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Summary record of the 2272nd 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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inappropriate to make a request of that type to the General Assembly. Hence the Commission must work on producing guidelines for States; being too ambitious might well lead to complete failure.

45. Mr. IDRIS said that the subject was complex and not only involved legal issues, but also had political and economic implications. He had to confess that he experienced difficulties with the report, which did not show the development of what was a long-standing subject. The conceptual framework of the topic was not yet ready, and the basic objective was still ambiguous. In that connection, he agreed with the statements by Mr. Vereshchetin (2269th meeting) and Mr. Sreenivasa Rao (2270th meeting) and endorsed the pertinent comments by Mr. Bowett (2269th meeting).

46. Despite worldwide concern about contemporary environmental problems, particularly in the wake of the Chernobyl accident, he was doubtful whether the present topic should be dealt with independently of the general rules of State responsibility. There was a basic substantive relationship between the topics that had not been dealt with by the Special Rapporteur or resolved by the Commission. He wondered whether a code on liability would improve the current status of international law and practice and be more efficient than an aspect-by-aspect approach geared to the adoption of realistic and carefully defined separate legal instruments.

47. The instrument now being devised was intended to cover only lawful activities. Harm, when caused without breaching an obligation, might be regarded as the result of an act beyond the control of the State concerned. In that case, there would be two victims, namely the State in which the event took place and the State suffering transboundary harm. Actually, the physical harm to the former could be more serious than to the latter. With regard to prevention, it was important to strike a balance between allowing States their legitimate freedom of action on their territories and ensuring that they exercised due care in preventing transboundary harm arising out of their activities. The goal should be not to prohibit lawful activities, but to regulate them.

48. The records of the Commission and the current debate showed that little progress had been made. The Commission was still considering basic issues and even questioning the value and objectives of the topic. International environmental law, including that related to the "global commons" and the United Nations Convention on the Law of the Sea, had been evolving effectively outside the Commission. The Commission had been experiencing considerable difficulty in reaching a consensus, partly because the goal of its work was not clear. He was not convinced that it was too early to examine the status of the topic. Once that was decided, it would be a simple matter to clarify the content and structure of the proposed instrument. In that respect, he wondered whether it was timely and realistic for the Commission to pursue its endeavours to formulate a general and multilateral convention or whether it would be reasonable to have the results take the form of general guidelines or a declaration of general principles by the General Assembly.

49. Lastly, he supported Mr. Rosenstock's suggestion (2269th meeting) that the Commission should establish a small working group to define the basic concepts involved and focus on the form and nature of the instrument to be adopted.

50. Mr. CRAWFORD said that, as shown by the debate, there was no consensus on where to place the draft articles on prevention. For his part, he agreed with Mr. Pellet (2269th meeting) that those provisions should not be recommendatory and they should not be relegated to an annex. The status of the draft articles was still unresolved, and it was not the right moment for the Commission to decide that prevention was less important than any other aspect of the topic. It was high time for the Commission to devote closer attention to the subject, and in that context he strongly supported Mr. Rosenstock's suggestion for a working group.

51. Mr. BARBOZA (Special Rapporteur), referring to Mr. Crawford's remarks, said that he had had the impression that the Commission was in favour of placing all the procedural articles on prevention in an annex. In his report, he had suggested that the same course should be followed for unilateral measures of prevention, but that did not imply that a consensus had been reached. As he saw it, there was general agreement in the Commission on not making procedural measures binding.

52. As to the comments by Mr. Idris, there had been debate in the Commission on the difference between the present topic and the topic of State responsibility. He had sought to make that distinction clear and wished to draw attention in that regard to the record of the debate at the forty-first session.¹²

53. Mr. IDRIS said he did not mean to suggest that there had been no debate, but simply that it had not yielded any concrete results. The topic under consideration and that of State responsibility continued to overlap somewhat and the problem must be resolved before the articles were drafted.

The meeting rose at 12.55 p.m.

¹² For summary of debate, see *Yearbook . . . 1989*, vol. II (Part Two), p. 89, para. 340.

2272nd MEETING

Friday, 12 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, 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 (continued) (A/CN.4/443,¹ 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. VILLAGRAN KRAMER said that the study by the Special Rapporteur highlighted the need to harmonize and reconcile the two types of State responsibility, namely, responsibility for the consequences of wrongful acts and so-called strict liability. It was understandable that some members of the Commission from industrialized countries, whose enterprises were liable to cause transboundary harm, might be concerned about the consequences the theory of strict liability could have in that regard. It was not, however, impossible to regulate the question at the international level and the method which had been proposed by the Special Rapporteur and which would be to draw up a provisional list of activities that could be classified in the category of ultra-hazardous activities was very useful because it made it possible to place that theory in the specific context of risk and to distinguish it from the theory of ordinary contractual responsibility.

