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Summary record of the 2642nd meeting

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

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2642nd MEETING

Wednesday, 19 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Montaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)\(^1\) (continued) (A/CONF.217/16, sect. D, A/CN.4/509,\(^2\) A/CN.4/510\(^3\))

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. PAMBOU-TCHIVOUNDA thanked the Special Rapporteur for submitting a clear, summary, sober yet complete third report (A/CN.4/510) on the subtopic of prevention of transboundary damage from hazardous activities, which was both scholarly and informative.

2. It was scholarly because it defined the fundamental concepts and the scope of the subject (in paras. 14 and 16, inter alia) and opened up new vistas in relation to liability based on an internationally wrongful act and also in relation to the concept of prevention and the future treatment of the specific regime of reparation, thus offering a global reading of the entire regime of international liability for injurious consequences arising out of acts not prohibited by international law.

3. It was informative because the Special Rapporteur had manipulated the dialectical link between the principle of due diligence and permitted acts so as to reveal to the reader both the meaning and the purpose of the concept of prevention and so as to suggest a structure for the regime proposed in the draft articles.

4. According to the Special Rapporteur, the obligation of due diligence could be reduced to an obligation incumbent on concerned States to manage risks in a concerted way. Those risks were inherent in activities conducted in the territory of one of the States or in activities likely to cause harm in the territory of the other States. The general rule requiring prevention of the risks of damage from activities not prohibited by international law clashed with the traditional image of the function of territory as the material basis for the exercise of the State’s jurisdiction. The option to legislate was transformed into an obligation to acquire an adequate and efficient normative, legislative and administrative tool. From that moment on, it was international law that determined, guided and imposed conditionalities on internal law. Thenceforth, the problem of the relationship between the internal and international legal orders was posed in concrete rather than theoretical terms. The linkage established between territorial jurisdiction and the risk of damage arising out of activities not prohibited by international law revealed the existence of a general obligation imposed on States by international law and of a consequent obligation to make reparation in the event of a breach of the former obligation. Accordingly, the obligation of prevention as it were objectivized a primary rule which had, in previous reports on the topic, been regarded as implicit in any activity not prohibited by international law. Thus, the relationship between State responsibility and international liability, to which paragraphs 25 to 30 of the third report were devoted, did indeed exist and the Special Rapporteur would ultimately have to come to grips with the task of elucidating it.

5. He wished to draw attention to the scope of the re-emerging and evolving function of territory in the context of the current trend towards the relocation of industry and the globalization of the economy. Scarcely more than 20 years previously, when calling for the transfer of technology, the countries of the third world, victims of the prevailing fashion, had undoubtedly not been aware, as they currently were, of the adverse effects of the technology of the North. They had certainly not been aware that they would themselves one day cease to be merely sites for turnkey plants and would instead become risk generators, in the sense of States of origin or concerned States within the meaning of the draft articles. Hence the need for the international community to provide itself with a generally accepted normative and conceptual instrument to safeguard the overlapping or complementary interests of the tangle of partnerships currently in vogue. Therein, in his view, lay the current and future value of the draft articles relating to prevention of significant transboundary harm, annexed to the third report.

6. He shared the Special Rapporteur’s view that the draft articles should take the form of a convention rather than of a declaration.

7. As Mr. Lukashuk had pointed out (2641st meeting), the draft General Assembly resolution forming the preamble to the draft articles lacked substance in terms of normative references and he endorsed Mr. Lukashuk’s criticisms in that regard. The draft resolution should be fleshed out so as to take account of the general rules of international law, the specific principles of environmental law and the right to development, as well as the principles

\(^1\) For the text of the draft articles provisionally adopted by the Commission on first reading, see Yearbook . . . 1998, vol. II (Part Two), p. 21, para. 55.


\(^3\) Ibid.
of Agenda 21\textsuperscript{4} adopted by the United Nations Conference on Environment and Development.

8. On the substance, however, the fifth preambular paragraph contained an innovative formulation which provided a serious ideological and conceptual basis for the structure of the draft articles and which, in his view, constituted the cornerstone of the entire system, both in its section dealing with prevention and in the future section to deal with reparation. It was the latter section that States were awaiting and the principle embodied in that paragraph would serve as an introductory norm, both for the set of provisions on prevention and for the set of provisions on reparation which the Commission would have to draft if the system was not to remain incomplete. Consequently, that paragraph should be relocated so as to appear in the main body of the draft articles and should be reformulated in terms making it worthy of its role as a guiding principle for the system as a whole.

9. With regard to article 1, he favoured retaining the explicit reference to “activities not prohibited by international law”, an expression that should also appear in the title, so as to bring it into line with the text. As for the object of that provision, it was not clear whether the Special Rapporteur wished to refer to activities or to damage or whether it was the cause or the consequence in which he was interested. The draft articles were applicable not to activities, but to the risk of significant transboundary harm, prevention of which was the core of the topic. One idea underlying article 1 was the concept of risk inherent in any human activity, an expression that did not appear in the third report. That, however, was what was at issue and that idea seemed to be the driving force behind the system which was being advocated and which involved concerted management by the State of origin and the States likely to be affected. That system was itself driven by the idea of solidarity. The relationship between the States of origin and the States likely to be affected might be reversed overnight if it was found necessary to relocate an activity.

