Document:-

A/CN.4/SR.2224

Summary record of the 2224th 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:-

1991, vol. I

it for its negligence in accordance with the case law resulting from the *Trail Smelter* decision,[17] 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 serious still—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.

[17] See 2222nd meeting, footnote 7.

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,

Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR[2] *(continued)*

1. Mr. BARBOZA (Special Rapporteur), noting that Mr. Mahiou (2222nd meeting) had raised the question of the precise meaning of the reference to "possible negotiation" in the seventh report and that Mr. Pellet (2223rd meeting) had alluded to the same passage in emphasizing the independent expert status of Commission members, said that the term "negotiation" was employed in its widest sense. As everyone was aware, the Drafting Committee was a convenient forum for dialogue between Commission members representing different positions, and discussions in the Committee—which could be described as negotiations *lato sensu*—had given rise in the past to useful compromise solutions. Of course, such discussions could not commit Governments, but inasmuch as the Drafting Committee's reports were approved in plenary meetings, the solutions in question did represent the opinion of the Commission as a whole. Other possibilities of negotiation in the widest sense were offered by the General Assembly. In that connection, he stressed how encouraged he had been by the concrete and satisfactory manner in which the Sixth Committee had answered the questions addressed to it on the present topic. Negotiations in that context meant the possibility of reaching agreement or at least of identifying a majority in favour of one or other of the alternatives which might be proposed in future.

2. As to a point raised by the Chairman in his statement made as a member of the Commission (2222nd meeting), he was grateful for the opportunity to explain once more that liability could in no circumstances be founded on risk. It could be founded solely on damage. That position had been adopted from the start and was clearly reflected in the draft articles and in the report. Risk was, of course, closely connected with prevention. A State in which an activity involving risk took place would be subject to certain obligations, in order, among other things, to minimize the risk of occurrence of actual damage; it would have to take certain procedural measures and impose obligations of due diligence on operators, enact the necessary laws and regulations to ensure that those obligations were adequately fulfilled, and enforce those laws and regulations through administrative or police action. There was no question of basing liability on risk; the issue of risk arose exclusively in connection with the scope of the articles.

3. Mr. BENNOUNA said that the very title reflected the exceptional complexity of the topic. In his opinion, the time for theorizing about the topic was over. By engaging in further discussions of an almost metaphysical nature, the Commission could only bring discredit on itself. What was needed was dialogue, followed by action. He had no doubt that adequate and innovative formulations would be found in the Drafting Committee. The topic was certainly ripe for such treatment. Everyone was agreed about its importance and about the strength and urgency of the demand for concrete proposals in the form of a framework agreement. Failing such proposals, the Commission ran the risk of being overtaken by other forums, such as UNCED, to which some contribution by the Commission should undoubtedly be made.

4. As to the issues raised by the Special Rapporteur in an informal note circulated at an earlier meeting,[3] like Mr. Pellet (2223rd meeting) he was opposed to the idea of leaving aside the question of the nature of the proposed instrument for the present. To attempt to regulate every aspect of the problem would, of course, be overambitious. The Commission should not embark on impossible tasks, such as drawing up a list of dangerous activities, for which it simply lacked the necessary technical expertise. It should clearly state that the draft in preparation was intended to be a framework agreement setting forth certain general principles for the guidance of States. He fully endorsed the view that the word "acts", in the title of the topic, should be replaced by "activities". In the matter of the scope of the draft, he was in favour of including activities involving risk and activities with harmful effects and of excluding a list of dangerous substances. There was no disagreement in the Commission on the principles set forth in the articles and he could see no reason why the Drafting Committee, busy though it was, should not tackle articles 1 to 10 forthwith.

5. He agreed that procedural obligations in the field of prevention, namely, not causing harm to others, and settling any disputes by peaceful means, were already established in general international law, but he saw no need for the draft to provide any sanctions in the event of non-observance of those obligations. The question of unilateral measures of prevention, too, was a matter of the implementation of general international law. The draft should set out the obligations in general terms, without attempting to go into the details of domestic legislation. On the question of the interrelationship between State and civil liability, he considered that international liability should always be viewed as the last resort. Civil liability should come first, the liability of the State coming into play only if the parties remained unsatisfied or if domestic law remedies had been exhausted. He agreed with the Special Rapporteur that to discuss the subject of the "global commons" at the present stage would be premature. Lastly, he reiterated that articles 1 to 10

[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

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

[3] See 2222nd meeting, footnote 5.

should be referred to the Drafting Committee as soon as possible.

