Commission for its consideration of the topic. That paragraph, after referring to the efforts of successive Special Rapporteurs since 1978 to develop a schematic outline and produce draft articles on the topic, stated that, in the interest of the progressive development of the law, the Commission had developed its study in directions which had been scarcely imaginable in 1978 and had increased its scope to such an extent that completion of the work seemed a distant prospect. The message was clear and it did indeed appear that the Commission had departed from the general mandate the Sixth Committee and the General Assembly had originally had in mind. The Special Rapporteur, of course, was not to be castigated on that account: the criticism, which was couched in measured terms, was addressed to all members of the Commission who had contributed to that state of affairs or who had allowed it to happen. Now that everyone had had the chance of expressing his views, however, the Commission should redefine its objectives and endeavour to respond to the General Assembly’s expectations by presenting it with an overall review of the status of its work on the topic and an indication of the direction it intended to take in the future, in accordance with the wish expressed by the Sixth Committee.

3. So far as his personal expectations as to the basic premise on which the articles should rest were concerned, he would take as his point of departure article 35 of part 1 of the draft articles on State responsibility.

4. That article seemed to him to be the genesis of the whole exercise of responsibility, for it stated—albeit in different terms—that it was not necessary that the act of a State should be wrongful for the question of compensation to arise. That being so, the Commission must make a clear distinction, in its work, between activities not prohibited by international law and the wrongful acts that formed the basis for part 1 of the draft articles on State responsibility except, of course, for one particular case: lawful acts carried out with the deliberate intention of causing transboundary harm, which would therefore no longer be lawful acts, but would become wrongful acts and thus engage the international responsibility of the author State.

5. With regard to procedural obligations, including those relating to information, negotiation, notification and prevention, the Commission should stay within the domain of soft law. It was compensation that should constitute the quintessence and ultimate purpose of the draft articles. Only when the State failed to effect compensation should its international responsibility be incurred. It was, of course, apparent from the history of the Commission’s work on the topic that the previous Special Rapporteur had initially ventured into the realm of responsibility in the broad sense of the term and of the primary obligations attaching thereto, but he had very soon been overtaken by events.

6. Turning to the important issues listed in the Special Rapporteur’s informal paper, he agreed that the Commission should not be in any hurry to give a particular form to the draft articles.

7. As to the title of the topic, he was not convinced that it would be advisable to opt for the word “activities” rather than the word “acts”, though he was ready to go along with a consensus on the matter. If reference were again had to the draft articles on State responsibility, it would be noted that the word “act” was used throughout the text. It had been logical to move on from the area of wrongful “acts” to that of lawful “acts”. But to refer now to activities, including activities carried out by entities other than the State itself, rather than to acts of the State seemed to him to involve a shift in meaning and a departure from the mandate laid down by the Sixth Committee.

8. With regard to the scope of the draft articles, he considered, again in the light of the Commission’s mandate, that there was no need to categorize the activities. The Commission could adopt a simpler approach, for what mattered in the final analysis was damage and compensation for damage. He was satisfied at the decision not to draw up a list of substances and at the emphasis placed on prevention. He also considered that the draft should include a general article on dangerous activities which would emphasize that aspect of the matter.

9. He noted that the Commission had already drafted articles on the principles—the next point in the Special Rapporteur’s informal paper—and was particularly interested in what Mr. Beesley had said in that connection (2222nd meeting).

10. With regard to liability, the State should, in his view, have only residual liability. Also, the articles should not be too detailed and should not go so far as to spell out what States would have to do in such matters as prevention. A State which had recognized that it had an obligation should be able to determine how it complied with that obligation.

1 Reproduced in Yearbook ... 1991, vol. II (Part One).
2 For outline and texts of articles 1-33 proposed the Special Rapporteur, see Yearbook ... 1990, vol. II (Part Two), chap. VII.
3 See 2222nd meeting, footnote 5.
4 For text, see Yearbook ... 1980, vol. II (Part Two), p. 61.
11. In the case of the obligation to compensate, a procedure should be found whereby interested parties themselves would be able to seek satisfactory remedies. Only when the remedy was not forthcoming should the State become involved.

