

Document:-  
**A/CN.4/SR.2763**

**Summary record of the 2763rd meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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entities for whose direct benefit the dangerous or hazardous activity was carried out;

(f) Strict liability had been recognized in a number of countries around the world belonging to all the legal systems. It was arguably a general principle of international law or, in any case, could be considered as a measure of progressive development of international law. In the case of activities which were not dangerous but still carried the risk of causing significant harm, there was perhaps a better case for liability to be linked to fault or negligence;

(g) On its own merits, fault-based liability might perhaps better serve the interests of the innocent victims and should be retained as an option for liability. It was not unusual in such cases to give the victim an opportunity to have recourse to liberal rules of evidence and inference. By reversing the burden of proof, the operator might be required to prove that he had taken all the care expected of a reasonable and prudent person, proportional to the risk of the operation.

56. Section C of part II of the report (paras. 122–149) addressed a few important questions concerning the regimes of civil liability, which were rooted in the development of the law in each State and its application by their domestic jurisdictions, which varied considerably from State to State, depending upon the system of law prevailing.

57. Thus, the question of the causal link between the damage caused and the activity alleged to have given rise to it and the related issues concerning foreseeability, proximity or direct loss were not treated uniformly. It was to be noted that there was no support for providing for liability for damage to the environment *per se*. Furthermore, in the case of damage to the environment or natural resources, there was agreement to recognize a right of compensation or reimbursement for costs incurred by way of reasonable or, in some cases, “approved” or “authorized” preventive or responsive measures of reinstatement (para. 131). The “reasonableness” criterion was defined to include those measures found in the law of the competent court to be appropriate, proportionate and cost-effective.

58. An analysis of the civil liability regime showed that the legal issues involved were complex and could be resolved only in the context of the merits of a specific case. The outcome would also depend on the jurisdiction in which the case was instituted and the applicable law. While it was possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, it was, in his view, not possible to draw any general conclusions on the system of civil liability. Such an exercise, if it was considered desirable, would properly belong to forums concerned with the harmonization and progressive development of private international law.

59. It was against that background that, in part III of the report (paras. 150–153), he put forward a few submissions for consideration. While the schemes examined had common elements, each was tailor-made for its own context. It did not follow that in every case the best solution was to negotiate a liability convention, still less one based on any particular set of elements. The duty could equally well be discharged, if considered appropriate, by allowing the plaintiff to sue in the most favourable jurisdiction or

by negotiating an *ad hoc* settlement. It was best to give States sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss that the Commission might wish to endorse should be both general and residual.

60. Having regard to the earlier work of the Commission on the topic, in paragraph 153 of his report, he put forward various submissions with a view to developing that model. If those recommendations were generally acceptable, they could provide a basis for formulating more precise draft articles on the topic of international liability, with a view to the Commission’s fully discharging its mandate. Members might also like to comment on the type of instrument that would be suitable and the manner in which the Commission could best discharge its mandate. One possibility would be to draft a few articles and to recommend that they should be adopted as a protocol to the draft framework convention on the regime of prevention. However, he would go along with any suggestions that met with the approval of most members.

*The meeting rose at 1 p.m.*

## 2763rd MEETING

*Tuesday, 27 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from trans-boundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA said she hoped that the viability of the entire project would not again be at issue, in view of

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

the results of the work of the Working Group established at the previous session<sup>2</sup> and the endorsement of the Sixth Committee.<sup>3</sup>

2. The first report of the Special Rapporteur (A/CN.4/531) was well-structured, but the tone of the introduction was too pessimistic. After all, the Special Rapporteur had had the support of the Commission in 2002 and of the Sixth Committee, as was reflected in the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its fifty-seventh session (A/CN.4/529). The General Assembly had reacted positively to Mr. Quentin-Baxter's suggestion many years earlier regarding a number of preventive measures and the right of the affected State to receive reparation from the State that was the source of the injury. Mr. Barboza's suggestion of additional guarantees had also been well received. A reference had been made to the 1996 Working Group, and apparently most members had endorsed its conclusions. It was puzzling to see that those conclusions had not immediately been taken further, and it would have been useful if the Special Rapporteur had informed the Commission in greater depth about difficulties encountered so that the Commission could try to overcome them.