6. Mr. TOMUSCHAT said that there was an urgent need for the Commission to know where it stood with regard to the topic under consideration. UNCED, to be held in 1992, afforded a welcome opportunity to assess what had been achieved so far and to plan future action. Like the Special Rapporteur, he would welcome it if the Commission could submit a set of coherent principles to the Conference, but he also agreed with Mr. Calero Rodrigues (2223rd meeting) that such a set of principles and rules should embody the Commission's finest intellectual virtues and should be innovative and unchallengeable.

7. He had grappled with the present subject for many years, but still did not find the Special Rapporteur's seventh report easy to understand, possibly because, well-drafted though it was so far as any specific point was concerned, the report was generally couched in abstract legal terms. Too little effort had been made to show what adoption of the draft articles would actually mean in terms of hard facts. Yet there was an obvious need to explain to the Sixth Committee and the public at large what the articles were all about. Anyone taking an interest in the topic should be able to learn without encountering major difficulties of communication. He was not proposing that the Commission should engage in a public relations exercise, but there was no denying the fact that, after so many years, the Commission could be called to account by the international community. It was therefore important to highlight the positive impact the proposed draft rules might have in the potential field of application. In that respect, he disagreed with Mr. Bennouna; a clear framework had to be established, and he failed to see how that could be done simply by drafting.

8. When the Commission, at its thirtieth session, in 1978, had begun its study of the topic by setting up a working group, environmental law had been largely undeveloped. Now there was an abundance of specific, but only partial, legislation, so that it might be asked whether the Commission's draft could still serve a purpose, and whether there were still any gaps requiring regulation by means of an overall instrument. The Special Rapporteur's seventh report avoided touching on that issue but did stress the need for new rules, without however identifying the relevant areas.

9. Many problems were inherent in the provision on scope. The Special Rapporteur rightly distinguished between two categories of activities, namely those involving risk and those which actually caused transboundary harm. Yet the categorization was not complete. For instance, it did not cover the construction of major works which could entail adverse consequences for a neighbouring State, such as building airports or high-speed motorways. Another question was whether the burning of fossil fuels constituted an activity involving risk. Under the definition in article 2 (*c*), it did not. On the other hand, it was certainly an "activity causing harm". However, the burning of wood, coal, oil and gas, as an activity carried out in every human society, called for specific rules.

10. The situation in the *Trail Smelter* arbitration,[4] where specific and clearly identifiable damage had been caused in the United States of America by a smelter in British Columbia, could not be treated in exactly the same way as the present situation in western Europe or in North America, in particular, where air pollution was omnipresent and could only be measured overall in millions of tons of sulphur dioxide. In the *Trail Smelter* situation, the focus was on the specific source of the noxious gases, but the general problem of air pollution could only be dealt with by introducing global quantitative limitations. States had in fact embarked on that course by pledging to reduce by agreed percentages the quantities of, for example, gases destroying the ozone layer.

11. The task faced by the Special Rapporteur was a formidable one, but it could be considerably facilitated by distinguishing more carefully between the different areas of application of the draft articles, and also between the different categories of acts and activities which needed to be taken into consideration. Only in that way could the Commission expect to win sufficient support for the draft. As long as Governments did not fully understand the scope of the draft articles, they would be reluctant to commit themselves.

12. Under the draft articles submitted by the Special Rapporteur, the legal relationships were conceived as being bilateral. The leitmotiv was: the affected State versus the author State. That approach, although not wrong in itself, needed to be brought up to date. In most fields of life today, international multilateral standards had become the relevant yardstick for measuring the acceptability of a given activity that might cause harm. Nuclear power plants, for example, had to comply with IAEA standards. If they failed to do so, a neighbouring State could rightly complain and request remedial action; if on the other hand, they did comply, an objection stood little chance of success. As for air pollution, many arrangements had been concluded in recent years. A State which fulfilled its duties under such an arrangement could not be challenged by another party; conversely, it became the subject of criticism if it failed in its commitments. Thus, many conflicts of interest were settled within a multilateral setting because of the existence of applicable standards. International standard-setting could be expected to increase considerably over the years to come, as regards both prohibition and prevention. That fact should be taken into consideration in the draft, even if reference could only be had to rules to be established by other bodies.

