

Document:-  
**A/CN.4/SR.2268**

**Summary record of the 2268th 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:-  
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jured State must not be able to avoid the obligation of resorting to the established procedure, regardless of what the procedure might be, and he referred in that connection to Articles 33 *et seq.* of the Charter of the United Nations.

46. The essential problem of proportionality must be formulated more precisely and an effort must be made to define clear criteria for its application. In respect of the suspension and termination of treaties, he was in favour of confirming the regime of article 60 of the 1969 Vienna Convention on the Law of Treaties but it was also necessary, from a broader standpoint, to envisage the suspension of the performance of certain obligations deriving from multilateral treaties and *jus cogens*. The issue of so-called self-contained regimes was a political phenomenon that should be dealt with separately.

47. The problem of differently injured States should not be the subject of a special article, because in reality the issue was to determine which State had a legal interest in taking action. As to substantive limitations, clearly the first rule should be respect for peremptory rules and *erga omnes* obligations or other rules deriving therefrom: the unlawfulness of resort to force, respect for human rights, and the inviolability of diplomatic and consular envoys. With regard to the resort to force, the legal scope of Article 2, paragraph 4, of the Charter of the United Nations was clear, indisputable and absolute, and there could be no question of maintaining that certain forms of unilateral resort to force had survived and must be taken into consideration. A more coherent regime of countermeasures must, however, be set up and efforts towards the progressive development of law must be intensified, albeit cautiously. For example, it might be worth considering to what extent the concept of force should be expanded to include economic coercion. On the question of the inviolability of diplomatic and consular agents, inasmuch as the distinction made by the Special Rapporteur had raised doubts, he was in favour of having States retain positive diplomatic and consular rights. As to respect for human rights, the Commission might try to agree on the relative scope of the global concept of "basic human rights".

48. In order to carry out its task in the progressive development of law, the Commission must prevent abuses in the matter of countermeasures yet make them sufficiently effective to guarantee cessation and reparation. To that end, a procedure must be developed for the settlement of disputes, in particular when a third party was involved.

49. In closing, he wished to express his support, by and large, for the views expressed by Mr. Bennouna (2266th meeting) and Mr. Jacovides (2265th meeting).

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would respond to the remarks on his third report in greater detail when he came to introduce his fourth report.

51. The question of the lack of articles had been raised again, but he would point out that articles were difficult to draft as long as doubts persisted as to their content. The fourth report attempted to draft an article on that difficult problem, and he hoped to be able to improve on it

by the time he introduced that report. He was precisely awaiting constructive comments from the members of the Commission.

52. It was surprising that in one of the statements earlier in the meeting, a member of the Commission had introduced a new concept of an internationally wrongful act, although the term had appeared in the 35 draft articles already adopted.

53. Regarding Mr. Shi's suggestion that the draft should not contain any reference to countermeasures and should focus instead on the peaceful settlement of disputes, the previous Special Rapporteur, Mr. Riphagen, had made suggestions in the Commission that had fallen far short of his own proposals on the peaceful settlement of disputes.

54. As to the matter of the Security Council raised by the Chairman, he agreed that the Council was the only institution available to the international community for maintaining international peace and security. It was precisely in view of that that it would be necessary for the Commission to take a close look at article 4, of part 2<sup>17</sup> which concerned the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. Although the Security Council had the right to take measures to put an end to fighting, it was not empowered to settle disputes or to impose a solution to a dispute. As announced, he would have to address that problem in connection with article 4 of part 2 of the draft, in due course.

55. The CHAIRMAN said that discussion of State responsibility would resume around 16 June, when the Commission would consider the Special Rapporteur's fourth report.

*The meeting rose at 1 p.m.*

<sup>17</sup> Ibid.

## 2268th MEETING

*Tuesday, 2 June 1992, at 10.05 a.m.*

*Chairman:* Mr. Christian TOMUSCHAT

*Present:* Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/443,<sup>1</sup> A/CN.4/L.469, sect. D, A/CN.4/L.470, A/CN.4/L.476, ILC(XLIV)/Conf.Room Doc.2)**

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN welcomed the participants in the International Law Seminar, who were attending the meeting, and invited the Special Rapporteur to introduce his eighth report (A/CN.4/443).

