

Document:-  
**A/CN.4/SR.2269**

**Summary record of the 2269th 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:-

**1992, vol. I**

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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.*

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## 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.

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**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).

6. The discussion on the topic in the Sixth Committee had brought out the need to pay particular attention to the interests of developing countries, which had neither the financial resources nor the necessary technical know-how to prevent or minimize the adverse consequences of activities carried out under their jurisdiction and therefore had a greater need than did the industrialized countries for clear and strict provisions defining the respective roles of the State of origin and the victim State.

7. If the provisions on prevention were placed in the body of the draft, joint treatment could be given to activities involving risk and activities with harmful effects. As the Special Rapporteur pointed out in the report, the State had, in either case, to adopt certain legislative, administrative and enforcement measures within the context of the concept of due diligence to prevent the harm from exceeding the tolerable threshold and becoming significant. A certain element of subjectivity existed with regard to the State of origin, which might not have accepted all the international instruments invoked within the framework of the codification exercise. That point required closer study.

8. The paragraphs of the report on the need to consult were, in principle, satisfactory. It should none the less be made clear that neighbouring or riparian States would not have a right of veto over the lawful activities of other States. Activities involving risk would, in any case, be lawful provided the State of origin assumed strict liability for harm caused. As for activities with harmful effects that caused harm in the course of operation, prior consultations would be necessary to take due account of the balance between the interests involved. Extending the scope of the draft articles to include activities involving a risk of harm would make the task of the Special Rapporteur and of the Commission unduly difficult. It was important to avoid imposing ill-defined obligations on States; separate rules to govern risk of harm, on the one hand, and actual harm, on the other, would be preferable. A State had the sovereign right to undertake lawful activities in its territory provided it took steps to ensure that those activities did not cause transboundary harm. It was gratifying to note that the Special Rapporteur subscribed to that principle.

9. Lastly, the proposed recommendatory provisions on prevention should be reviewed and defined more clearly as regarded both content and scope. In the present era of increasing liberalization and privatization of national economies, direct liability for transboundary harm should devolve upon the private operator. In the draft under consideration, priority should therefore be given to civil liability, and the question of the obligation of vigilance of States in respect of activities with harmful effects should be left aside. The concept of risk and its relationship with the operator's liability certainly required further in-depth consideration.

10. Mr. PAMBOU-TCHIVOUNDA said that, in view of the far-reaching implications of the proposals put forward in the report concerning the obligations of prevention, as well as those concerning article 2, he could not agree that the general-debate phase was over. The proposal that an essential part of the draft—a part dealing not with technical aspects of the topic but with substan-

tive ones—should be consigned to an annex was curious indeed, and it would be still more curious if the annex pointed, as it were, in a direction different from that of the draft itself. The resulting instrument could not possibly be homogeneous or consistent. Without the prevention provisions, the draft articles as a whole would remain an empty shell, and the Commission would have laboured to no avail. Whatever the difficulties involved, the Commission must shoulder its responsibilities and, with the assistance of as many authoritative views as could be obtained, tackle every aspect of the topic, bearing in mind each one of its multiple facets. The legal aspects of the industrial policies of States were shaped by all those facets—economic, financial, ecological, technological or political—as well as by their own development requirements and the means available to meet them. Hence the principle of obligations of prevention was inevitably relative in nature. Moreover, the fact had to be borne in mind that laws governing new technological inventions and their applications were generally enacted only after the invention had caused or threatened to cause a disaster. In defining the obligations of prevention, the Commission should strive to define their precise limits and indicate the threshold beyond which a State would be considered as failing to comply with the prevention principle. It should also endeavour to define the precise nature of preventive measures and determine their precise implication for States. Much of that task still lay ahead, and he therefore reiterated the view that the general-debate phase was far from over.

11. Mr. CALERO RODRIGUES expressed congratulations to the secretariat on producing the summary record of the 2268th meeting, if only in one language, in time for the 2269th. So far as he was aware, that achievement was a "first" in the Commission's experience. He hoped that the other language versions of the record would be distributed shortly and that the standard thus set would be maintained in the future.