10. That latter idea should have appeared in article 1, which suffered from its unduly abstract nature. A simple formulation, referring, for example, to industrial, commercial or agricultural activities, would have provided a newcomer to the topic with helpful guidance. Some such clarification would make the draft article more useful and precise and might be provided in the commentary.

11. With regard to article 2, he proposed that subparagraph (a) should be redrafted to read: “‘Risk of causing significant transboundary harm’ means the risk of significant and foreseeable harm arising, regardless of its gravity”. That reference to the idea of gravity, which must appear in the explanation of the expression “risk of causing significant transboundary harm”, would enable account to be taken of the question of the threshold for “significant” harm, a matter discussed in paragraph 16 of the third report.

12. In subparagraph (c), the expression États concernés in the French version should be replaced by États intéressés to bring that subparagraph into line with proposed subparagraph (f), which should be relocated after subparagraph (c).

13. The fifth paragraph of the preamble of the draft resolution preceding the draft articles should be relocated to follow article 2. It would thus become article 2 bis, entitled “Obligation of prevention”, and would read:

   “1. The freedom of all States to carry on or permit non-prohibited activities in their territory or territory otherwise under their jurisdiction or control is not unlimited.

   “2. That freedom entails the obligation for the State to prevent any risk of significant damage to other States, particularly bordering States, arising from such activities.”

14. The text of article 3 would remain unchanged, subject to any amendment to its content. It should, however, be entitled “Prevention measures”, not “Prevention”.

15. With regard to article 6 [7], an oversight should be rectified by inserting the words “in its territory” immediately after the words “carried out” in paragraph 1 (a), so as to show that there was a link between the State referred to in the chapeau and its territory referred to in paragraph 1 (a).

16. In the French version of article 10 [11], the expression les États fixent ensemble (the States concerned shall agree) was a clumsy formulation which should be replaced by les États fixent d’un commun accord.

17. Lastly, in article 10 [11], paragraph 2 bis, drafted along “soft” law lines, the expression fait en sorte (shall … arrange to introduce) was also unfortunate, for the State of origin could easily use it as a pretext for claiming that it was not obliged to introduce such measures, but only to arrange to introduce them. It would be more directive to use the formulation “the State of origin shall … introduce appropriate and feasible measures” (prend les mesures pratiques …).

18. Mr. Kateka said that Mr. Pambou-Tchivounda’s proposal that the fifth preambular paragraph should be moved to the main body of the text of the draft convention so as to make it a new article 2 bis on the obligation of prevention was an interesting one, but it had the disadvantage of disturbing the balance of the preamble, whose second and third paragraphs drew attention to the important principles of permanent sovereignty over natural resources and the right to development. If that proposal was adopted, those two principles should, if possible, be mentioned in the new article 2 bis.

19. Mr. TOMKA said he agreed with Mr. Kateka that the adoption of Mr. Pambou-Tchivounda’s proposal would upset the balance of the preamble; however, it would also change the whole thrust of the text of the draft convention. Consequently, the utmost caution was called for in that regard.

20. Mr. GOCO asked whether Mr. Pambou-Tchivounda thought that, when an activity was undertaken in the

State of origin and harm seemed inevitable, a temporary interruption of the activity could be ordered under article 19 [17].

21. Mr. PAMBOU-TCHIVOUNDA, replying to Mr. Kateka and Mr. Tomka, said that the fifth preambular paragraph could very easily be retained and its substance developed in the text of the draft convention. As for Mr. Goco’s very interesting question, the Special Rapporteur was undoubtedly best placed to answer it and to clarify the matter for the benefit of all the members of the Commission.

22. Mr. ECONOMIDES said that the Special Rapporteur had performed a remarkable task in a very short space of time and the draft articles he was submitting could virtually be adopted as they stood on second reading. However, they could be improved.

23. First, like Mr. Brownlie, Mr. Gaja and Mr. Simma, he thought that it would be judicious in article 1 to delete the words “not prohibited by international law”, which did not add a great deal and might even be misleading. As the Special Rapporteur himself had said in paragraph 28 of his third report, few activities were per se generally prohibited under international law. If those words were deleted, the draft would apply in all cases unless a lex specialis provided for another regime of prevention or the implementation of the draft articles was contrary to a rule of jus cogens.

24. Secondly, it could legitimately be said that, at the current time, in transboundary relations, the rule that a State should refrain from causing significant transboundary damage to another State was a customary norm of international environment law. For some time, that rule had been confirmed by international practice and article 7 of the Convention on the Law of Non-Navigational Uses of International Watercourses was a noteworthy example. Article 3 therefore corroborated that customary rule, and, following its example, must apply to any activity that could cause significant transboundary damage and not only to dangerous activities. Article 1 could be recast to make that clearer.