2. Mr. BARBOZA (Special Rapporteur) said that he first wished to draw to the attention of the members of the Commission the summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session (A/CN.4/L.469, sect. D); the Rio principles on general rights and obligations;<sup>2</sup> and the draft Framework Convention on Climate Change<sup>3</sup> and draft Convention on Biological Diversity.<sup>4</sup> He recalled that the Commission had already considered 33 draft articles, 10 of which, relating mainly to scope, principles and the use of terms, had been referred to the Drafting Committee,<sup>5</sup> which had, at the Commission's forty-first session, been reduced to nine.<sup>6</sup> It had also been agreed that draft article 2 (Use of terms) was to remain "open" in order to include new terms or change the meaning of those already selected, as necessary. In an appendix to the report under consideration, he had developed the concepts of risk and harm dealt with in draft article 2. He emphasized the basically provisional nature of the draft articles on which members were being requested to express their views. The purpose was to enable him to identify the main schools of thought in the Commission. He would have to wait until the Drafting Committee had considered the texts before it in order to have a clearer idea of the direction in which the subject would develop in the future. In the meantime, he proposed that the Drafting Committee should also review draft article 10 (Non-discrimination),<sup>7</sup> to which there had been no objection during the consideration of the sixth report.

3. The aspect which the Commission needed to re-examine in the light of the discussions it had already held and those in the Sixth Committee was that of prevention, which was easier to understand now that several international instruments on the matter had seen the light

of day and there was a growing body of legal literature. In that connection, he cited several examples which illustrated the intense legal activity in that field both in European and in United Nations bodies. The draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, prepared by the Council of Europe,<sup>8</sup> was perhaps the instrument that came closest to the Commission's work because, unlike most of the conventions, it covered all types of dangerous activities, not only a specific one.

4. The main purpose of the proposals presented in the eighth report was to transform obligations of prevention into simple guidelines for Governments. While reparation had to do with harm, risk could not be linked with prevention for the simple reason that the kind of responsibility called for by activities involving risk was a form of strict liability, which was known in French as *responsabilité pour risque*, meaning a type of liability which required the liable party to provide a certain kind of compensation, regardless of any preventive measures it might have adopted. As he had explained in his report, the rules of prevention—in the sense of prevention before an incident had happened—were quite different from the concept of "prevention" after the incident and were not contained in liability conventions or draft conventions, which referred to measures to be taken to prevent the harmful effects of an incident from extending beyond national jurisdiction. How could the Commission reconcile the idea of placing obligations of prevention in an annex of a non-binding nature with that of not deciding for the time being on the final nature of the draft articles which would be submitted to the General Assembly? By treating the texts on prevention as guidelines, the Commission would not be prejudging the final decision it would take on the nature of the other draft articles. Even if the other draft articles also became guidelines, there was no reason why both sets of articles could not be included in the same document. However, the Commission might decide to eliminate any reference to prevention before the incident without affecting the final instrument in any particular way.

5. The first part of the eighth report dealt precisely with the question of whether the draft articles should include obligations of prevention together with obligations of reparation. Obligations of prevention were divided into procedural obligations (arts. 11 to 15) and unilateral preventive measures (art. 16).<sup>9</sup> As a majority in the Commission was against keeping procedural obligations in the text, he had incorporated them in an annex as guidelines for Governments, which read:

ANNEX

**In respect of the activities referred to in draft article 1, and in the interest of fuller compliance with its obligations and principles, the following provisions are in the nature of recommendations, without prejudice to any corresponding responsibilities arising under international law.**

<sup>1</sup> Reproduced in *Yearbook... 1992*, vol. II (Part One).

<sup>2</sup> Subsequently adopted as the Rio Declaration on Environment and Development, document A/CONF.151/26, vol. I.

<sup>3</sup> Subsequently signed at UNCED on 4 June 1992 as United Nations Framework Convention on Climate Change (*International Legal Materials*, vol. XXXI (1992), p. 849).

<sup>4</sup> Subsequently signed at UNCED on 5 June 1992 as Convention on Biological Diversity (*International Legal Materials*, vol. XXXI (1992), p. 822).

<sup>5</sup> For texts and summary of discussion, see *Yearbook... 1988*, vol. II (Part Two), pp. 9 *et seq.*

<sup>6</sup> For revised articles proposed by the Special Rapporteur, see *Yearbook... 1989*, vol. II (Part One), pp. 134-135, document A/CN.4/423, para. 16.