12. The Special Rapporteur was right to say that the time for general discussion was over, although, of course, it was quite appropriate for new members to express their views. The Commission already had a certain basis for its work on the topic. It had been guided throughout the exercise by the tentative schematic outline prepared by the previous Special Rapporteur.<sup>3</sup> The sixth report by the present Special Rapporteur,<sup>4</sup> containing no less than 33 articles described as "experimental", also provided an excellent basis. The articles in chapters I (General provisions) and II (Principles) were already with the Drafting Committee; those on prevention, liability and civil liability were still before the Commission. No articles on settlement of disputes had been proposed so far, but their inclusion was now contemplated by the Special Rapporteur, as could be seen from the commentary to draft article VIII included in his eighth report.

<sup>3</sup> Reproduced in *Yearbook...* 1982, vol. II (Part Two), pp. 83-85, para. 109. Subsequent changes are indicated in *Yearbook...* 1983, vol. II (Part Two), pp. 84-85, para. 294.

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

13. The Special Rapporteur had requested members' views on whether the articles on prevention should be placed in an annex and presented simply as recommendations. At the previous session, it had been agreed that the nature of the entire instrument would be decided at some future date. He was, therefore, not certain that the Commission needed to decide immediately on the exact nature of the articles on prevention. It would be better simply to evaluate and, if necessary, modify the draft articles, thereby arriving at a set of provisions which could then be incorporated either into a convention or into an instrument of a non-binding character.

14. Draft article I,<sup>5</sup> which would be more appropriately titled "Assessment", established the obligation of a State to assess the potential transboundary harm of any activity falling within the scope of article 1 of the main text. Draft article I established a basic principle: activities which created an appreciable risk of causing transboundary harm should require the prior authorization of the State under whose jurisdiction or control they were to be carried out. Prior authorization was reasonable, but he wondered if it should have the character of a requirement. In many cases, it was not certain whether the activity fell into the category of activities creating an appreciable risk. Nonetheless, he would endorse the basic idea that a State was under an obligation to control any activities on its territory that might fall within the scope of the main articles.

15. Draft article II dealt with notification and information to States that might be affected by transboundary harm. He agreed fully with the Special Rapporteur that information was closely linked to notification. The notification and information procedure should be followed in cases where transboundary harm was certain or probable. The article was innovative in that it covered both activities involving risk and activities with harmful effects, an interesting and useful distinction, which was also reflected in draft article IV. Thus far, the Commission had mainly given its attention to prevention in the case of activities involving risk; it had not given much consideration to activities which were certain to have harmful effects. Yet, there were effective measures to be taken in the case of an activity that would necessarily give rise to harm, for example by establishing a regime of compensation. It might be useful for prevention of activities involving risk and prevention of those with harmful effects to be treated separately. In both cases, it was important to have a clear definition of the activities in question and to determine a threshold for risk and for harm.

16. Draft article III was helpful and might even encourage States to accept the instrument as a whole. Draft article IV, the substance of which was satisfactory, called for a State to hold consultations with potentially affected States before undertaking or authorizing an activity with harmful effects. The article represented the first instance of a separate provision relating to activities with harmful effects. While not entirely satisfied with the wording of draft article V, he endorsed the underlying concept, which represented an intermediate step between consul-

tations and prohibition. Draft article VI, on consultations in the case of activities involving risk, was acceptable in substance, but it ought to provide a more precise definition of the purpose of such consultations.

17. Draft article VII concerned initiatives on the part of the affected States, which had to be afforded an opportunity to intervene. However, he did not agree that a State, if it had reason to believe that an activity under the jurisdiction or control of another State was causing it significant harm or creating a risk of causing such harm, should, as provided for under that article, have the right to invoke draft article II. Rather, the potentially affected State should be entitled to call for consultations, which would then be carried out as if they had been initiated by the State of origin. The last line of draft article VII, which required the originating State to pay for the cost of any study undertaken by the affected State, was unnecessary and should be eliminated.