25. Furthermore, the draft was contrary to a well-established principle of international dispute settlement law. According to article 9 [10], an international dispute could arise when the State of origin provided notification that an activity was planning to carry out in its territory could cause significant transboundary damage to another State likely to be affected by that activity. Under international law, when an international dispute arose, the parties to that dispute must refrain from any unilateral act which could extend the dispute or make its settlement more difficult. However, instead of taking account of that fundamental rule of international law which ICJ had recalled on a number of occasions, the draft articles authorized the State of origin, following notification, unilaterally to engage in the activity in question even if a dispute existed with a State likely to be affected. In order to achieve a satisfactory and equitable balance in that regard, it would also be necessary to rule out any “right of veto”—to take the expression used by the Special Rapporteur in paragraph 34 of his report—of the State likely to be affected, as well as unilateral action by the State of origin when there was a dispute regarding the activity and until that dispute had been settled. That equitable balance was currently lacking and, in their current form, the draft articles favoured the State of origin and left the States likely to be affected somewhat defenceless.

26. Article 19 [17], paragraph 2, had serious shortcomings. It should be supplemented, possibly in the Drafting Committee, by drawing on the provisions of article 33 of the Convention on the Non-Navigational Uses of International Watercourses.

27. He supported Mr. Gaja’s proposal that the system of notification provided for in the draft articles should be strengthened and Mr. Pambou-Tchivounda’s proposal for the inclusion of a new article 2 bis on the obligation of prevention.

28. The draft articles prompted other comments, but they were not so important. There was a problem with article 2, subparagraph (a): it was not clear and should be clarified or even deleted. The words “a State of origin” in article 6 [7], paragraph 1, should be replaced by the words “the State of origin”. Article 9 [10], paragraph 2, did not indicate at what point the six-month period referred to would begin. Article 10 [11] did not make it clear what would happen if the States concerned did not manage to agree on the time frame for the duration of consultations. In article 11 [12], subparagraph (c), the word er in the last sentence of the French text should be replaced by the word ou. As for article 18 [6], he wondered whether it should not expressly mention the rules enacted by international organizations and, in particular, by the European Union. Lastly, the preamble should refer to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which provided for a duty of cooperation and dealt with other questions of relevance to the draft articles. In conclusion, he said that he too considered that the draft articles should take the form of an international convention.

29. Mr. LUKASHUK said that, unlike Mr. Economides, he thought that the expression “not prohibited by international law” qualifying the word “activities” in article 1 must be retained because it helped to define the scope of the draft articles and prevented any overlap with the area of State responsibility. He did, however, agree with Mr. Economides that there was a certain imbalance between the interests of States of origin and those of States likely to be affected and that, when it came to a draft convention, in other words, a text which it was hoped would be ratified by the largest possible number of States, it would be realistic to re-establish that balance.

30. Mr. HAFNER, commenting on the Special Rapporteur’s analysis of the questions under consideration, said that, unlike the Special Rapporteur, he did not think that the question whether or not the words “not prohibited by international law” should be retained was closely linked with the relationship between the topic of State responsibility and that of international liability for injurious consequences arising out of acts not prohibited by international law. It was certainly linked with the scope of noting

5 See 2617th meeting, footnote 19.
the draft articles, but, beyond that and if it was agreed that international liability related to the obligation of a State to compensate for damage caused by its non wrongful act, the words in question affected only whether the prohibited nature of the activities concerned was a condition for the applicability of the articles. In the case of non-compliance with the articles, responsibility would necessarily arise.

31. In paragraphs 17 to 20 of his report, the Special Rapporteur had discussed the question of the relationship between prevention and international liability and it was difficult to understand why he brought up the problem of due diligence under that heading. As Mr. Simma had explained (2641st meeting), it had to be assumed that a breach of the duty of prevention entailed State responsibility. In that context, reference could be made to due diligence and he shared the view expressed on that in the report insofar as it reflected a certain standard of respect for the rules of international law. As Mr. Brownlie had emphasized (ibid.), it constituted only one aspect of the question of State responsibility and was not synonymous with State responsibility itself. Nevertheless, the question remained as to whether the duty of care was of a relative or absolute nature. It was certainly relative insofar as it depended on the degree of dangerousness of the activity in question; however, to make it dependent on the level of economic development of the State concerned did pose certain problems. The Rio Declaration\(^6\) and other international instruments did, of course, speak of relative obligations in the field of environmental law. But who was to decide when a State was not in a position to establish and maintain an adequate administrative apparatus? The problem was knowing precisely when responsibility occurred. Why then was it not possible to argue that a small State had fewer obligations than a powerful State if one compared their budgets? Would it be possible to argue that a State with a budget deficit was under less of an obligation than a State with a budget surplus? Did that also mean that an affected developing State had fewer rights to assert if the State of origin was at a comparable level of development to itself than if it was an industrialized State? Without denying the needs of developing countries in terms of environment rights, the Commission should not lose sight to itself than if it was an industrialized State? Without denying the needs of developing countries in terms of environment rights, the Commission should not lose sight of the fact that it was dealing with conflict relations in the context of the North-South conflict; such a type of conflict would be the exception. It might therefore be asked whether the reference to the different levels of development was well chosen in the context.