<sup>7</sup> For text, see *Yearbook... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1, annex.

<sup>8</sup> Council of Europe, document DIR/JUR (92) 3, (Strasbourg), 31 July 1992.

<sup>9</sup> See footnote 7 above.

*Article I.<sup>10</sup> Preventive measures*

The activities referred to in article 1 of the main text should require the prior authorization of the State under whose jurisdiction or control they are to be carried out. Before authorizing or undertaking any such activity, the State should arrange for an assessment of any transboundary harm it might cause, and should ensure, by adopting legislative, administrative and enforcement measures, that the persons responsible for conducting the activity apply the best available technology to prevent or to minimize the risk of significant transboundary harm, as appropriate.

*Article II. Notification and information*

If the assessment referred to in the preceding article indicates the certainty or the probability of significant transboundary harm, the State of origin should notify the States presumed to be affected regarding this situation and should transmit to them the available technical information in support of its assessment. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected, the State of origin should seek the assistance of an international organization with competence in that area in identifying the affected States.

*Article III. National security and industrial secrets*

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin should cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

*Article IV. Activities with harmful effects: prior consultation*

Before undertaking or authorizing an activity with harmful effects, the State of origin should consult with the affected States with a view to establishing a legal regime for the activity in question that is acceptable to all the parties concerned.

*Article V. Alternatives to an activity with harmful effects*

If such consultations show that transboundary harm is unavoidable under the conditions proposed for the activity, or that such harm cannot be adequately compensated, the affected State may ask the State of origin to request the party requesting authorization to put forward alternatives which may make the activity acceptable.

*Article VI. Activities involving risk: consultations on a regime*

In the case of activities involving risk, the States concerned should enter into consultations, if necessary, in order to determine the risk and amount of potential transboundary harm, with the aim of arriving at an arrangement with regard to such adjustments and modifications of the planned activity, preventive measures and contingency plans as will give the affected States satisfaction, on the understanding that liability for the harm caused will be subject to the provisions of the corresponding articles of the main text.

*Article VII. Initiative by the affected State*

If a State has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a risk of causing it such harm, it may ask that State to comply with the provisions of article II of this Annex. The request

should be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1 of the main text, the State of origin should pay compensation for the cost of the study.

*Article VIII. Settlement of disputes*

If the consultations held under articles III and V above do not lead to an agreement, the parties should submit their differences for consideration under the procedures for the settlement of disputes set out in Annex . . .

*Article IX. Factors involved in a balance of interests*

In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

- (a) Degree of probability of transboundary harm and its possible gravity and extent, and likely incidence of cumulative effects of the activity in the affected States;
- (b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;
- (c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;
- (d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;
- (e) Economic viability of the activity in relation to possible means of prevention;
- (f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;
- (g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;
- (h) Benefits which the State of origin or the affected State derive from the activity;
- (i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;
- (j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;
- (k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;
- (l) Extent to which assistance from international organizations is available to the State of origin;
- (m) Applicability of relevant principles and norms of international law.

6. Although some members wanted to keep unilateral measures of prevention as "real" obligations, he believed that obligations of that kind were primary rules whose breach gave rise to State responsibility. The introduction of State responsibility, however, made for a two-fold problem: on the one hand, Governments were extremely reluctant to become parties to instruments containing clauses on State responsibility, as was apparent from the studies carried out by Handl and by Doeker and Gehring, to which he had referred in the report, and, on the other, the difficulties of a procedural nature relating to the method for the settlement of disputes and to the court competent to decide cases concerning relations between States and individuals could not be ignored. That was why he had eliminated all obligations of prevention from the instrument. He had, however, included

<sup>10</sup> Roman numerals have been used to differentiate the draft articles proposed by the Special Rapporteur for possible inclusion in an annex from those forming the main body of the instrument.

a caveat in the introduction to the annex which applied in particular to activities with harmful effects where the negligence of the State in taking the measures suggested in draft article 16 might, in some cases, be found to be in breach of the existing obligations.