18. As to draft article VIII, the Commission should indeed establish a special procedure for the settlement of disputes and such a procedure should specify precisely under which articles a settlement procedure could be invoked. At the same time, if the provisions were not mandatory, it would be difficult to institute that type of procedure. It should be noted that draft article VIII referred to "the consultations held under articles III and V". However, there was no mention of consultations in draft article III. Draft article IX listed factors that might be taken into account by States in the case of consultations. Such a list was not useful and could be removed.

19. He had been among those who had objected to having a set of procedural obligations on prevention. The Special Rapporteur had revised the text to such an extent that he was no longer proposing purely procedural articles; rather, the draft articles on prevention combined procedural and substantive obligations. Consequently, as they currently stood, those draft articles could, if necessary, take on a mandatory character.

20. Mr. VERESHCHETIN said that, as long as the Commission did not establish a precise framework for the subject-matter under discussion, the Drafting Committee would hardly be in a position to make progress on the draft articles, and the Special Rapporteur would have difficulty continuing his work in such conditions.

21. The Commission must say whether it intended to confine itself to the General Assembly's instructions and consider the obligations arising out of injurious consequences of activities not prohibited by international law, or whether it would establish new primary obligations of prevention whose violation would lead to secondary obligations and responsibility in the classic sense. Those were two separate questions, but they could be interrelated, for example, by considering the set of problems associated with the prevention of transboundary harm and liability for such harm. But that would require formulating the task differently and asking the General Assembly to alter the agenda accordingly. Assuming that a new agenda item was introduced, the Commission would then need to deal with three issues: establishing obligations in respect of the prevention of transboundary harm; responsibility that arose out of the violation of such obligations; and liability arising out of transboundary harm

<sup>5</sup> For texts of draft articles I to IX, see 2268th meeting, para. 5.

regardless of those primary obligations. He took the Commission's terms of reference to be confined to the third set of issues alone; furthermore, the terms of reference contained no mention of transboundary harm.

22. To demonstrate his point he cited the example of the Convention on International Liability for Damage Caused by Space Objects, the only such instrument providing for the absolute liability of States for transboundary harm. It contained no measures for preventing harm, but only measures for compensation. During discussions in the Drafting Committee, it had been argued that, since all cosmic activities were associated with risk, there was no need to regulate prevention and that it was logical to turn immediately to the question of compensation for harm. Along those lines, the Commission too could begin by dealing with the question of liability for consequences of activities associated with risk and then, having resolved that problem, turn to other issues, including prevention. To take another example, the Committee on the Peaceful Uses of Outer Space was currently drafting rules for the use of nuclear power sources in outer space, and it was precisely because the use of nuclear power sources in space objects entailed a particular risk that rules and technical measures to eliminate or at least minimize that risk were being devised in parallel with rules pertaining to liability associated with those concrete activities; such rules must also institute liability for harm caused.

23. Those examples showed the need to formulate the task as clearly as possible from the outset. In his view, it was preferable to combine measures concerning prevention and measures concerning liability only when dealing with very specific activities. Unfortunately, the Commission had complicated its work. It had not determined what it meant by the term "international liability" and had instead focused on abstract questions of prevention in disregard of the concrete activities involved. That would make it very difficult to achieve positive results.

24. One of the three issues he had mentioned would need to be addressed, even if the agenda was not amended: the question of liability for transboundary harm arising out of activities not prohibited by international law. It would seem logical to deal with the subject at the present time and to leave such issues as prevention in abeyance. He therefore agreed with the Special Rapporteur's proposal to include the articles on the prevention of transboundary harm in a separate document for consideration later. He did not mean to imply that the issue of prevention was less important or that it should not be examined, but that problem did not fall within the mandate of the Commission, which had not even resolved the question it had been asked to consider.