32. Paragraph 20 (d) of the report stated that, in view of the duty of due diligence, a State of origin would have to shoulder a greater degree of the burden of proof. What was meant by “greater degree”? Did it entail a shift of the burden of proof?

33. In paragraph 22 of his report, the Special Rapporteur referred to questions of sustainable development, capacity-building and international funding mechanisms. That again had to do with what was called differentiated responsibility. But the following sentence seemed to introduce an inconsistency: on the one hand, the report referred to differentiated responsibility and, on the other hand, it stated that the distinction could not discharge a State from its obligation of prevention. To what extent did differentiated responsibility reduce the obligation of prevention? The classical legal tradition demanded precise limits. Returning to the question of differences in levels of development, he asked how the question of capacity-building and international funding mechanisms could influence relations between States of equal or comparable levels of development. It was not a question of relations between a State and the community of States where those principles could apply, since the community of States necessarily included States with different levels of development. He doubted that States would contribute to the funding in question if they were not likely to be affected. He did not see why the Special Rapporteur placed such emphasis on those issues. Fortunately, the draft articles reflected a more balanced position in that regard.

34. Turning to the draft articles, he said that he would propose only minor drafting changes because it was too late to suggest major ones, as Mr. Pambou-Tchivounda had done.

35. As he had said at the previous session, he supported the deletion of the words “not prohibited by international law”. Whether non-compliance with the draft articles made an activity a prohibited one or whether an activity became lawful only if those provisions were respected was open to discussion. It was quite clear that, if an activity was carried out in breach of the articles on prevention, that would give rise to State responsibility, so that the performance of the activity could be described as unlawful, not directly, on account of the intrinsically lawful nature of the activity, but rather because of the non-observance of the articles. In order to avoid discussion on such points, the Special Rapporteur quite rightly proposed the deletion of the words “not prohibited by international law”, as suggested by a number of States. He was not convinced that that deletion required the revision of the other draft articles, in particular article 6 [7]. That provision did not give operators the right to authorization and the State was thus not bound to authorize prohibited activities. The only thing required under article 6 [7] was that the commencement of the activity should be dependent on authorization. It did not limit the right of the State to deny authorization.

That remained a discretionary right of the State and the only consequence of the denial of authorization was that the activity could not commence.

36. It had been argued that a State would never inform another State about its planned activities if they were prohibited, but he thought States would take the view that an activity was lawful, so as to trigger the duty of information. He shared the Special Rapporteur’s view that the Commission should deal only with prevention and not with collateral issues such as whether or not an activity was prohibited. That line of thinking was in full conformity with the approach taken by the Commission in other matters. Similar international instruments, such as the Convention on Environmental Impact Assessment in a Transboundary Context, referred only to planned activities, not to activities not prohibited under international law. If those words were retained, it would always be necessary to prove that an activity was lawful in order to ascertain whether the draft articles were applicable and that would be an impediment to the instrument’s effectiveness.

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\(^6\) See 2641st meeting, footnote 9.
37. The Commission had intentionally excluded from the draft articles any reference to the global commons and similar issues. It would be a good idea to follow Mr. Gaja’s suggestion that those issues should be mentioned in the preamble in order to signal clearly the Commission’s intentions. Mr. Gaja had also criticized article 9 [10], which required an indication of an actual risk for the duty of notification to be triggered. In order to meet that concern, the wording could be changed to read: “indicates that a risk … cannot reasonably be excluded …” or “indicates a possible risk …”.

38. As to the sic utere tuo ut alienum non laedas principle whose inclusion in the text had been proposed, he shared Mr. Brownlie’s view that it was already covered in article 18 [6].

39. As to whether joint monitoring bodies should be mentioned, he felt that that would be unwelcome, since it could be seen as contributing to the proliferation of international bodies, international bureaucracy and costs. The idea should be retained, but an appropriate place to express it would be in the commentary. He could not support the idea put forward by Mr. Lukashuk and Mr. Simma that certain other instruments should be mentioned in the preamble.

40. With regard to article 5, he wondered whether the addition of the word “concerned” was appropriate. According to the definition in article 2, subparagraph (f), that would mean that the duty to take the necessary legislative, administrative or other action would arise only if the activity was at least already planned. At that stage, it would certainly be too late to take legislative measures. Hence, the word “concerned” should not be inserted.

41. He drew attention to the nota bene which appeared at the end of the report and contained interesting observations, even if its status was not clear. The members of the Commission knew, and States had stressed, that there was an extremely sensitive relationship between article 3 and articles 11 [12] and 12 [13]. The analogy with article 7 of the Convention on the Law of the Non-Navigational Uses of International Watercourses was misleading, however, because the draft articles in question and article 7 of the Convention said two entirely different things. In article 7, the balancing of factors came into play only if the necessary prevention measures had been taken and harm nevertheless occurred, whereas, in the draft articles, the sum total of preventive measures was subject to balancing factors. It nevertheless seemed that States were prepared to go along with that idea.