13. He agreed that the title of the topic was inadequate. The aim was to establish a coherent system of rules for activities with harmful transboundary effects. The Commission should therefore move away from the cold logic of the original heading and, in what was a complex topic, should come up with clear choices whose practical consequences could be clearly perceived, if it wished to receive meaningful advice from the Sixth Committee. The difficult task of working out a suitable legal regime rested almost entirely with the Commission. Even now,

[4] Ibid., footnote 7.

the Commission was being overtaken by developments in other forums. It meant that space for innovative regulation was shrinking, something that might be of benefit to the international community, but not necessarily to the Commission.

14. The Commission should agree on a concrete strategy. The Special Rapporteur's idea of setting up a small working group seemed excellent. The approach should be realistic and should focus on what could be achieved within the next five years. The liability topic should not share the long life of its sister topic, State responsibility. Lest that happen, a stock-taking exercise should be undertaken. The Special Rapporteur had attempted to review the work done so far, but had confined himself to the legal plane. More generally, an assessment was required of the real needs of the world community—an assessment that was overdue and could impart a new direction to the Commission's work.

15. Mr. NJENGA congratulated the Special Rapporteur on his excellent report on a most intractable topic. He said that the Commission had worked on the topic for over 10 years and despite the efforts of the Special Rapporteur and his predecessor, the late Mr. Quentin-Baxter, was still grappling with its scope, which would determine the course of the subject. The topic's importance, however, was clearly manifested by the numerous activities of international and regional institutions, for example, the forthcoming UNCED. Preparations were well in hand and it was appropriate that the Commission should be discussing the subject at its present session, at the end of which it should be able to agree on the general direction that the topic should take.

16. When the Special Rapporteur had submitted a set of draft articles in his sixth report,[5] he had clearly stated that his aim was to facilitate concrete discussion of the approach and scope of the topic. The Commission itself, in the report on the previous session, had stated that:

> The new articles were only an outline of the topic; they were put together with the purpose of giving the Commission a panoramic view of the topic....[6]

Noting that the sixth report had raised some complex technical issues, the Commission had further stated:

> Many members of the Commission felt that they needed more time to reflect on the issues raised in the report and were able to make only tentative remarks. The Commission therefore decided to revert to the issues raised in the sixth report at its next session.[7]

17. When, therefore, the Special Rapporteur had urged the Commission not to reopen the general debate, his intention had simply been to discourage repetition of arguments made previously. Members should go to the essence of the proposals contained in the sixth report and provide the Special Rapporteur with guidelines on how to proceed with the work. The short list of important issues circulated informally by the Special Rapporteur was extremely useful and should serve to concentrate the debate on fundamentals.

18. As to the nature of the future instrument, it would be helpful in the interests of future progress if the Commission were to decide right away that it was working towards a framework convention that would contain, in the words of the Special Rapporteur, coherent, reasonable and politically acceptable articles. In view of the many lawful activities, namely, those not prohibited by international law, that had transboundary consequences it was the only realistic goal, since the Commission could not provide a comprehensive binding convention to cover them all.

19. Present State practice was to regulate various specific activities, more particularly by binding bilateral or multilateral conventions, in such varied areas as transport of dangerous goods, disposal of hazardous waste, nuclear liability or liability for space objects. On the whole, therefore, the draft articles should be of a residual character; they should be modest and should concentrate on the essentials, leaving the establishment of specific regimes to bilateral or multilateral agreements, which of course could draw inspiration from the proposed draft.

20. A framework convention of that kind could include provisions on State freedom of action and the limits thereto, as contained in the draft article 6, modelled on Principle 21 of the Stockholm Declaration,[8] which recognized the sovereign right of a State to carry out lawful activities within its territory but at the same time stressed its responsibility to ensure that the activities did not cause transboundary damage to other States or to areas beyond the limits of national jurisdiction.

21. The draft should also incorporate the principle of cooperation to prevent activities from causing transboundary harm or to minimize such harm. The principle of prevention through legislative, administrative steps and the monitoring of activities could also be included. Similarly, the principle of reparation in the event of significant harm should be incorporated in order to ensure that an innocent victim of such harm was not made to bear the loss or injury. A very important principle that could be considered was non-discrimination, so as to make sure that domestic remedies available in the State where the activities causing harm were equally available to those affected beyond the State's frontiers. He was convinced that a draft convention which addressed that fundamental issue could command broad international support.