25. The Commission could begin by determining how it intended to define the term "international liability". The English term had no equivalent in Russian, French, Spanish or a number of other languages. The Commission must also decide whether international liability concerned only relations between States, as was his understanding, or whether it also included the civil liability of natural and legal persons. Agreement on that score must be reached before the drafting of the specific articles could begin. Furthermore, was international liability

within the scope of the topic to be taken to mean absolute liability, regardless of fault, or were there other forms of liability? He agreed with the Special Rapporteur that, irrespective of its position on the articles on prevention, the Commission must still define risk and harm from the outset, or at least produce a working hypothesis. Again, the question of the basis in general law of compensation for transboundary harm arising out of activities not prohibited by international law was still unclear.

26. Citing well-known legal precedents and Principle 21 of the Stockholm Declaration,<sup>6</sup> scholars often referred to custom in connection with the need to ensure that activities carried out within the national boundaries or under the jurisdiction of a State did not cause harm to the territory of other States or to areas beyond the boundaries of its jurisdiction. On the one hand, if that general principle of international law was recognized, the Commission's entire structure of liability for injurious consequences arising out of activities not prohibited by international law collapsed, and the very justification for the whole topic of liability in its present formulation ceased to exist. In that case, the Commission should discuss responsibility for breach of obligations of States, in other words, it should come back to the general regime of responsibility. On the other hand, if the Commission considered that such custom did not exist, how could it expect States to be willing to agree to obligations to compensate any transboundary harm arising out of activities not prohibited by international law? He saw a vicious circle developing, a danger that was also present if the Commission decided to take as a basis for liability the assumption that transboundary harm violated the territorial sovereignty of the injured State: once again, the problem reverted to one of breach of obligations, in other words, responsibility in the classic sense.

27. In view of the complexity of the problem and the doubts as to the possibility of establishing a general legal regime of liability for harm arising out of activities not prohibited by international law, an effort should be made to draft a regime with specific parameters for its application, particularly with regard to the nature and degree of risk. He was convinced that the slow progress being made on the subject was due to the lack of agreement on the conceptual framework of the problem.

28. Mr. PELLET said he was surprised that Mr. Vereshchetin had asked the Special Rapporteur to deal separately with the various problems posed by the subject-matter but had himself not addressed the issue of prevention, on which the Special Rapporteur had sought to focus in his eighth report.

29. Mr. Vereshchetin and Mr. Calero Rodrigues had pointed out that the Commission's terms of reference made no mention of the question of transboundary harm. Perhaps the Commission should not confine itself to that issue. In the area of international human rights law, for example, States were expected to protect the rights of their own population, and the Commission might consider whether, in cases of serious harm to health or the

<sup>6</sup> See footnote 2 above.

environment, it ought not to tackle the question of the protection of the population of a State.

30. Mr. VERESHCHETIN, replying to Mr. Pellet's remarks, reiterated that as long as the Commission failed to define the parameters of the topic it would be unable to make progress on drafting individual articles. He did not insist on the need to deal with transboundary harm, although he was inclined to take the view that that was of overriding importance. However, it was not mentioned in the Commission's mandate, and that, too, showed that the topic must be clearly defined before the individual articles could be drafted. He agreed with many of the Special Rapporteur's conclusions, including the need to examine the question of prevention separately and to define risk, harm, and so on, but once again, that could only be done once the Commission had agreed upon its terms of reference.

31. Mr. YANKOV said that the Special Rapporteur's report provided a lucid overview of the topic and he was to be commended for his perseverance in exploring such a complex matter. Clearly, it was time for the Commission to provide guidelines for future work.

32. The issue of prevention had to be dealt with, whatever the Commission ultimately decided with respect to the nature and place of the relevant provisions in the draft. One could not discuss activities which might cause significant transboundary harm without considering preventive measures. At the same time, if prevention was viewed as an obligation deriving from a primary rule, it then overlapped with the topic of State responsibility. The Special Rapporteur might, therefore, consider adding a provision which dealt with the interface between the issues of risk and harm and that of State responsibility.