2. With regard to prevention, he believed that the argument that the imposition of obligations of prevention might give rise to the civil liability of the State in the event of failure to fulfil those obligations was not convincing enough to eliminate the question of prevention from the draft text under consideration. Prevention was part of the normal set of rules of law and, in the modern-day world, it was inherent in all human activities. The idea of imposing a lowest common obligation of prevention on States was one that had been discussed at UNCED and provisions on prevention were likely to be included in a large number of instruments that would be concluded after that Conference. The Commission could not fail to take account of that trend.

3. In reply to those who drew a distinction between preventive measures taken before harm had occurred and measures to minimize harm taken after it had occurred, he pointed out that, as the Special Rapporteur had explained, prevention had two aspects. In the first stage, it was designed to prevent significant harm from occurring and, in the second, when an accident had actually occurred, it was designed to avoid a multiplier effect, an approach which fell squarely within the framework of a rule of prevention.

4. With regard to the concept of risk, the definition given by the Special Rapporteur in the report on the ba-

sis of the three main criteria of magnitude, location and effects, was undoubtedly very useful for discussion purposes, but he thought that it would be preferable, as the Special Rapporteur himself suggested, to divide the proposed text so that the first two sentences would form a paragraph of article 2 (Use of terms), with the remainder of the wording appearing in a commentary. The best course would be to proceed as proposed by the Special Rapporteur, including his suggestion that the list of dangerous substances should be placed in an annex, if only to facilitate the discussion. He was not sure whether it was really necessary to define the concept of harm, since a rigid definition might hamper the judges in their work, particularly since it might soon become obsolete as a result of technological developments and the increasing sophistication of industrial activities. It might be better to characterize harm simply by reference to its magnitude. The important point was to make it clear that what was involved was not ordinary harm, but "substantial", "appreciable" or "significant" harm, depending on the term to be used. It might also be desirable, when defining the components of transboundary harm, to avoid the use of the awkward term *choses* in French or *cosas* in Spanish.

5. Lastly, he suggested that the Commission might give further consideration to the possibility of assigning liability for harm and hence for the resulting consequences and legal obligations to the operators or, in other words, to persons and not to States. The State was an intermediary, its role being basically that of enacting rules and regulations and ensuring that they were applied; it was the operator who was directly liable. It might be useful to give further consideration to that question of the liability of the operator, without, however, going too far in that direction.

6. Mr. MIKULKA said that he would draw the Commission's attention to the fact that the question of prevention, which was the focus of the Special Rapporteur's eighth report, and that of liability for the injurious consequences of activities which involved risk or had harmful effects, were two completely different and totally unrelated problems. In the case of State responsibility for wrongful acts, the obligation to make reparation was secondary, whereas, in the case of liability for injurious consequences arising out of acts not prohibited by international law, it was primary and it arose when an activity carried out in the territory of one State caused harm in the territory of another State, even if that activity was not wrongful and no matter whether preventive measures had been taken or not.

7. He agreed with other members of the Commission that measures of prevention should be compulsory, despite the Special Rapporteur's proposal that they should be recommendatory. The argument in the report, that the imposition of primary obligations of prevention would make any breach a wrongful and therefore prohibited act, so that the Commission would then be dealing with prohibited acts which were not part of the topic under consideration, was not convincing enough to eliminate the idea of obligations of prevention from the draft to be formulated. In view of the absence of any real progress in formulating substantive rules on liability for injurious consequences arising out of activities that were not pro-

¹ Reproduced in *Yearbook* . . . 1992, vol. II (Part One).

hibited, the formulation of a body of rules on the problem of prevention might meet at least some of the international community's needs. The duty to make reparation for transboundary harm could, however, not be subordinated to the State's obligation in respect of prevention. The obligation of reparation had to be placed in the context of the principle of equity whereby an innocent victim should not be left to bear the burden of the harm. Accepting the Special Rapporteur's idea

... that transboundary harm caused by ... activities [involving risk], when significant, is in principle, prohibited under general international law. That being so, an activity of this type could exist only if there were some form of prior consent of the affected States,

would mean moving from the realm of liability to that of responsibility for wrongful acts. Prior consent would then be no more than a circumstance precluding wrongfulness within the meaning of article 29 of part 1 of the draft articles on State responsibility.² In order to keep the topic under consideration completely separate from the question of State responsibility for wrongful acts, that idea had to be discarded.