22. The provisions contained in articles 11 (*a*), 13 and 14 on notification, consultations and negotiations, and possible establishment of a regime for the activity, were much too broad for a general framework convention that would regulate all sorts of activities with the potential, however remote, of causing transboundary harm. It would also be too much of an inhibition on the right of States to conduct lawful activities within their own territory. Support for his objection to those procedural obligations lay in the lack of legal consequences in the event of failure to comply with them. If such failure did not result in any transboundary harm, neighbouring States concerned had no basis for a complaint. On the other

[5] See 2221st meeting, footnote 7.

[6] *Yearbook... 1990*, vol. II (Part Two), para. 471.

[7] Ibid., para. 472.

[8] See 2221st meeting, footnote 6.

hand, if harm did occur, the State of origin would be bound to make reparation even if it had strictly complied with the provisions on procedure. In the matter of failure to comply with the procedural obligations the Special Rapporteur offered two alternatives, discussed in the report. However, both alternatives dealt with the same situation, namely, when harm had actually occurred, for only then could a State be affected. In such a general field the precautionary principle should not be elevated to a binding legal principle and it could easily be dealt with at length in the commentary. He, for one, did not favour including any "soft" law provisions in the draft.

23. It should be easy to accept the proposal for the title to speak of "activities" not prohibited by international law, rather than "acts". The change was not a matter of harmonizing the language versions but of correctly reflecting the issue with which the Commission was dealing. The Commission was trying to regulate not the acts but the activities having the potential to cause transboundary harm.

24. As to the vexed question of scope, the adoption of the risk approach was likely to have stemmed from the primacy given to prevention over reparation by the first Special Rapporteur. Of course, the element of risk was still the primary basis for provisions on preventive measures, such as article 16. Once it was established that a given activity caused or might cause transboundary harm, the State of origin was obliged to take appropriate measures in accordance with the best available technology. But even in those cases of high-risk activities, the basis of the obligation was harm, or the probability of harm. He emphasized the need for agreement on the threshold of harm, for the purposes of compensation.

25. It was futile to attempt to draft a list of dangerous activities in a framework convention which covered a whole range of activities. The Council of Europe Directive cited as a precedent by the Special Rapporteur in the report contained a list of more than 1,200 dangerous substances as well as activities that produced hazardous radiation or genetically altered organisms and micro-organisms introduced into the environment. In a framework convention, a list of that kind would not help to identify activities that would require precautionary measures. Furthermore, it could never be an exhaustive list and could in no way exclude liability for activities not on the list. Significantly, most of the lists contained in multilateral conventions were considered to be illustrative. That was the case with regard to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa.

26. The draft should assign civil liability to operators and residual liability to States, either where the operator could not be identified or where compensation was not adequate. Such an approach was more important than ever in view of the global trend towards the withdrawal of States from commercial activity, with the concomitant encouragement of private enterprise. There was no reason why private enterprises engaging in activities with the potential to cause transboundary harm, particularly multinationals with budgets several times greater than those of most developing countries, should not bear primary civil liability, leaving residual liability to the State, except in those situations which had been identified by the Special Rapporteur. The Commission should be guided in that field not by theoretical considerations of State liability but by current practice, including that of the channelling of liability. The Special Rapporteur had cited several examples of current practice, *inter alia*, the Vienna Convention on Civil Liability for Nuclear Damage; article 5 of the International Convention on Civil Liability for Oil Pollution Damage, under which the owner of the vessel at the time of the incident was liable for all pollution damage; the provisions contained in the report of the Ad Hoc Working Group on Legal and Technical Experts to Develop Elements which Might be Included in a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, which had concluded its work earlier in 1991 and which had been chaired with distinction by the Special Rapporteur. It was to be hoped, incidentally, that the report would be made available to the Commission, as it contained several features of importance to the topic, including the establishment and operation of a compensation fund.

27. In his sixth report,[9] the Special Rapporteur had been very reluctant to deal with liability for harm to the environment in areas beyond national jurisdiction—the "global commons". His reservations had been based on, *inter alia*, the fact that significant harm to the environment of the "global commons" might not lead to significant harm to human beings; that under general international law there was no liability for that harm to the environment of the "global commons" which did not affect persons or property; and that it was difficult to identify the affected States in the context of the "global commons". Personally, he thought that approach was unduly conservative and, in adopting it, the Commission would be out of touch with the general orientation of the international community, which was increasingly asserting the importance of protecting the "global commons". That concept had found expression in numerous international and regional forums and decisions, including the 1972 Stockholm Declaration,[10] which had expressly referred to the "common good" of mankind; General Assembly resolution 45/53, which had explicitly stated that climate change was a common concern of mankind; and two meetings of legal experts held at the initiative of UNEP. In addition, the need to protect intergenerational equities had been receiving increasing emphasis within the context of sustainable development and environmental law.