12. He did not support the proposal of the Special Rapporteur to leave the question of the "global commons" in abeyance. The problems and preoccupations of developing countries regarding the environment were also indicative of their concern over the "global commons", a subject which did not, in his view, come within the framework of the draft articles. Nevertheless, the Commission, as the principal codification organ of the United Nations, could not afford to do nothing—given that the Sixth Committee of the General Assembly had drawn its attention to the matter. The very least the Commission could do was to take the initiative in suggesting to the General Assembly the need for urgent co-ordinated action, which could be pursued in two stages, first, by recommending that an expert should be recruited to the Codification Division of the Secretariat to do the necessary preliminary work, and, secondly, by referring the matter to the Commission at the appropriate time for it to be pursued through the appointment of a Special Rapporteur. Naturally, there would be financial implications, but the importance of the matter warranted any such expenditure.

13. Mr. CALERO RODRIGUES said that, although the Sixth Committee had not followed up the idea put forward by one of the delegations in the General Assembly of inviting the Commission to submit a report to it on the state of development of the topic, such a document would be useful not only for the General Assembly, but also for the Commission. The Special Rapporteur had endeavoured to follow that suggestion in his seventh report. He was to be congratulated on having once again placed the emphasis on questions of principle in introducing his report and in his informal list of important issues. In his own view, therefore, it would not be very helpful for the Commission to concern itself for the time being with the articles grouped together by the Special Rapporteur.

14. Some members seemed to fear that the debate might be reopened. But why not reopen or simply continue it if a particular basic issue needed clarification, since the Commission had not reached the point of referring the articles to the Drafting Committee? Members should not hesitate to take a position on such basic issues, without, of course, reverting to points that had already been the subject of a detailed exchange of views.

15. He considered that the Special Rapporteur's idea of appointing a working group to synthesize in a report the status of the Commission's work on the topic and to indicate the direction it intended to take was interesting. He did not, however, think it necessary to prepare a document for UNCED, since the Commission had nothing concrete to propose.

16. He agreed that the Commission should be concerned with drafting coherent, reasonable, practicable and politically acceptable articles; that the factors or criteria chosen should be scientific, identifiable and logical, with the aim of improving international law and international agreements; and that, in the final analysis, the provisions would win support and compliance because of those factors and not necessarily because of the form in which they appeared. There was, however, one question relating to the nature of the instrument, which had not been dealt with in depth. In developing the elements of the schematic outline proposed by the former Special Rapporteur, Mr. Quentin-Baxter, the Special Rapporteur had tried to produce a complete and coherent set of rules, which, because of the very wide scope of the topic, were intended to be applicable to a broad spectrum of activities and situations. Many of those activities and situations, probably the most important ones, were already covered by specific international instruments and it seemed impossible to draw up the same type of rules for an instrument of general application. In his sixth report, the Special Rapporteur had explained that his first nine articles were the product of successive drafts which incorporated ideas from various quarters and he had admitted that, at times, the desire to remain true to those ideas had resulted in cumbersome and clumsy juxtaposition, which ought to be remedied. But how could such a shortcoming be remedied if the articles aimed to deal in detail with all the situations covered by the topic? The Commission should perhaps be more modest in its ambitions and limit the articles to the enumeration of principles or general rules, spelling out only the essentials and expressing certain rights and obligations in legal terms. Provisions of a procedural nature would then be reduced to a minimum, or could even be dispensed with, and the general outline of the instrument would not differ much from the one suggested by Mr. Quentin-Baxter.

17. He agreed that the title of the topic should refer to "activities" rather than to "acts". The Commission was already heading in that direction and, if the title was to be changed, now was the time to do it. However, he would interpret the word "activities" to include "acts" as well and he considered that transboundary harm caused by an isolated act came within the scope of the articles.

18. The scope of the articles was the most difficult problem facing the Commission. The starting-point should be the twofold idea of activities involving risk and activities with harmful effects. In the seventh report, the Special Rapporteur defined the former as those which have a higher than normal probability of causing transboundary harm—an unsatisfactory definition because it was not clear what was meant by "normal"—and the latter as those which cause transboundary harm in the course of their normal operation. In that connection, he drew attention to an error in the penultimate line of the English text, which used the words "or those which", whereas there was no alternative involved. In fact, there was something missing in that part of the report, which did not refer to the idea of a threshold. The Special Rapporteur also said that the two types of activities should be dealt with together, his argument being that limits to a State's freedom of action within its terri-

6 See 2221st meeting, footnote 7.
tory, cooperation, non-discrimination, prevention and reparation were principles applicable to both types of activity. That was correct if the Commission was dealing only with activities which were known to entail a risk of transboundary harm or which, as discovered after harm had occurred, involved an inherent risk of harm. The Special Rapporteur further mentioned a point of view which he himself shared, namely that the draft should be extended to cover unforeseeable harm. However, he would not go so far as to say that any transboundary harm must be compensated. In his view, only transboundary harm above a certain threshold should be taken into account.