8. Mr. PELLET said that he wished to come back to the concepts of harm and risk, as discussed in the appendix to the report.

9. With regard to definitions, he said that the substance of the definition of risk proposed in the report seemed to be based on ideas that were correct, but the wording was unusual for a legal text. The text was more of an explanation than a definition and he thought that it should be placed in the commentary. It would also be preferable to have two separate paragraphs dealing with the concepts of risk and activities involving risk respectively, since risk was the probability of significant harm, whereas an activity involving risk was a type of conduct or a process involving such a probability. There was no need to go further in the body of the text, the rest of which was an explanation rather than a definition.

10. In connection with the concept of risk, there was no need to include the idea of "significance", for two reasons. First, because it would lead to endless discussion; for instance, with regard to the peaceful uses of nuclear energy, it was hardly likely that States would take the same view of the probability of an accident, depending on whether reactors were sited in their territories or came under the jurisdiction of other countries. It was undeniable that a risk existed, even with the use of sophisticated and reliable technology, and it could hardly be claimed that the peaceful use of nuclear power was not an activity involving risk, whatever the actual level of probability. The second reason, which was more theoretical, was that the problem was not the magnitude of the risk, but the magnitude of the potential harm.

11. In the light of the definition of risk which he was proposing and which was basically the same as the Special Rapporteur's, it was clear that the definition of harm must precede the definition of risk, as a matter of ordinary logic without any substantive implications.

12. The definition of harm proposed by the Special Rapporteur in the report was much more open to question than the ideas underlying his comments on risk. The list of the various categories of harm was not objectionable in itself and he would agree that loss of life, personal injury, impairment of health, damage to property, detrimental alteration of the environment and perhaps the cost of preventive measures—a matter on which he reserved his position—were all elements of a proper definition. Moreover, the definition was much the same as the one the Chairman had suggested in the draft article he had annexed to his contribution³ to the work edited by Francioni and Scovazzi. However, it was quite extraordinary that the word "compensation" should be used in the seemingly harmless wording of subparagraph (c) of the proposed definition because it was not in article 2 that it should be decided whether harm gave rise to compensation. He was sure that the Special Rapporteur was not trying to force the Commission's hand, but he did want to draw his attention to the fact that the provision put the cart before the horse because a reference to compensation would mean that what was being defined was not harm, but its consequences, and that would prejudice the entire issue. He therefore requested the Special Rapporteur to reassure him on that point and, at any rate, to explain why the idea of compensation was present in the middle of a definition of harm.

13. He agreed that, although there was no point in defining risk, harm must be defined. He had no particular preference as between the words "significant" and "appreciable", but he wished to draw the Special Rapporteur's attention to a number of studies on the question, including an article by Sachariew.⁴ It was, however, one thing to describe harm in relation to the definition of risk and quite another to define what was meant by "significant" or "appreciable". He fully agreed with what Mr. Villagran Kramer had said in that regard. It would be both pointless and dangerous to define the magnitude of harm, since that was primarily a matter to be decided by the courts. It would also be presumptuous and paralyzing to attempt a definition that would soon be obsolete in any case because attitudes towards such matters were changing so fast. There was thus no point in embarking on a definition within a definition.

14. With regard to the concept of transboundary harm, he had no objection to the definition contained in the report, but he had two additional points to make. First, the draft should not leave out harm which did not come within the scope of that definition, but which was nevertheless well within the bounds of the topic, such as harm caused to the "global commons". It might be worthwhile asking whether the draft should be confined to harm with some extraneous element, such as trans-

³ C. Tomuschat, "International liability for injurious consequences arising out of acts not prohibited by international law: The work of the International Law Commission" in *International Responsibility for Environmental Harm* (London/Dordrecht/Boston, Graham & Trotman, 1991), pp. 37 *et seq.*

⁴ K. Sachariew, "The definition of thresholds of tolerance for transboundary environmental injury under international law: development and present status", *Netherlands International Law Review*, vol. XXXVII, 1990, No. 2, p. 193.

² For text, see *Yearbook* ... 1980, vol. II (Part Two), p. 33.

boundary harm or harm caused to the "global commons". The question also arose whether a State was responsible for harm caused to its own population or to the national environment—whether it was liable for the damage. That was a point which the Special Rapporteur must consider, even if there was no easy answer.