28. In theory, it was a good idea for the Commission to present its work to UNCED, but unfortunately, it was simply not in a position to do so. The Drafting Committee would not be able, during the present session, to conclude its consideration of the articles. Even if a working group was set up, it would not have enough time to agree

[9] Ibid., footnote 7.

[10] Ibid., footnote 6.

on even the most generalized principles for adoption in 1991.

29. Lastly, he wished to draw attention to the fact that the secretariat of UNCED had prepared a check-list of elements for the elaboration of principles by Working Group III on legal, institutional and all related matters, to be incorporated under the general rights and obligations in the field of environment and development, for inclusion in whatever instrument, charter or statement the Conference might adopt. The following elements had been identified under the heading of basic duties: (*a*) common responsibilities of nations and peoples for the survival/integrity/sovereignty of the Earth; (*b*) avoidance of harm to future generations; (*c*) equitable sharing of responsibilities and benefits; (*d*) protection of individual rights to the environment and development; (*e*) protection of indigenous peoples; (*f*) access to information and environmental risks; and (*g*) promotion of environmental education and awareness (A/CONF.151/PC/WG.III/2). The check-list had also identified issues relevant to the elaboration of principles of decision-making and principles of transnational relations. While it was doubtful that the Commission could make any useful contribution to the 1992 Conference, he wished in no way to discourage future efforts on the topic under consideration.

30. Mr. GRAEFRATH, expressing his gratitude for the seventh report, which summed up a wealth of earlier material and sought to respond to the many suggestions made at the previous session and in the Sixth Committee, said that he none the less continued to experience difficulties with the content of the report: it seemed to be a mixture of taking stock of what had gone before and of suggesting changes in articles that had already been proposed. At the same time, the Special Rapporteur was cautioning against reopening the general debate. The topic was not, as some maintained, a new one and had been before the Commission for more than 10 years. It was too late at that stage to reopen the general debate, unless the Commission wanted to change its fundamental approach to the topic. That, however, did not seem to be the intention of the report.

31. The only new aspect to the report was its consideration of the interrelationship between the civil liability of the operator and State liability. In that connection, one important issue was to establish the basic premise: either the State had to make reparation or it had to make sure of certain conditions. All the relevant conventions of which he was aware, with the exception of the Convention on International Liability for Damage caused by Space Objects, were based on the liability of the operator. Those conventions clearly defined the obligation of States to: (*a*) take the necessary measures for protection of, preparedness for, and response to transboundary harm; (*b*) ensure that activities within their jurisdiction and control were carried out in conformity with certain provisions; and (*c*) ensure that recourse was available, in accordance with their legal systems, for compensation and relief in respect of transboundary damage caused by activities within their jurisdiction and control. That was also the approach of articles 139 and 235 of the United Nations Convention on the Law of the Sea and the 1991 draft Convention on the Transboundary Impacts of Industrial Accidents.[11]

32. It still had to be determined whether or to what extent the State should be assigned subsidiary liability, if the insurance or other financial guarantees provided by the operator turned out to be insufficient. However, it was not a simple matter of saying that the State was liable either where the operator was unable to compensate the injury or where the operator at fault could not be identified. In the former instance, the question was why the State should be liable if it had adopted laws and regulations and taken administrative measures which were reasonably appropriate for securing compliance by persons under its jurisdiction, as established in article 4 of annex III to the United Nations Convention on the Law of the Sea. If the obligation of the State to ensure compliance was established, and by respecting those obligations the State could not be held liable, there must be a good reason to introduce an obligation to make reparation. It was at that point that the concept of activity involving risk came into play. First, that concept provided the basis for specific obligations of prevention. Secondly, it provided the grounds, in the case where damage occurred, for invoking the subsidiary liability of the State if the operator was unable to respect its obligation to make reparation. As to the case of inability to identify the operator at fault, the question was why the State should be liable for damages in cases where the harmful effect originated in an entire region or was the result of the regular activities ofindustrialized States—for example, the depletion of the ozone layer. He was not at all convinced that such cases could be successfully approached on the basis of a philosophy of reparation. Such a philosophy could not be the basis for the elaboration of both a convention on liability for transboundary harm caused by accidents and a convention for the protection of the enviroment; they were two different things.