33. The trend in recent years had been to broaden the concept of prevention, mainly in relation to containment of the harmful effects of a particular activity. For example, the United Nations Convention on the Law of the Sea referred to the prevention, reduction and control of pollution of the marine environment. In general, provisions on prevention had been designed not to prevent the harmful incident altogether but to limit the extent of the harm caused. However, some draft conventions provided for measures aimed at preventing the very occurrence of damage and, in certain cases, such measures were envisaged even where there was inadequate or inconclusive scientific evidence to prove the causal link between certain activities and the damage or impact.

34. The Commission should provide the Special Rapporteur with clear guidelines for elaborating the provisions on prevention and confine itself, at the present stage, to formulating a general principle relating to the obligation of States to adopt appropriate legislative and other measures to prevent, reduce and control the risk of transboundary harm. The Commission should review the provisions on prevention carefully but should postpone any decision on the nature of those provisions until the character of the entire instrument had been determined. Again, a start should be made, as soon as possible, on formulating substantive and procedural provisions relating to the international liability of States and civil liability.

35. There was no need to include in the text all the possible parameters relating to the risk and threshold of transboundary harm. They could, if necessary, be included in an attached list. It would be preferable to use the term "significant" rather than "appreciable" in reference to both risk and transboundary harm.

36. Limited though it currently was, treaty practice in the field of the protection of the environment and conservation of natural resources should serve as a guide in the work on the topic under consideration. However, he agreed with other members that the topic should not be confined to environmental issues.

37. As to the recommendatory provisions on prevention, the concept of prior authorization, contained in draft article I, needed further clarification; otherwise, certain States might find in such a requirement a justification for rejecting the entire instrument. He was in general agreement with the substance of draft article II, on notification and information, but would have liked the role of regional and other competent organizations to have been spelt out in detail, either in the draft article itself, or at some appropriate point in the commentary. There was a body of treaty law on, for example, the protection and preservation of the marine environment, though he recognized that existing conventions on the regional seas were not very effective mainly because, apart from the Mediterranean Sea Action Plan,<sup>7</sup> they provided for only very general measures. Draft article VIII was not adequate. A much more elaborate provision was needed, irrespective of the proposal—which he supported—for an annex setting forth the details of the mechanism for the settlement of disputes.

38. By and large, he agreed with the proposed draft articles and endorsed the Special Rapporteur's suggestion that they should be regarded as experimental, to provide the basis for a coherent set of rules on prevention.

39. Mr. BOWETT said that, like Mr. Vereshchetin, he did not, as a novice on the Commission, have a clear picture of what was a highly complex topic. In particular, he did not see where the provisions on prevention were going to fit into the topic as a whole. It would therefore be of great assistance if the Special Rapporteur could provide the Commission with an overall scheme of the entire topic. His general feeling was that the Commission might well end up with what were no more than guidelines. If the guidelines appeared to work in practice, and if States were prepared to accept them, there might come a stage when they could be embodied in a more legal and compulsory form. That stage, however, probably lay some way ahead.

40. In his report, the Special Rapporteur rightly drew a fairly basic distinction between two distinct categories of activities, which should be kept quite separate in any draft the Commission prepared. The first category concerned activities involving risk, in other words, activities in which harm was possible but by no means certain, while the second category concerned activities having a harmful effect, in other words, activities where harm was

<sup>7</sup> Formed the basis for the Convention for the Protection of the Mediterranean Sea against Pollution and Protocols thereto, signed at Barcelona on 16 February 1976.

well-nigh inevitable or possibly even already occurring. It followed that, inasmuch as those two categories were fundamental and should be kept separate, they must be defined with care. Yet, while the draft provided the elements for a definition of activities involving risk, it did not do so for a definition of activities with harmful effects. In that connection he agreed entirely with Mr. Calero Rodrigues that both categories of activities should be defined in terms of the threshold of damage or harm, because there were certain kinds of potential or actual harm that would be so minimal that it was not really necessary to provide for them in the draft.