19. He recalled that the topic had been included in the agenda as an “offshoot” of the topic of State responsibility and, in that connection, paragraph 83 of the Commission’s report on its twenty-first session stated that:

The Commission also agreed in recognizing the importance, alongside that of responsibility for internationally wrongful acts, of the so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities. However, questions in this latter category will not be dealt with simultaneously with those in the former category, mainly in order to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject. Any examination of such questions will therefore be deferred until a later stage in the Commission’s work.

The Commission had reiterated and developed the same idea in paragraphs 38 and 39 of the report on its twenty-fifth session. The topic had thus originated in the idea of compensation. In his preliminary report, however, Mr. Quentin-Baxter had added to that basic consideration the idea of prevention. In paragraph 9 of that report, Mr. Quentin-Baxter gave pride of place to prevention, relegating international responsibility as such to second place, and he personally found that unacceptable. Moreover, although the suggestion that the topic should be extended to questions of prevention had never been called into question in later years, it was open to doubt whether the Commission had ever actually decided that the primary aim of the draft articles should be to promote the construction of regimes to regulate the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects, as Mr. Quentin-Baxter had stated. In his seventh report, the Special Rapporteur had expressed the view that the topic should not be looked at exclusively from the standpoint of the harm produced. He himself was in agreement with that view and thought that transboundary harm should be the key element.

20. In any event, the draft articles had to deal with the problem of the injurious consequences which were sustained, or might be sustained, by a State as a result of activities conducted in another State. However, Mr. Quentin-Baxter, who had introduced the concept of prevention into the topic, had written in his third report two years later that:

... in relation to the establishment of regimes of prevention and reparation, all loss or injury is prospective; in relation to the establishment of an obligation to provide reparation, all loss or injury is actual. It might therefore be considered that, in the case of activities involving risk, the Commission was dealing with prospective harm, whereas, when harm had actually occurred, it was dealing with actual harm. Everything thus came down to a question of harm and it was therefore not at all strange that emphasis should be placed on the key role of that concept. He could nevertheless not accept the idea that the draft articles should leave aside certain types of harm—except, obviously, for harm arising from internationally wrongful acts—and that such harm should be compensated by virtue of the general principles of international law. To cover such harm, there was no need for the Commission to change the scope of the draft; it simply had to deal with prevention and compensation in different sections, as had already been done both in the schematic outline and in the articles submitted in Mr. Barboza’s sixth report. It was not true that the Commission could not do so because States would not agree; the Commission did not know what the reaction of States would be and, if the approach seemed to be a useful one, it should not be deterred by imaginary fears. The draft should therefore be very broad in scope and cover all types of harm, except for harm caused by a wrongful activity.

21. He had no objection to the principles embodied in the draft articles.

22. With regard to dangerous substances, he reiterated his view that a list would considerably limit the scope of the topic. The Commission had taken a major step forward in accepting the Special Rapporteur’s opinion that only physical transboundary harm should be covered, but it still had to settle the question of the threshold by qualifying the harm as “appreciable” or as “significant”.

23. As to prevention, he thought that the procedural obligations could either be further simplified or eliminated.

24. Referring to the relationship between responsibility and civil liability, he said that it might be tempting to include civil liability within the scope of the draft articles, but that was virtually impossible, since civil liability was governed by national systems of law. The Commission should therefore simply state in the draft that responsibility should be considered in cases where civil liability did not give rise to compensation. Thus, the Commission would not be transposing civil liability into provisions of international law, but it would not be excluding it from the draft altogether.