7. Whatever the nature of the annex to which such obligations were confined, should prevention measures be treated jointly or separately? There was only one important difference between measures relating to a particular activity: the content of the consultation. In his view, all the measures could be treated jointly; unilateral measures and legislative and administrative measures imposed on the State the same kind of burden, regardless of the type of activity concerned. Because activities with harmful effects caused transboundary harm in the course of their normal operation, they should not be permitted unless there was some form of prior consent between the affected States. Activities involving risk which had been authorized by the State of origin would not require the prior consent of the States likely to be affected provided that the State of origin was prepared to compensate them if damage occurred and to do so within the framework of a regime which recognized, in principle, the liability of the operator for damage. The object of consultation with the affected States should be to draw up provisions on prevention that would ensure that the activity was secure.

8. An important condition for the legality of an activity which caused or created the risk of causing transboundary harm as a result of environmental interference was mentioned in the report of the Experts Group on Environmental Law of the World Commission on Environment and Development. It stated that, for an activity to be lawful

... the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk [must far exceed] in the long run the advantage which such prevention or reduction would entail.<sup>11</sup>

9. That statement referred to activities which were not prohibited, regardless of the harm they caused or the risk they created, because they were useful or even necessary to the life of modern societies, or, if one preferred, to the balance of interests test. He would like to know whether or not such a proviso should be included in the draft, bearing in mind that draft article IX of the annex could perhaps provide sufficiently flexible criteria to ensure a proper balance of interests.

10. In the appendix to the report, he had re-examined the definition of the concepts of risk and harm in the light of instruments drawn up after draft article 2 had been referred to the Drafting Committee. The reference to risk as a separate element might become a dangerous form of shorthand to denote an element which was inseparable from certain activities falling within the scope of the draft. The concept of risk would serve no purpose if it was referred to as separate from activities involving risk. Since the point was to identify those activities, it was also necessary to define what was meant by risk

and, above all, by significant risk. The elimination of obligations of prevention did not exempt the Commission from defining the concept of risk in draft article 2. That was why he had included some ideas in his report which might be of interest to the Commission and, in particular, to the Drafting Committee, whose task it was to consider draft article 2.

11. Some international instruments referred to in the appendix defined activities involving risk narrowly, generally by making use of lists of activities, substances or technologies. The Commission had preferred a general definition of activities involving risk and had therefore discarded lists of an exhaustive nature. In the appendix, he gave some indications which seemed to pinpoint more closely activities involving risk.

12. Equally important, in his view, was a definition of the concept of harm and, in particular, of environmental damage, which, following a recent trend, included the idea of compensation not only for reasonable measures of reinstatement actually undertaken or to be undertaken, but also such aspects of the *status quo ante* as it had been impossible to restore. The solution proposed in draft article 24<sup>12</sup> was supported by recent doctrine and practice.

13. He drew attention in that connection to the definition laid down in the Guidelines prepared by the Task Force of the Economic Commission for Europe, which he had cited at the end of the report.

14. Taking into account what was said in the report, he would like the Commission to indicate whether the provisions on prevention should be incorporated in an annex as guidelines for Governments. The Commission had a choice between three options: to treat the provisions on prevention as guidelines, to delete any reference to prevention prior to the accident, which could easily be envisaged, or, something he did not recommend, to retain unilateral measures of prevention as "real" obligations.

15. Those members who would prefer the provisions to appear as guidelines in an annex might wish to give their views on the content of the annex he had proposed. In accordance with the wishes expressed by some members of the Commission at preceding sessions, the procedure was a flexible one and simpler than those envisaged earlier.

16. He also looked forward to hearing members' opinions about the definitions proposed in the appendix, bearing in mind, however, that draft article 2 was in the hands of the Drafting Committee and any reopening of the general debate on whether the concept of risk should prevail over that of harm or vice versa or on which of those two concepts should form the basis of the draft articles would be very disruptive, especially as an approach based on the "risk-prevention" duo was bound to be misleading.

17. The Commission had at its disposal a number of articles from which it could perhaps extract the elements of an instrument to propose to the General Assembly. If

<sup>11</sup> *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1987), p. 80.

<sup>12</sup> See footnote 7 above.

prevention was eliminated, what would be left was liability proper and, in keeping with an international practice of growing importance, it should take the form of civil liability. It went without saying that the draft articles would include some obligations of a very general nature to ensure the smooth functioning of the civil liability system, such as the non-discrimination principle on which several provisions of the chapter in question were based. Within the framework of civil liability, some thought should be given to the "polluter pays" principle, which had not so far been authoritatively defined. The role of States should be one of residual liability in some extreme cases, as in that of the nuclear conventions where insurance or other guarantees could not cover all the damage. It might also include some cases where the sources of damage could not be identified, but that was a new field which warranted a great deal of further thought.