41. On the assumption that the two categories of activities could be defined, he believed that the draft articles on prevention were sensible and sound. Draft article I, which imposed an obligation on the State to authorize risky activities within its own territory, made eminently good sense and he agreed in particular with the obligation to precede any activities that had the potential for transboundary harm with an environmental impact assessment. He also considered that draft articles II and III must both be right and had no difficulty in endorsing draft articles VI and VII as part of the approach to prevention in relation to activities involving risk. However, in the case of activities with harmful effects, which were the subject of draft articles IV, V and VII, there was a requirement of prior consultation which did not apply to activities involving risk. He wondered, therefore, what the purpose of such prior consultation was. Presumably it was to arrive at an agreed regime which would permit such activities notwithstanding their harmful effects; that might involve either modification of the original scheme proposed by the State authorizing the activities or even possibly some element of compensation for the interests in other States that would be harmed by those activities. Draft article IX, on factors involved in a balance of interests, was one of the most attractive features of the draft and the concept it embodied was extremely helpful. There was, however, one rather difficult question. If the activities concerned produced harmful effects in the territory of a neighbouring State, they were, on one view, unlawful. If that were so, why were they being dealt with under a topic concerned with activities that were not unlawful? The answer apparently—and it was in fact already contained in the report—was that, if the activities, though producing harmful effects, were carried out pursuant to an agreed regime or other form of consent, then the very fact of consent precluded wrongfulness; in other words, though *prima facie* unlawful, they could not be treated as unlawful as they were activities carried out pursuant to consent. The next question which arose was why there was a need for a provision on settlement of disputes if no unlawful acts were involved. He was not certain what the answer was. Perhaps the Special Rapporteur had in mind the possibility that, in the course of the activities, there could be conduct involving a breach of the agreed regime, in which event there would be an unlawful act and that would provide the basis for a dispute settlement provision. Or perhaps the Special Rapporteur had in mind the possibility that differences might arise between the States involved during the course of negotiations to reach agreement on an agreed regime. In that event, a dispute-settlement mechanism would be more in the nature of a conciliation device to assist the parties in arriving at agreement on an eventual regime.

That was a point on which the Special Rapporteur would no doubt wish to provide the Commission with guidance.

42. Mr. KOROMA said that, though not a newcomer to the Commission, he too experienced some difficulty in understanding the purpose and direction of the draft and, in particular, of the Special Rapporteur's eighth report. The Commission should, by that stage, have built the basic structure of the edifice, even if certain fittings had yet to be added. He agreed that a schematic outline of the topic would have been helpful and possibly, in his summing up, the Special Rapporteur might wish to provide the Commission with some guidance in that connection.

43. He would like to know whether the Special Rapporteur's suggestion was in fact that the topic should be divided into two sections, the first dealing with obligations, and the second, in the form of an annex, consisting mainly of recommendations. So far as he knew, the Commission's earlier decision not to concern itself for the time being with the nature of the instrument but to endeavour to elaborate the regime and then to take a decision on whether to have a convention, modern rules, or guidelines remained valid. Another question, which should have been raised in the report, concerned the need for the topic on liability and the way in which it differed from the topic of State responsibility. Under the regime of State responsibility, for example, the author State would be expected to pay compensation for a wrongful act, whereas, under the regime of liability, the author State would be expected to pay compensation even for an act that was not prohibited by international law. That difference was due to the fact that, in the case of a wrongful act, compensation could be expected to be higher, while, in the case of a lawful act, there could be mitigating circumstances, as in space exploration, for instance. Secondly, in the case of State responsibility, a stigma attached to the wrongful act, something which did not apply in regard to the regime of liability.

44. It had been generally agreed that the title of the topic should be aligned with the French and other language versions not only for reasons of linguistic harmony but also because the topic should in fact deal with activities not prohibited by international law. For instance, the construction and operation of a dam on a State's territory was a lawful activity. However, if that dam burst, causing harm to another State, liability was incurred and compensation was due. That was the kind of act with which the topic was concerned, as was apparent from the understanding reached by the Commission.