25. The question of harm to the “global commons”, was clearly important and needed to be considered so that rules in that area could be formulated. From the outset, however, the Commission had worked on the basis of the assumption that the harm to be dealt with was...
harm which was caused by activities carried out under the jurisdiction or control of a State and which arose "in the territory or in [places] [areas] under the jurisdiction or control of another State and was [appreciably] [significantly] detrimental to persons, [objects] [property], the use or enjoyment of areas or the environment" (art. 2, subparagraph (g)). It was true that, as stated by the Special Rapporteur, if there was no obligation under international law to compensate for harm to the environment in areas beyond national jurisdiction, then such an obligation should definitely be established. The question arose, however, whether the draft articles, as they currently stood, could encompass that type of harm. As it had been conceived, the topic dealt with harm caused to States. At the current stage, the Commission should perhaps recognize that the issue of harm to such areas should not be overlooked and decide to undertake a study of the matter when work on the current topic had been completed, subject to the approval of the General Assembly. It might even inform the General Assembly that it was ready to begin such an undertaking.

26. In order to sum up the principles which should be taken into account in preparing a report to the General Assembly on the question as a whole, he had drafted two texts which were in no way meant as drafting proposals but which dealt with prospective harm, namely, risk, and with harm as such, namely, actual harm. The texts read:

"Proposition 1 (Prospective harm = risk)"

"Where activities carried out under the jurisdiction or control of a State appear to involve significant risk of causing substantial physical transboundary harm, that State shall:

1. Assess the risk and the harm;
2. Take all possible measures within its power to eliminate or minimize the risk and to reduce the extent of the foreseeable harm;
3. Provide information to the potentially affected States and, if necessary, enter into consultations with them, with a view to establishing cooperation for the adoption of further measures with the same purposes.

"Proposition 2 (Harm = actual harm)"

1. Where substantial physical harm is caused to persons or things within the jurisdiction or control of a State as a result of activities carried out under the jurisdiction or control of another State, the former State is entitled to obtain from that other State compensation for damages, unless compensation has been obtained under applicable rules on civil liability of the States concerned.
2. The compensation should in principle fully cover the damage. However, the amount of compensation should be agreed upon by the States concerned, with recourse to determination by a third party if no agreement is reached within a reasonable time.
3. A reduction in the amount of compensation shall be considered, taking into account the elements and circumstances of the specific situation, including the relative economic and financial conditions of the States concerned."

27. Mr. PELLET said that, in introducing his seventh report, the Special Rapporteur had partially, but only partially, dispelled the perplexity he had felt when he had read the report; questions therefore remained about certain points.

28. First of all, he was not sure about the Special Rapporteur’s role. The Special Rapporteur claimed to be entirely neutral. Was that really true? Article 16 of the Statute of the Commission did not impose any such obligation: rather, special rapporteurs were mandated to give impetus to the drafts with which they were entrusted, not only by leaving several possibilities open, as a matter of course, but also by indicating the choices they preferred and the reasons for their preferences and for any doubts they might have. That was the philosophy of the codification and progressive development of the law. In any event, the Special Rapporteur considered himself to be neutral and it should be recognized that, in general, he was, but at the price of some vagueness, since, in the name of that neutrality, he was not suggesting any guidelines in relation to which the members of the Commission could define their positions.

29. Furthermore, despite his outright choice of neutrality, the Special Rapporteur provided some answers in his report to some of the questions in abeyance. For example, he seemed to be choosing between the two possible grounds for liability—risk or harm—by inviting the Commission to focus the topic on activities themselves, namely, on risk rather than on harm. In his own opinion, both approaches had advantages and disadvantages, but he was convinced in any case that a clear position should be taken on the issue, since liability based on risk did not give rise to the same consequences as liability based on harm. The Commission therefore had to make a choice. He was prepared to opt for risk, of which the Special Rapporteur seemed to be in favour, provided that the Commission followed the logic of that choice and the Special Rapporteur drew all the possible conclusions from it. That was not, however, always the case. As another example, the Special Rapporteur considered the possibility of bringing the procedural obligations into play only in the event that transboundary harm resulted. In that case, the concept of risk was replaced by that of harm. The same was true of what the Special Rapporteur had said, in introducing his report (2221st meeting), with regard to State responsibility and liability: his comments on that point seemed to indicate an approach based on harm rather than on risk.

30. As to the important issues on which the Special Rapporteur had asked the Commission to decide, he would not comment on the title of the topic, since that question did not affect the French version, and, as to the issue of the "global common", he referred to the statement he had made the previous year, adding that, like the Special Rapporteur, he believed that the issue was not ripe for detailed consideration at the current session.