42. The relationship between article 3 and articles 11 [12] and 12 [13] raised another question: if a State was bound to apply less stringent measures of prevention than those required in other circumstances only after negotiation with the State that might be affected, did that State forgo any claim of responsibility on the part of the first State if damage which could have been avoided by using more stringent preventive measures nevertheless occurred? Whatever the answer was, the question merely highlighted some of the implications of the special relationship between the three articles mentioned above and cast doubt on the appropriateness of the last sentence of the nota bene. The solution might be to draw inspiration from the Convention on Long-Range Transboundary Air Pollution, which contained a note stating that the provisions of the Convention were without prejudice to questions of responsibility.

43. He supported the idea suggested by Mr. Pellet of including, either in the preamble or in the draft articles themselves, a reference to the principle of precaution, which played an increasingly important role in environmental law.

44. With regard to the comment by Mr. Economides on article 18 [6], he said that, if the words “under relevant treaties” was given a broad interpretation, the rules established by international organizations, including the European Union, would be covered and it would be unnecessary to amend the provision.

45. In conclusion, he said the Commission should not hesitate to refer the draft articles to the Drafting Committee or, if the Special Rapporteur so wished, to a working group.

46. Mr. MOMTAZ congratulated the Special Rapporteur on having revived a moribund and somewhat neglected topic. Once the 19 draft articles that he had proposed had been adopted as a framework convention, they would offer excellent guidance to States facing the harmful consequences of transboundary pollution.

47. Referring to the preamble, he endorsed the comments made by Mr. Gaja and Mr. Lukashuk on the instruments which were cited and which were part of “soft” law. It was true that the preambular paragraphs did not refer to positive law, and that should be stated expressly and clearly. They did, however, refer to the Rio Declaration, which could be considered “hard” law because principle 2, which was corroborated by principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), had been found by ICJ in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, to express “the common conviction of the States concerned” and to form “part of the corpus of international law relating to the environment” [see pp. 241–242, paras. 27 and 29]. As positive law was thus well and truly involved, that should be mentioned in the preamble. It was also necessary, in line with the suggestion made by Mr. Pambou-Tchivounda, to refer to Agenda 21.

48. ICJ had also referred to respect for the environment in the global commons. The idea was one that warranted further attention, even if a decision had been taken not to deal with it at the current stage. It was difficult to know for certain at the current time to what extent man’s activities created significant damage to human health in the atmosphere. For example, the global warming of the planet through the greenhouse effect might turn out to be the result of climatic variations that were merely temporary, but, in any event, the danger it represented was serious and fundamental. It was a field different from that generally covered in the law: potential damage that

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seemed to be a definite threat. That was the reason why a reference to the question, which was of concern to the international community, would be welcome in the preamble. In that connection, reference should also be made to the fundamental right to a clean and healthy environment.

49. The last preambular paragraph referred to “regional economic integration organizations”, whereas articles 4 and 16 spoke of “competent international organizations”. In his opinion, the second expression should be used.

50. Turning to the draft articles, and beginning with article 1, he said that, as Mr. Gaja had advised, it would be better to delete the phrase “not prohibited by international law” in reference to activities which involved a risk of causing harm. The Special Rapporteur had referred to nuclear testing (2641st meeting), which he deemed to be prohibited by international law. The question was a highly controversial one, despite the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons*, but the proposed deletion would have the advantage of extending the scope of the future convention to nuclear testing, which was undoubtedly an activity that could involve a risk of, and, in some cases, cause significant trans-boundary harm.

51. In article 5, the words “and follow-up” should be inserted between the word “monitoring” and the word “mechanisms”, since it was necessary not only to monitor, but also to follow up the implementation of legislative, administrative and other measures adopted by States.

52. In article 7 [8], he wondered whether the words “impact assessment” were appropriate, given that the concept of an impact “study” was well established in international environmental law.

53. Articles 8 [9] and 9 [10] raised a question of positioning because the States likely to be affected deserved to be warned of the risk of transboundary harm on a priority basis. It was only later that the States concerned would have to inform the public of the risks to which it was subjected. The order of the two articles should therefore be reversed.

54. Article 11 [12] was of capital importance but among the factors that had to be taken into account in order to achieve an equitable balance of interests, it failed to mention the importance of the economic activity in question for the economy of the State of origin. That issue deserved further consideration.

55. Article 15 [16] did not sufficiently highlight the fact that the citizens of the States likely to be affected by significant transboundary harm were entitled to have access to the courts of the State of origin. It would be wise to bring the text into line with the provision of the Convention on the Law of the Non-Navigational Uses of International Watercourses on access to the courts of the State of origin.

56. Article 19 [17], on the settlement of disputes, should be more detailed. Inspiration could be drawn from the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security which contained a whole series of relevant formulations. It should be noted that no distinction was made between fact-finding commissions and conciliation commissions and that left fact-finding commissions the option to settle disputes by becoming conciliation commissions, where necessary. That formula could prove useful for the topic under consideration.

57. Mr. HE said that the draft articles managed to balance the interests of the State of origin with those of the States likely to be affected by transboundary damage. He would nevertheless comment on some important issues raised in the report.