18. He welcomed the fact that, at the current session, the Drafting Committee would consider the draft articles which had been referred to it and to which, as already stated, draft article 10 (Non-discrimination) should be added. Without some pronouncement on the part of the Drafting Committee at the current or at the next session, it would be of little or no avail to go on producing new reports. Responsibility for fulfilling the mandate of the General Assembly was not his alone, but that of the Commission as a whole.

19. Mr. CRAWFORD said that the report gave rise to a problem of a general nature, that of the distinction between the topic under consideration and the topic of State responsibility and the continuing reservations or inhibitions which some members of the Commission apparently had in that regard.

20. From the point of view of terminology, he fully agreed with the Special Rapporteur's proposal that the word "acts" in the title of the topic should be replaced by the word "activities". With that change and on the understanding that the scope of the topic as thus broadened was confined to the injurious consequences of activities which were in themselves lawful, the Commission could cease to worry whether it was drafting rules on international liability for injurious consequences of activities not prohibited by international law or on State responsibility. By persisting in that false debate, it was in danger of achieving no results at all, since, in the final analysis, it had to propose rules on the topic under consideration which involved obligations and those obligations would, in turn, necessarily involve the responsibility of States.

21. As to the problem raised in the report with regard to procedural obligations of prevention and, in particular, their location in the future instrument, he thought that the Special Rapporteur's preference for a purely recommendatory set of guidelines was the result of his conception of the topic as a whole and, more specifically, of strict liability for actual damage. The Special Rapporteur took the view that there was no point in imposing obligations of prevention on a State which would be subject to strict liability if the damage eventually occurred. He accepted that position in principle, but was not sure that the Commission could take a final decision on the issue.

His own view was that it would be more useful to establish proper prevention procedures in advance, although it was true that a regime of strict liability would encourage even the most reluctant States to take some measures of prevention. Nevertheless, he was prepared for the time being to accept the Special Rapporteur's proposal that obligations of prevention should be consigned to an annex, not only because to proceed in that way seemed preferable to providing no obligation of prevention at all, but also because the solution would enable the Drafting Committee to make substantial progress on the contents of those obligations and leave aside the decision as to where in the draft they should appear.

22. He agreed with the approach to the problem of prior consultations described in the report. On the one hand, a State should not be able to externalize the costs of, for example, its industrial activities by imposing burdens on other States while keeping the benefits entirely to itself; and, on the other, neighbouring States should not have a veto over a State's projected activities, provided that appropriate procedures had been followed to minimize the risk of harm. That approach was, moreover, consistent with the nature of the obligations envisaged in the annex.

23. Lastly, he thought that the questions of definition discussed at the end of the report were matters of detail and drafting, except for the important issue whether the word "appreciable" or the word "significant" should be used to qualify harm. It was difficult to solve that problem in the abstract before deciding on the contents of the substantive articles. He understood the Special Rapporteur's interest in the definition adopted by the ECE Task Force on Responsibility and Liability regarding Transboundary Water Pollution, which provided, in particular, that if no threshold had been agreed, damage occurred where an affected State was required, as the result of the activity on the territory of the State of origin, to take measures in the interest of the protection of the environment or population or rehabilitation measures, but he did not think that the definition could serve as a criterion for the threshold of harm because of its subjective nature and the disparities that might exist between the States concerned with regard to environmental standards and their economic situation. The definition might, at most, be useful as a precondition in the sense that a neighbouring State should not be able to claim reparation from the State of origin if it had not taken any preventive measures itself.

24. Mr. VILLAGRAN KRAMER said that the complex and delicate nature of the topic made it necessary to revert to the fundamentals of the law in the field under consideration.

25. If there was a point where the topic converged with that of State responsibility, it was surely the theoretical equality of States before the law and their de facto economic inequality. The Special Rapporteur was therefore right to build his argument on the concept of equity, especially as UNCED was to deal precisely with the de facto inequality of States and the important role which the highly industrialized countries would have to play by taking on greater obligations than the developing countries. That did not mean that a developed country

had to assume more civil liability than a developing country, but the possibility could not be ruled out that a developing country which had to make reparation for transboundary harm could be completely ruined if it was bound to provide *restitutio in integrum*.