45. In constructing a regime for injurious consequences arising out of activities not prohibited by international law, certain criteria would have to be elaborated and, to that end, the Commission should revert to basic principles. Thus, it was first necessary to determine the scope of the topic, which, as was clear from the Commission's earlier decisions, was not confined to the environment or to ultra-hazardous activities. The next stage would be for the Commission to determine the principles and rules to be applied and, having done so, it might then decide to codify, or progressively develop, them in the form of obligations and recommendations.

46. One of the issues dealt with in the report, and repeatedly considered by the Commission, was whether the basis of liability should be risk or harm. Most members thought it should be harm, and for good reason. If liability were to be based on risk, it would tend to restrict the topic, since liability would arise only if it were established that the activity was risky at the time it was embarked upon. Paradoxically, it would also tend to enlarge the scope of the topic, inasmuch as every human endeavour involved a measure of risk. To give the topic a firm footing, therefore, liability should be based on harm, although that did not mean that risk had no place in the determination of compensation. The view that liability was based on harm was also borne out by a long line of case law, which showed that the State's duty to use its territory so as not to cause harm to others was now a universal rule. It was also recognized in a number of treaties, such as the Treaty Banning Nuclear Weapons Tests in the Atmosphere in Outer Space and Under Water and in the Helsinki Rules on the Uses of the Waters of International Rivers.<sup>8</sup> Harm caused to others, therefore, lay at the very heart of the topic of liability.

47. Other factors to be taken into consideration in determining liability included the concept of reasonableness, balance of interest, and due diligence. The Commission would also have to decide whether the standards of strict and absolute liability should apply to the topic of liability as well as to the topic of State responsibility. That was necessary as a matter of policy and on account of the principle that he who suffers harm must not be left to bear the harm alone and that the victim of harm must be paid compensation.

48. It was essential for the main debate to take place in plenary, since the Commission was engaged in the progressive development of the law in an important area. The Drafting Committee should, of course, be left to formulate the various articles, but it should not be seen to replace the plenary, all the more so as there were no summary records of the Drafting Committee's discussions.

49. Mr. ROSENSTOCK said that, as another newcomer to the Commission, he experienced the same problems as did Mr. Vereshchetin. His perplexity was exacerbated by the fact that the solution to at least part of the problems raised by Mr. Bowett seemed to be a legal fiction, which worried him even more. He believed the problem was in part due to a perception of a practical reality and an attempt to deal with it, which could not safely be discussed in plenary without distancing the hopes of progressive development even further. A happy compromise might perhaps be to have an informal meeting of the Commission, off the record, to see whether some measure of agreement as to the foundation of the topic could be reached. It would be utter madness to set about constructing the floors of the building before agreeing on its foundation.

*The meeting rose at 1.10 p.m.*

<sup>8</sup> ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 et seq.

## 2270th MEETING

*Tuesday, 9 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.

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**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. KOROMA, continuing his statement from the preceding meeting, recalled that he had compared the topic to a building with a foundation and a roof already in place while construction was going on. He had attempted at that meeting to define the scope of the topic and had proposed that the English title should be brought into line with that of the other languages. He had also stressed that the topic constantly had to be distinguished from that of State responsibility.

2. In formulating the regime for the topic, the Commission had to bear in mind the basic principles; the most important was that harm as opposed to risk was the basis of the obligation to make reparation and it had been embodied in the draft declaration considered by UNCED.<sup>2</sup> The fact that harm was essential in order to establish the obligation to make reparation was, in his view, basically what distinguished liability for lawful activities having injurious consequences from responsibility for wrongful acts.

3. The Commission's goal was not to establish a regime of strict liability or liability for risk. It had to take account of factors such as reasonableness, due diligence, the balance of interests, equity and the need not to hinder scientific progress or economic development in defining the regime of liability for lawful activities.

4. He was, however, convinced that any harm had to be compensated, that the victim should not be left to bear the loss and that States had to see to it that activities carried out in their territory did not cause harm to other

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

<sup>2</sup> See 2268th meeting, footnote 2.