15. Turning to the much discussed question of the respective roles of risk and harm, he said that they both had a role to play, but perhaps not the role assigned to them by the Special Rapporteur. Risk was and must be the factor giving rise to responsibility, in the sense of liability. If an activity involved risk—and he was still sceptical about activities with harmful effects—the State was liable, but, if there were grounds for compensation, it could be only because the activity had actually caused harm. Harm gave rise not to liability, but to reparation. In his view, there was an obvious parallel with responsibility for wrongfulness, as dealt with in the report by Mr. Arangio-Ruiz;⁵ in that case, the fact giving rise to responsibility was the wrongful act and harm was the factor which gave rise to reparation. In the context of liability for lawful acts, risk was the factor which gave rise to liability, but only harm could warrant compensation. In that respect, he reserved his position on whether there was a rule of international law requiring the State to make reparation. As Mr. Villagran Kramer had suggested, the focus should be on the duty of the operators to make reparation.

16. He wished to correct certain comments which had been wrongly attributed to him by other speakers. First, with regard to the form of the provisions on prevention, Mr. Bennouna (2271st meeting) had attributed to him the comment that the method of work when drafting a convention was not the same as when drafting a resolution. What he had actually said and still maintained was that a provision which might be acceptable in a recommendation without binding force might not be acceptable if it was to be included in a convention. For instance, he was one of the members of the Commission who held the view that a State was not bound to make reparation for harm caused by an activity which was not prohibited by international law. It would, however, be idealistic and unrealistic to state that view in a draft convention; that would be to confuse what was desirable and what was possible, whereas the same idea might well be included, on the basis of equity, in a recommendation. He therefore reiterated that it was by no means unimportant to decide whether the Commission should be engaging in "hard" law codification leading to a convention or in flexible progressive development leading simply to recommendations. Where other issues, such as reparation, were concerned, he considered that it would be better to have standard clauses which would fit different categories of risk. In any event, a decision must be taken urgently because the nature of the discussion would change depending on the purpose of the exercise to be undertaken.

17. Secondly, he thought that Mr. Bennouna, Mr. Razafindralambo and Mr. Mahiou (2271st meeting)

had misinterpreted his comments by attributing to him the view that the consideration of the topic should be limited to prevention. What he had meant was that prevention was not the finishing post of the Commission's discussion, but its most reliable starting line. Regardless of the tricky question whether a State was bound to make reparation when harm had occurred, there was no doubt that the State must seek to prevent harm and to limit its injurious consequences. That was settled and clear; the principles of international law involved were beyond any doubt and, indeed, had not been questioned. The rest was a matter of speculation and opinion on which the Commission was obviously somewhat divided. He hoped that the Commission could start out from firm ground before hitting stormy seas and that, just as though it were throwing a bottle into the sea, it would send the General Assembly the first part of the draft articles on prevention. After that, he would be ready to take ship with his colleagues on the way to unknown lands.

18. Mr. ROSENSTOCK said that, like the previous speaker, he considered it vital that there should be some consensus or general understanding on the point at which the Commission's work should begin and the order which it should follow. It might not be possible to conceptualize that starting point in terms of State responsibility because the problem of the relationship between State responsibility and the topic under consideration was complicated by the pragmatic but somewhat artificial boundaries the Commission had adopted for the topic of State responsibility. The problem was also complicated by the fact that the issues covered first in Mr. Quentin-Baxter's and then in the present Special Rapporteur's reports were so complex that neither fault nor strict liability provided the key. It was an area in which fault and strict liability seemed to overlap to a certain degree. Perhaps the task of the Commission should be broken down into different segments to enable it to tackle the problems one by one, on the understanding that it would endeavour to cover all aspects of the problem in due course. He agreed that one aspect with which the Commission could start was prevention, in which connection many of the Special Rapporteur's proposals would provide an excellent starting point. Another issue which it should be possible to deal with and which could be taken up in the initial stages of the general study was the civil liability of operators, including provisions for insurance and funding arrangements. Thereafter, the Commission could try to tackle some of the conceptually more difficult issues.

19. If that approach was not acceptable as a first step, the Commission would be faced with the choice of either continuing to go round in circles or of adopting an approach that would enable it to make genuine progress. If such an approach was to have any chance of producing early results, it would be essential for the Commission to agree to draft a statement of principles or guidelines. It was no accident that, when the United Nations had broken new ground in the fields of human rights and outer space and had tackled problems of enormous sensitivity such as torture, it had first drafted a declaration. A declaration or statement of principles should not be seen as an alternative to a treaty instrument, but, rather, as a step to-

⁵ See *Yearbook* . . . 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3.

wards the drafting of such an instrument. It was true that the Commission did not normally start by deciding between a declaration and a treaty—that it did not normally start by determining the nature of the instrument itself. But it was not prohibited from so doing. Given the extraordinary complexity of the topic, the fact that the Commission stood at the outer edge of the progressive development of the law and the magnitude of the problems it had experienced over the past decade, the Commission must demonstrate its ability to innovate by taking a decision at the current stage on the kind of instrument on which it was working. It was no longer in the period of the 1950s when Gilberto Amado had insisted that the codification work on diplomatic privileges and immunities and the law of treaties must be carried out in treaty form. Even if the Commission decided to adopt a different approach from time to time, that would not, in his view, in any way affect its primary task of preparing treaty instruments.