31. With respect to the nature of the instrument to be drafted, he did not share what appeared to be the Special Rapporteur’s view that it was "urgent to wait". He be-
lieved that the Commission should take a stand immediately, since the wording of the draft articles would depend on the choice that was made. Moreover, that did not mean that that question always had to be answered in the same way; the different sections of the draft articles seemed to call for different solutions. It was therefore not necessary to take rigid positions on that aspect of the problem.

32. Recalling the position he had adopted at the preceding session, he said he continued to believe that, as positive law now stood, there were no specific or general rules concerning liability \textit{stricto sensu}, and reparation in particular, for transboundary harm caused by activities involving risk. That was clearly an area in which progressive development was the appropriate choice. The Special Rapporteur was also aware of that fact, as he was insisting that negotiations would be essential. However, the Commission was not the appropriate forum for such negotiations, for two reasons. First, it was composed of independent experts who, on their own, could not take decisions on such significant questions of principle. Secondly, the subject was both technical and, above all, extremely diverse, and although the Commission was free to call on outside expertise, as authorized under its Statute, it had rarely done so. For example, he did not think that acid rain posed the same problems as an accident such as the one at Chernobyl or that harm from acid rain could be compensated in the same way as harm caused by oil pollution. In that connection, he did not share the view of Mr. Mahiou, who, at the preceding meeting, had said that it would be enough to identify two types of activities: those which caused harm and those which were dangerous. In fact, the range of the latter activities was extremely varied and he strongly doubted, for example, that the uses of nuclear energy for peaceful purposes or the construction of a major dam could be covered by the same rules.

33. In his view, it would be reasonable for the Commission simply to propose standard clauses which States, if they found such clauses to be satisfactory, could incorporate into their treaties, domestic legislation or transnational contracts, but which would be adaptable enough to cover extremely different situations. Such a goal corresponded to two realities: States would be free to implement such rules, without being compelled to do so, and such rules would by their nature be adapted to very different types of problems. If those clauses were well designed and frequently used, they would then create a practice that might be codified at a later stage, although that did not seem to be possible at present.

34. The issue took on an entirely different aspect with regard to the obligation of vigilance, whether or not it was combined with the prevention procedure envisaged by the Special Rapporteur. On that matter, it would make sense to move ahead and, in the usual way, establish a genuine set of draft articles which could be turned into a convention, as necessary.

35. Those comments on the nature of the instrument provided a partial answer to the question of the scope of the draft articles. The duty of prevention related only to activities involving risk. The problem of reparation, which was connected with harm, arose in all cases, with regard both to activities involving risk and to activities causing transboundary harm. Since he himself was not in favour of codification in the area of reparation because he did not believe it possible, he considered that the scope of the draft articles had to be defined by reference to the concept of risk, on the understanding that risk was connected with the activity in question and that the use of certain substances was always only one of many factors of risk. In that connection, he was still sceptical about the possibility of drawing up an exhaustive list of dangerous substances. Like the Special Rapporteur, he believed that the Commission could propose an indicative list. Moreover, since he was opposed in principle to the idea of a convention containing examples, he would be satisfied with a list of examples in the commentary, but not in the form of an annex to the convention. If the Commission were to adopt another position, the list would then have to be exhaustive, be drawn up with the assistance of experts and have a mechanism for keeping it constantly up to date; that would make the instrument very cumbersome and would complicate the Commission’s discussions.

36. The nature of risk still had to be determined. All human activities involved risk, but the articles relating to prevention could certainly not be applied to just any type of risk. As the Special Rapporteur had pointed out, some delegations in the Sixth Committee would like the draft to apply only to exceptional risks. He himself could endorse that solution, but he did not believe that it would make for greater progress than using the idea of serious, significant, appreciable or grave risk. In any event, there was still the problem of the threshold and it arose both for risk and for harm. He would not go into detail, but drew the attention of the Special Rapporteur and the Commission to an article by Sachariew, in which the author, who did not take a definite stand, made a scholarly analysis of a sensitive problem that the Commission would have to solve.

37. With regard to the question of principles, it was important to give different treatment to cooperation, prevention and, if the Special Rapporteur so wished, non-discrimination, on the one hand, and to reparation, on the other, the first three principles being ripe for codification, while the fourth was not.