26. He wondered about the future of the topic under consideration as UNCED was about to begin and about the role of the Commission at a time when the Council of Europe, the European Community and other specialized bodies were preparing or had completed drafts of major legal instruments. While the Commission should not overlook that trend in the development of international law, it should also base itself on the general principles deriving from the case law in the field, which was not abundant, but was none the less of great practical value and included the *Island of Palmas* case,<sup>13</sup> the *Trail Smelter* case,<sup>14</sup> the *Corfu Channel* case<sup>15</sup> and the *Gut Dam Claims*.<sup>16</sup> There were basically four general legal principles: a State could not use its territory or allow its territory to be used in any way which resulted in harm to other States; a State could not derive benefit from an activity or act without taking responsibility for the consequences of that activity or act; harm in any form gave rise to reparation; and the risk of harm had to be minimized or even eliminated, in so far as possible. The topic was complicated by the fact that certain preventive measures might give rise to a violation of a rule and, accordingly, to responsibility for a wrongful act and by the fact that, at the same time, reparation had to be made for the harm suffered. Two types of responsibility came into play. In common-law terminology, the first was called "responsibility", while the second was known as "liability", as recalled by the Special Rapporteur in his seventh report.<sup>17</sup>

27. The draft declaration to be considered by UNCED<sup>18</sup> embodied principles which were closely related to the issues being dealt with by the Special Rapporteur. According to that text, cooperation was no longer only a principle, but also an obligation of States. The Commission had to take account of that document, which had significant political implications. It had to take a decision that would enable it to move forward in the debate on the topic under consideration and, in that connection, he wished to know whether some of the 11 texts cited in the eighth report, such as the draft convention of the Council of Europe,<sup>19</sup> could be made available to the members. It would be helpful to know whether the Commission would be considering the report on its own or whether it would be discussing other documents at the same time. It should be borne in mind that the Commission had not yet reached the stage of preparing a draft to be submitted to States. For the time being, its task was to prepare a compilation, as it were, of the applicable legal principles. Substantive and procedural obligations

should be distinguished from one another and he would have no objection if the latter were placed in an annex, in the form of recommendations. In his view, the procedural rules were the least important because work in that area was well advanced as a result of the work already done on the law of the non-navigational uses of international watercourses.

28. Mr. EIRIKSSON said that he was among those who believed that, on the basis of the work done by the Special Rapporteur, the Drafting Committee should now be able to prepare a set of draft articles which could be submitted to the General Assembly within two years. In that connection, the report should be useful to the Drafting Committee, particularly as far as the definitions were concerned.

29. He had already offered suggestions on certain articles, to which he hoped that the Drafting Committee would give serious consideration, but he also wished to stress the need to broaden the scope of the proposed articles. As UNCED was about to begin, it seemed appropriate to view the topic under consideration in the context of the environment. To that end, the Commission might learn a great deal from the efforts being made in international bodies to elaborate environmental law, most recently in the work carried out in preparation for that Conference.

30. It should be recognized that the centre-piece of the articles would be the obligation to make reparation for significant transboundary harm. That obligation was equivalent to the so-called "polluter pays" principle in the environmental context. Clearly, that self-evident rule was not accepted without qualification, although it could be expected to gain further support at UNCED. He therefore believed that the Commission would be able to establish the principle that States should negotiate on the level of reparation in certain specific cases. The articles should thus define some of the criteria which were to be taken into account during such negotiations and which might be different from those applicable to activities involving risk, but they should not contain provisions on implementation.

31. He had long advocated setting up a system of civil liability, first, because it would provide a more speedy remedy for the injured party; secondly, because it would encourage the establishment of an effective international insurance scheme; and, thirdly, because it would serve to reduce tension between States. Nevertheless, the experience gained during the preparation of the draft articles on international watercourses had shown that agreement did not go beyond some limited general principles.

32. His view on the fundamental question of risk was that, while the draft articles should deal with any activity which might give rise to transboundary harm, they should concentrate in particular on activities involving significant risk. For such activities, it would be necessary to establish rules of prevention and reparation that were different from those applicable in the case of harm. There would thus have to be an article on the relationship with the rules applicable to State responsibility. He was also in favour of establishing certain thresholds to limit the scope of the articles on the basis of the extent of the damage and, possibly, as a political concession, the

<sup>13</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829.