58. First, it was generally recognized that liability and prevention were two separate issues which should be treated separately. The Working Group established by the Commission at its forty-eighth session had dealt with both issues, but had been criticized in the Sixth Committee for thereby undermining the basic conception of a liability regime. It had been pointed out that jurisdictional control or sovereignty over a territory did not in itself constitute a basis for international liability of the State and that the crucial consideration was the actual control over the activity that took place within the State’s territory. Liability for transboundary damage should thus be placed on the operator rather than on the State. It had been suggested that the Commission should approach the draft articles as an environmental regime rather than from the standpoint of international liability. As a result, the Commission had decided to set aside the issue of liability until it had completed the second reading of the draft articles on prevention. In view of the nature of the topic and the considerations set out in paragraphs 31 to 34 of the report, he accordingly considered that it was quite appropriate to delete the words “not prohibited by international law” in article 1.

59. Secondly, with regard to the duty of due diligence, the Special Rapporteur listed a number of elements of that duty in paragraph 20 of the report, indicating in paragraph 20 (b) that the required degree of care was proportional to the degree of hazardousness of the activity involved. The procedural obligations (prior authorization, environmental impact assessment, precautionary measures) should thus be more important and more stringent if the activities were more hazardous. On the other hand, the level of diligence demanded should depend on a State’s capacity and its stage of economic growth. The State’s economic level should be one of the factors used for determining the standard of diligence to be applied in respect of a particular State. That would be in line with principle 11 of the Rio Declaration. Thus, the implementation of the principle of prevention and the duty of due diligence could not be isolated or divorced from the broader context of sustainable development and consideration of the needs and practices of developing countries and countries in economic transition. In the absence of provisions embodying the need to take account of the special conditions of developing countries, he would suggest that all those points should be emphasized in the commentary.

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60. Thirdly, referring to article 3, then to articles 4, 10 [11] and 11 [12], and to the fears expressed that those provisions might lead to a dilution of the obligation of due diligence, he said that what should be stressed was that the balancing of interests achieved through consultation and cooperation must not be used to discharge a State from its obligation. Instead, the balancing of interests could result only in a regime which would enable the States concerned to implement their duty of prevention in a more satisfactory way.

61. Lastly, he agreed with the Special Rapporteur and other members of the Commission that the draft articles should take the form of a convention.

62. Mr. TOMKA said that the approach adopted by the Special Rapporteur in his third report was somewhat unusual, since he had not dealt with the articles one by one, but, rather, provided a general overview, highlighting a certain number of issues. He noted, moreover, that only five Governments—representing less than 3 per cent of the United Nations membership—had submitted written comments.

63. In paragraph 36 of the report, the Special Rapporteur recommended that the draft articles should be adopted as a framework convention, even though the current title envisaged only a convention. Presumably, the addition of the word “framework” was not to be construed as making the instrument less binding and was not intended to induce States to accept the text more readily, but simply signified that other instruments would subsequently have to be negotiated between States or within the international community in the United Nations.

64. With regard to the preamble, the Special Rapporteur proposed a combination of two elements. The first—that constituting the paragraphs of the preamble referring to the relevant existing instruments—should be positioned after the title and should open with the words “the States parties”, not “the General Assembly”. The other element, particularly the last three of the proposed paragraphs, should simply be deleted, since it was not the Commission’s role to elaborate draft resolutions of the General Assembly.

65. As for the body of the draft articles, he had not been fully convinced by the arguments in favour of the deletion of the phrase “activities not prohibited by international law” in article 1, even if it was true that few activities were strictly prohibited by international law. In any case, it was unlikely that States would apply the draft articles to activities that were clearly prohibited. Even if there was some doubt as to whether some activities were prohibited or not, such as nuclear testing, it was not to be expected that States which considered such activities not to be prohibited and might thus in the future embark on such testing would become parties to the proposed convention, if their adherence could be interpreted as signifying that the convention should also apply to such an activity.

66. He wished to draw the attention of the Drafting Committee and the Special Rapporteur to the comment made by the United Kingdom in relation to article 1, which appeared in the report of the Secretary-General containing the comments and observations received from Governments (A/CN.4/509). In particular, he wondered whether the plural word “activities” was appropriate or whether it should not appear in the singular, as in article 17. As for article 3, he noted that the suggestion by the Netherlands had not been addressed in the third report and thought that it should at least be mentioned in the commentary to the draft articles.

67. With regard to article 5, he concurred with the proposal that the word “concerned” should be deleted, since it was unnecessary: the kind of measures envisaged by the draft article might come too late if there was already a risk of significant transboundary harm. Lastly, with regard to the nota bene and in response to the point raised by the United Kingdom in its general comments contained in the report of the Secretary-General, he thought that, in the final text, the matter should be dealt with either in the commentary to the appropriate articles or in the report of the Commission, but not at the end of the text of the draft convention.