33. Lastly, he was not clear as to the purpose of taking stock at the present stage in the Commission's work, of something that seemed to take the Commission back to 1987, when Mr. Shi had concluded that the Commission should either request the General Assembly to defer consideration of the topic or adopt a working hypothesis.[12] The Commission had precedents for either alternative. If the proposed working group could arrive at a working hypothesis that was acceptable to the Commission, then the Special Rapporteur would have achieved an extremely important goal.

34. Mr. BARBOZA (Special Rapporteur) said that he would appreciate clarification regarding Mr. Tomuschat's conclusion that the construction of major works and normal activities, such as driving a car or burning fossil fuels, were not covered by the topic. In his view, they were activities that should be and were included in the scope. If that was not the case, any obstacles to including them should be removed.

[11] The draft Convention, subsequently renamed "Convention on the Transboundary Effects of Industrial Accidents", was adopted at Helsinki on 18 March 1992.

[12] *Yearbook ... 1987*, vol. II (Part Two), p. 43, para. 144.

35. Mr. TOMUSCHAT said that, according to the definition in the introductory articles, which limited risk to certain activities, the construction of major works did not fall into the category of activities involving risk. That type of construction activity did not cause immediate harm. Rather, it contained potential risks, which could materialize at a later stage. For example, it was clearly open to question whether noise should be considered as harm in the traditional sense, as understood by international law and as reflected in awards by international arbitration tribunals. A distinction had to be drawn between two types of activities which involved harm: activities which gave rise to clearly identifiable specific harm, such as in the *Trail Smelter* case,[13] and activities in which harm was the result of an accumulation of various factors, which was true of the normal activities engaged in by industrialized societies. The latter type should be governed by specific rules and should receive specific treatment.

The meeting rose at 11.30 a.m.

[13] See 2222nd meeting, footnote 7.

2225th MEETING

Tuesday, 18 June 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, 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.

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

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR[2] (*continued*)

1. Mr. ROUCOUNAS recalled that, in 1973, when the question of liability for risk had briefly attracted the Commission's attention, the United Nations Conference on the Human Environment had completed its work and UNEP had just been established. Nearly 20 years later, the international community, which had gradually entered what was probably sarcastically being called "the ecological age", had made some slight progress in the regulation of certain specific questions. A number of international instruments, which were, moreover, not all the same in scope, thus showed how much headway had been made, but they showed mainly how much more still had to be made in order to achieve universal results. The Commission, which had begun to study the question as an offshoot of the question of State responsibility, gave the impression to outsiders that, despite its lengthy debates, which reflected the fascination created by the idea of common areas beyond the jurisdiction of any State, it was not yet sure what major options it had with regard to the draft articles on international liability for injurious consequences arising out of activities not prohibited by international law.

2. Nevertheless, he did not believe that the Sixth Committee had wanted to put the Commission to a pointless test comparable to the physical contests to which the gods of antiquity had subjected mortals. On the contrary, the discussions in the General Assembly and the Commission itself showed that the Commission was being called upon to follow the direction the law was actually taking.

3. A recent United Nations study revealed that 80,000 compounds of organic or inorganic chemical substances were now being commercially produced and that 1,000 to 2,000 new chemical products came on the market each year. The effects of such industrial activity, both on human health and on matters relating to transport, marketing, utilization and elimination, were being discussed by international bodies and some conventions and other texts were trying to establish either State control, primarily of a preventive nature, or international cooperation. In that connection, he referred to the 1972 Convention on International Liability for Damage Caused by Space Objects, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. Apart from those specific fields, however—and that was where the importance of the work undertaken by the Commission lay—there were no specific provisions on the consequences of the violation of a rule or on conditions for the compensation owed to the victims of harm caused by an activity involving risk. To take a few recent examples, there were no provisions on liability in the1986 Convention on Early Notification of a Nuclear Accident, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal or even in the draft convention prepared in 1991 by the Economic Commission for Europe on the transboundary impacts of industrial accidents,[3] article 18 of which read:

[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

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

[3] See 2224th meeting, footnote 11.