38. He recalled that he had spoken at length on prevention at the preceding session and had shared the view of those who found that the obligations provided for in the draft article proposed on that subject by the Special Rapporteur were too "soft". He therefore noted with satisfaction that the Special Rapporteur was considering the possibility of "hardening" it. The question was, however, how that would be done. If it was by imposing a strict obligation of conduct on the State in whose territory the activity involving risk was carried out by requiring it to take all the necessary precautions and penalizing...
it for its negligence in accordance with the case law resulting from the Trail Smelter decision, he would be in agreement, for the Commission would then remain within the realm of codification, with development being very gradual and very reasonable. He also agreed that there should be an obligation to inform the States that were particularly likely to be affected, even if that meant entering the realm of progressive development, for he did not think that positive law contained an obligation of that kind. He did not believe, however, that it was necessary to go so far as to make the authorization of the activity subject to consultation, negotiation or—more seriously—the agreement of the State or States likely to be affected: that would be tantamount to altering the very nature of the activity in question. The topic related to activities which were not prohibited by international law: that was the starting-point. If those activities were made subject to consultation, negotiation or prior agreement, they would become suspect and subordinated to a joint decision that would be hard to imagine.

39. He was thus not opposed in principle to the Special Rapporteur’s proposals concerning prevention, but not in the form of obligations. At the present stage, encouragement seemed to be the only reasonable solution: international cooperation could be provided for in the future convention, but in the form of something of which the parties were desirous. The case would then be one of substantive “soft” law because of its content. Alternatively, encouragement could take the form of a recommendation or it could be the subject of an optional protocol annexed to the future instrument. In the last two cases, there would be formal “soft” law because of the nature of the instrument embodying it. In all cases, no particular penalty would be envisaged if the State of origin had been vigilant enough and it should be all the more vigilant if the risk was greater. On that point, he agreed with Mr. Francis that the State had to be made to assume its responsibilities, but that the Commission should not take the place of the State and legislate for it.

40. In other words, he was in favour of a “hard” regime of prevention, but with flexible procedural obligations.

41. He reiterated his view that the question of responsibility and liability was not yet ripe for codification, at least in the form of a convention. At the current stage, he would merely indicate that, if it was really necessary to go as far as reparation, he would urge that the principle of the primary liability of the operator, regardless of the definition of that term, should be stated very strongly. The liability of the State could only be residual. In that connection, he did not share the view of Mr. Calero Rodrigues, who considered that the draft articles should not deal with civil liability. In his own view, the draft articles could and should state the principle of the civil liability of the operator, while making it an obligation of the State to organize that civil liability in its internal law. He also believed that the only feasible system would be to make it the obligation of the State of origin to take the necessary measures, as the Special Rapporteur himself had suggested. On that point as well, however, he doubted whether uniform rules were possible.

42. To sum up, he suggested that the Commission should propose to the General Assembly that the work should be divided into two parts. In the first stage, the Special Rapporteur would try to propose, as from the next session, a precise and complete set of draft articles on the duty of prevention, without necessarily dealing with the consequences of failure to perform that duty, because that would mean entering the realm of responsibility for internationally wrongful acts. That draft would, of course, be based closely on existing case law and on the conventions in force: on that point, he agreed with the comments Mr. Mahiou had made at the preceding meeting. In the second stage—or perhaps simultaneously, as long as the two things were kept separate—the Commission could try to formulate standard clauses relating to reparation, taking care to make the necessary distinctions on the basis of the categories of activities in question and the type and subject of the harm caused (human losses, economic damage, environmental harm).

43. He was surprised that, at the preceding meeting, some members of the Commission, in particular, Mr. Beesley and Mr. Koroma, had placed emphasis only on environmental protection. The liability of States for activities which were not prohibited by international law could, of course, be incurred in the event of harm to the environment and he was not unaware of the importance of that problem. He nevertheless believed that the Commission, in its wisdom, should refrain from bowing to fashion and that it should not forget that those activities could directly cause human or economic losses, of which the draft articles had to take account. It would be deplorable if the Commission were to concern itself exclusively with the problem of the environment, however serious it might be, on the pretext that it was now the concern of many of its members and of the international community.

44. Lastly, he was aware that the very principle of the draft articles was being criticized and that doubts were being widely expressed as to their value, but he did not share that pessimistic view, even if it was necessary to take account of the doubts and concerns that had been expressed. The overall review the Special Rapporteur had rightly invited the Commission to carry out should be an opportunity for firm and moderate decisions that would make it possible to achieve progress.

The meeting rose at 11.45 a.m.

2224th MEETING

Thursday, 13 June 1991, at 10.05 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,

17 See 2222nd meeting, footnote 7.