68. Mr. BAENA SOARES expressed his satisfaction at seeing the Commission’s work on the topic under consideration reaching its conclusion in the spirit of cooperation and with a readiness to harmonize sometimes contradictory points of view, largely thanks to the wisdom of the Special Rapporteur, who, moreover, took a constant interest in the practical aspects and consequences of his proposed text. He welcomed the preamble included by the Special Rapporteur in the annex to his third report, for it was of intrinsic importance. He commended the proposed text, although he also supported the proposal that, without prejudice to its structure, existing conventions on development and the environment should be mentioned. That would help provide a balanced consideration of both those areas of activity.

69. In paragraph 34 of his report, the Special Rapporteur stated that, under the draft articles, a right of veto was not given to States likely to be affected by the potentially hazardous activities of other States. That right did not exist. The objective was rather to guarantee cooperation so that the States concerned could participate in the design and application of a system of management of risk in a form and with mechanisms chosen by themselves. That seemed reasonable. With regard to the possibility mentioned in paragraph 35 that the phrase “activities not prohibited by international law” should be deleted from article 1, he had not been convinced by the arguments in favour of such a deletion and would prefer the current wording to be retained. He was, however, in favour of the Special Rapporteur’s recommendation in paragraph 36 that the draft articles should be adopted as a framework convention.

70. The changes in the wording of some of the draft articles, resulting from discussions by the Working Group, of which he had been a member, or from comments by Governments, were, on the whole, improvements. He was, however, grateful to the Special Rapporteur for his efforts to find a clearer and more precise wording for article 2, subparagraph (a). Article 14 [15], on the other hand, could give rise to some concern, in that it listed three categories which would give the State of origin extremely broad latitude for withholding data and information “vital” to its “national security” or “to the protection of industrial secrets or concerning intellectual property”. That allowed vast scope for exceptions, even if somewhat reduced by the requirement that the State of origin should
cooperate in good faith with the other States concerned. Without wishing to reopen the debate, he said that the implementation of the draft article would require particular care and caution. He was in favour of referring the draft articles to the Drafting Committee.

71. Mr. RODRÍGUEZ CEDENO emphasized the importance of drawing a distinction between the issues of prevention and responsibility, which would be extremely useful in dealing appropriately with the topic of prevention and reduction of risk to a minimum. It would even be worthwhile making explicit reference to certain universally accepted legal instruments, in the form of material law relating to the environment. He also endorsed the idea of adding a reference to Agenda 21 or at least to some of the principles contained therein. In particular, the reference to the right to development—in the form of the resolution adopted by the General Assembly—was crucial, for it would enable the necessary link, which must be retained, between article 3, relating to prevention, and articles 10 [11] and 11 [12], which—especially the latter—related to the balance of interests, to be maintained. As the Special Rapporteur indicated in paragraph 22, the principle of prevention and the duty of due diligence were broadly related to questions of sustainable development, capacity-building and international funding mechanisms.

72. It was appropriate that the preamble mentioned basic principles, such as those relating to permanent sovereignty over natural resources, the right to development and the Rio Declaration, and listed the limits to the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction. It would even be worthwhile making explicit reference to certain universally accepted legal instruments, in the form of material law relating to the environment. He also endorsed the idea of adding a reference to Agenda 21 or at least to some of the principles contained therein. In particular, the reference to the right to development—in the form of the resolution adopted by the General Assembly—was crucial, for it would enable the necessary link, which must be retained, between article 3, relating to prevention, and articles 10 [11] and 11 [12], which—especially the latter—related to the balance of interests, to be maintained. As the Special Rapporteur indicated in paragraph 22, the principle of prevention and the duty of due diligence were broadly related to questions of sustainable development, capacity-building and international funding mechanisms.

73. The text ought to reflect the close relationship between the duty of prevention, the elements of which had been presented in a detailed and extremely complete way in paragraph 20 of the report, and the level of economic development, which, however, should by no means be interpreted as justifying an exception clause. Although it was sometimes difficult to determine levels of development, that was a useful concept to apply in the context of the draft articles.

74. In his view, it was also important to establish clearly that the draft articles applied to hazardous activities which were capable of causing serious transboundary harm. Liability applied simply to the management of the risk of such transboundary harm. With regard to harm caused by activities contrary to international law, or internationally wrongful acts, on the other hand, the issue was one of State responsibility. In that regard, he was concerned about the suggestion that the phrase “activities not prohibited by international law” in article 1 should be deleted, since the phrase drew the necessary distinction between the two categories of activities which gave rise to the twin regimes of liability and responsibility. He noted that, whereas in paragraph 31 of the report, the Special Rapporteur justified the use of the phrase, in paragraph 35, he proposed that it should be deleted. Meanwhile, the phrase had been retained in article 1. He would be in favour of retaining the phrase in order to define the scope of liability, which was the point at issue, and believed that the question should be examined with the greatest caution.