20. If the Commission did decide to prepare draft principles or guidelines, it should bear in mind the close connection between the topic and State responsibility, in the broad sense, of which it was in some ways a part, although the Special Rapporteur's arguments to the contrary were not without relevance. In so doing, the Commission should focus its efforts on the area where there were the most sources, namely, the area of ultra-hazardous activities. It could then move on to the question of risk generally, referring to the helpful analysis in the report, and, in due course, deal with the harmful effects that might result from such activities. Once that base had been established, it would be possible to elaborate some principles concerning the consequences of actual harm. In that connection, he agreed with the distinction drawn by Mr. Pellet between harm, on the one hand, and compensation, on the other; the Commission should bear in mind that no society compensated for all harm and that all societies and legal systems took account of the usefulness of the activity in question, as well as the extent and nature of the damage. Basically, the Commission should proceed along the lines laid down by Mr. Quentin-Baxter and the present Special Rapporteur before the latter had been constrained to take a more ambitious leap by a few members of the Commission whose reach might have exceeded their grasp and some members of the Sixth Committee who had perhaps not fully understood the complexity of the subject. The lines laid down by Mr. Quentin-Baxter and the present Special Rapporteur were neither neat nor simple, but they provided a useful working hypothesis and, by proceeding gradually and starting with matters that were relatively easy to deal with, the Commission could perhaps achieve something. Such an approach was not an automatic guarantee of success, however, and he would warn the Commission in particular against any ill-advised attempt at generalization based on questions such as watercourses, outer space, nuclear accidents, oil pollution or the law of the sea. He endorsed Mr. Pellet's proposal to focus initially on prevention. Either way, the Commission must find a way of getting on with the job.

21. Mr. Sreenivasa RAO said that, in tackling the topic of international liability, it was necessary to have a sense of urgency, but at the same time to act with caution. The

Special Rapporteur should have backed up his arguments with concrete—even hypothetical—examples. Inasmuch as the Commission did not know for certain what it was trying to prevent with its draft or the kind of principles of prevention involved, it could not really make any progress. Was the aim to draft principles of a hortatory nature, in the hope that States would give substance to them in practice? If the Commission embarked on a path that had already been traced, its draft might duplicate existing rules; but, if it ventured on to new ground, when no consensus had been reached on a particular rule, it might scare away the States likely to accept a regime of prevention. The Commission had not yet given serious consideration to that dilemma. Thus far, it had merely toyed with concepts that were devoid of all practical interest. How could it argue in favour of its draft if there was no agreement on the source, cause and effect of harm? Had it managed at last to define what it meant by "liability"? As matters stood, the Commission had nothing on which it could base a decision, and that was of all the more concern to him, since the life and behaviour patterns of millions of people were at stake. The Commission should therefore not treat the task entrusted to it lightly. It should narrow the scope of its exercise and adopt a realistic approach, moving forward gradually towards a reasonable rational and acceptable regime.

22. Mr. KOROMA said that he could not help feeling a certain sympathy for the Special Rapporteur, who was constantly buffeted from one position to another. International liability had, of course, developed out of State responsibility and, when considering the former, it was not possible to disregard the latter entirely. If, however, the Commission considered that liability was an autonomous topic, it should abide by its decision; otherwise, it would be better for it to call a halt to the whole exercise and to take the view that the topic of liability should be examined in the context of State responsibility. He was convinced that the past approach was the right one—and other members shared his view.

23. It was obvious that prevention had a role to play in the topic, but was it the Commission's place to tell States what they should or should not do in their own territory? He did not believe it was. It was, however, another matter when it came to the "global commons", the environment and maritime space.

24. In his view, it was not possible to base liability on risk alone; if an activity that was risky caused harm, however, there was then a basis for a claim. The Special Rapporteur had explained that absolute liability was unknown to systems deriving from the civil law; perhaps that was a matter the Working Group should examine, since other legal systems were familiar with the concept of strict liability.

25. Lastly, he stressed that the topic had a basis in law, doctrine and case law.

The meeting rose at 11.25 a.m.