<sup>14</sup> *Ibid.*, vol. III (Sales No. 1949.V.2), p. 1905.

<sup>15</sup> *I.C.J. Reports 1949*, p. 4.

<sup>16</sup> *International Legal Materials*, vol. VIII (1969), p. 118.

<sup>17</sup> *Yearbook . . . 1991*, vol. II (Part One), document A/CN.4/437.

<sup>18</sup> See footnote 2 above.

<sup>19</sup> See footnote 8 above.

extent of the knowledge States had of activities carried out under their jurisdiction.

33. The articles should embody a general obligation on the duty of prevention, restricted to activities involving significant risk. In that case as well, it would be better to have general criteria rather than an elaborate implementation mechanism. As had often been said, Governments might not be ready to accept draft articles having as broad a scope as those on which the Commission was working. Yet the Commission had a mandate to do important work in that field and, without being too ambitious, it should act boldly and move ahead. With regard to its method of work, he believed that, as it had already done two years previously in preparing the draft articles on jurisdictional immunities, the Commission should wait until the Drafting Committee had completed its consideration of a full set of articles before submitting the results of its work to the General Assembly.

*The meeting rose at 11.30 a.m.*

## 2269th MEETING

*Friday, 5 June 1992, at 10.05 a.m.*

*Chairman:* Mr. Christian TOMUSCHAT

*Present:* Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

### **International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/443,<sup>1</sup> A/CN.4/L.469, sect. D, A/CN.4/L.470, A/CN.4/L.476, ILC(XLIV)/Conf. Room Doc.2)**

[Agenda item 5]

#### **EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. Mr. BARBOZA (Special Rapporteur), in reply to comments made by Mr. Villagran Kramer at the previous meeting linking continued consideration of the item with the conclusions of UNCED, said that the specific issues the Commission was called upon to consider would be discussed only superficially at that Conference, the agenda of which, as everyone was aware, was ex-

tremely full. He was grateful to members who had already spoken on the item. However, while general comments were always useful and welcome, he would particularly like to hear the views of members on the main issues raised in the report, namely, whether all matters pertaining to obligations of prevention, or at least the procedural articles relating thereto, should be consigned to an annex—a question of great importance, in his opinion—and, secondly, the question of the definitions proposed for article 2. He appealed to members to address those matters.

2. Mr. GÜNEY said that, before commenting on the points raised in the report, he wished to air his misgivings, in some cases amounting to reservations, with regard to codification of a topic which should not be treated outside the framework of the application of the normal rules governing State responsibility.

3. The idea of a list of dangerous activities, based on the concept of dangerous substances, had failed to meet with the Commission's or the Sixth Committee's approval. Instead of preparing a list, the Commission should therefore endeavour to define dangerous activities, using a flexible form of language that could be adapted in the light of future developments.

4. International liability for injurious consequences was a complex subject that gave rise to both legal and political questions. The draft articles should deal principally with the civil liability of operators, the liability of States for harm being merely residual. The system proposed would constitute a considerable development in international law, since, as the Special Rapporteur pointed out in the report, States had thus far been reluctant to assume responsibility/liability in existing conventions or drafts regulating certain activities involving risk. Neither Principle 21 of the Stockholm Declaration<sup>2</sup> nor the development of the concept of preventive diligence of States set forth in various conventions on environmental protection were sufficiently well-established in law to be considered ready for codification.

5. At the present stage in the development of international law in the field under consideration, the Special Rapporteur's proposal that the obligations of prevention should be consigned to an annex consisting of purely recommendatory provisions was pragmatic and sensible and he supported it as regarded both procedural obligations and obligations of due diligence. Placing the provisions on prevention in the body of the draft would raise the issue of the relationship between State responsibility for wrongful acts and State liability for lawful activities; a State of origin which failed to respect the primary obligation of prevention would become guilty of an unlawful act. In that context, he expressed doubts with regard to the theory of fault, which placed the burden of proof on the victim, to the detriment of the principle of strict liability, which placed the burden on the author of the harm.

<sup>2</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

<sup>1</sup> Reproduced in *Yearbook... 1992*, vol. II (Part One).