75. In general, he endorsed the amendments the Special Rapporteur had proposed to the Commission on the basis of the comments made by Governments. In his view, the draft articles could take the form of a framework convention within the meaning of that expression under international law. The addition of subparagraph (f) to article 2, defining the expression “States concerned”, was particularly useful, but the reference in article 14 [15] to intellectual property ran the risk of affecting the exchange of information, as well as the aim of preventing and reducing harm to a minimum. Lastly, in relation to article 19 [17], he noted that, since the entire draft aimed to establish a system of prevention that would prevent disputes arising, article 19 [17] was not the only provision relating to the settlement of disputes, but should be seen as one element in a general dispute settlement system. He therefore thought that the Drafting Committee could make some improvements to the draft article, taking as its example article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, and particularly by incorporating in paragraph 1 the concept of direct negotiations relating not only to the interpretation and implementation of the draft articles, but also to the prevention and reduction of risk to a minimum.

76. Mr. ELARABY endorsed the view that a legally binding convention was needed, particularly since a considerable body of soft law on the topic already existed.

77. The scope of the draft articles should be broadened by deleting, as had been proposed, the expression “activities not prohibited by international law” in article 1. Such an enlargement would also be consistent with the general goals listed in the preamble, as well as being in accordance with the Special Rapporteur’s comment in paragraph 16 of his second report,9 which stated that China, Cuba, Egypt and India were of the view that the concept of prevention as proposed by the Commission did not place it sufficiently within the broader realm of sustainable development.

78. Secondly, he noted that, although the second and third reports were largely concerned with due diligence, there was no draft article dealing specifically with that concept. Article 3 would be the appropriate place for the concept to be mentioned, if not defined.

79. With regard to the dispute settlement procedure dealt with in article 19 [17], he said that the two paragraphs comprising the article lacked substance. Paragraph 1 mirrored, albeit in a truncated way, Article 33 of the Charter of the United Nations, with the sole addition of the word “expeditiously”. Paragraph 2 had more substance, but the provision that the report of the fact-finding commission should be considered by the parties in good faith was clearly not adequate for what might be expected from a convention. He therefore suggested that paragraphs 1 and 2 could be either redrafted or reversed to provide for a judicial settlement mechanism, in one form or another, as a last resort. In the context of such a judicial settlement or indeed of dispute settlement as a whole, pro-

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9 See 2641st meeting, footnote 6.
vision could be made for the possibility of injunctions or preventive measures.

80. Lastly, he too thought that article 2, subparagraph (b) should contain a reference to the global commons, thus reflecting the concept of “regions over which no State had sovereignty” adopted by ICJ in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.

The meeting rose at 1 p.m.

2643rd MEETING

Thursday, 20 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivas Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.


[Agenda item 4]

Third report of the Special Rapporteur (concluded)

1. Mr. GALICKI said that the Commission had come to the final stage of its work on the topic. A courageous proposal had been made to adopt the draft articles contained in the annex to the third report of the Special Rapporteur (A/CN.4/510) as a framework convention on the prevention of significant transboundary harm, which seemed fully justified, since the articles were well elaborated and carefully balanced, covering all matters of prevention. One advantage of the draft was its precise scope, which took into account two important factors: the separation of the topic of prevention from the general subject of liability and recognition of the duality of regimes in relation to liability and responsibility. As a result of that approach, the articles were mainly directed at the management of risk, as part of the prevention of significant transboundary harm. It seemed the right choice. The attempt to avoid imprecise concepts was also clear from the definitions of the terms used, especially “transboundary harm” and the phrase “risk of causing significant transboundary harm”, and the various categories of States engaged in prevention procedures. The precise definitions made it possible to elaborate equally precise rules.

2. The main problem regarding the scope of the proposed draft convention appeared to be whether to retain the reference to “activities not prohibited by international law” in a regime that distinguished the duty of prevention from the broader concept of international liability. Opinions were divided within the Commission. He was in favour of retaining the phrase in article 1, for several reasons. First, it appeared in the title of the draft and, although aware of the differences between the rules governing the duty of prevention and those governing the matter of international liability as a whole, he believed that there should be some link between the two systems. The phrase in question seemed to provide that link. Secondly, as correctly noted in paragraph 31 of the third report, the use of the phrase released a potential victim from any necessity to prove that the loss arose out of wrongful or unlawful conduct. Lastly, the reference to “activities not prohibited by international law” marked a significant dividing line between the topic of State responsibility and that of international liability, of which the principle of prevention was a sub-topic.

3. The duality of regimes for responsibility and liability seemed to be confirmed by international conventions governing various kinds of so-called ultra-hazardous activities, such as space activities. Rather exceptionally, the draft articles might be found to link certain aspects of international liability with aspects of international responsibility. Article VI, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects, for example, provided that no exoneration from absolute liability “shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law”. That conjunction of international responsibility and liability was, however, rather an exception, since it applied to the final stage of the application of rules governing international liability. In that context, conduct “not in conformity with international law”, as an element intensifying the liability, could be justified.

4. On the other hand, any attempt to extend the duty of prevention to activities prohibited by international law would be anomalous. The duty of prevention, as it derived from the draft articles, was of a pre-activity nature. It would be highly unrealistic to demand of a State that intended to commit an internationally wrongful act to comply in advance with all the prevention procedures contained in the articles. It thus seemed that limiting the application of the articles to activities not prohibited by international law was actually an advantage, since their future application would be easier and the tricky issue of responsibility would be avoided.