3. As to the recommendations of the 2002 Working Group, the term "innocent victim"<sup>4</sup> was inappropriate, especially with regard to the environment or the global commons, to which such moral qualities as innocence hardly applied. Moreover, the Working Group had discussed the threshold of "significant"<sup>5</sup> harm, but for the purpose of compensation it was sufficient to speak of "appreciable" harm.

4. In the discussion of policy considerations, according to paragraph 43 of the report, the Commission should direct its effort towards encouraging States to include international agreements and adopt suitable legislation and implementing mechanisms for prompt and effective remedial measures. However, the Commission's task was much broader, namely, to draft rules. Although it could not impose such rules on States, the Commission should not merely produce "soft" recommendations or very general guidelines.

5. Paragraph 44 gave the impression that the innocent victim would always have to bear part of the loss, something that might be unavoidable in practice in view of the difficulty in quantifying such loss. The Commission should not, for all that, depart from the assumption that the victim should not have to pay anything.

6. The Special Rapporteur's analysis of model schemes of allocation of loss was very useful, the conclusion being that, apart from space activities, State liability was highly exceptional. In her opinion, the State almost always had a residual role, either directly (for example, in conventions which stipulated that the State would bear the loss that could not be covered by the operator) or indirectly (in the form of funds set up by parties that were States). True, the

primary liable entity should be the operator. However, she endorsed the Special Rapporteur's comment to the effect that it was not the operator that should be liable, but the entity that controlled the activity. It was worth pointing out that several conventions spoke of "the operator", yet the person in question might well be the entity in control. Article 2 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, for instance, extended the notion of "operator" to anyone who was in control of a particular stage of a procedure.

7. The Special Rapporteur had said he would be presenting models of liability and compensatory schemes, but she hoped he would do rather more. States had a duty to provide arrangements for equitable allocation of loss. Hence the need to draft general rules, albeit of a residual nature.

8. With regard to the Special Rapporteur's submissions in paragraph 153 of his report, any regime recommended should indeed be without prejudice to claims under civil liability as defined by national law (subpara. (a)), but she would add the proviso that it should not always be necessary to exhaust national remedies before resorting to international mechanisms. Under some systems, it was possible to refer directly to international mechanisms. The Commission should perhaps say that civil liability was available, but not that it must be exhausted before turning to international mechanisms for dispute settlement and allocation of cost. Moreover, several national jurisdictions should be available, at least in the State of origin of the injury and in the State of the injury.

9. Subparagraph (b) was wholly acceptable, and she agreed with the submission in subparagraph (c) that the scope should be the same as in the draft articles on prevention. Nevertheless, the threshold should be lower, namely "appreciable" rather than "significant" harm.

10. As for subparagraph (d), the assertion that State liability was an exception needed to be qualified—it was an exception when the State had a primary role, but not when it had a residual role. Even the Convention on Third-Party Liability in the Field of Nuclear Energy and the draft directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage,<sup>6</sup> although not yet in force, pointed in that direction, and funds and other mechanisms also did so indirectly. As could be seen from paragraph 171 of the topical summary prepared by the Secretariat of the discussion in the Sixth Committee of the General Assembly at its fifty-seventh session, most delegations in the Sixth Committee were in favour of residual liability for the State. The fact that the State had duties to fulfil encouraged it to take preventive measures, which in turn promoted compliance with the draft articles on prevention of transboundary harm arising out of hazardous activities.<sup>7</sup>

11. Clearly, the causal link should be based solely on reasonableness (subpara. (e)) but on the issue of harm caused by several sources (subpara. (f)), a regime of joint

<sup>2</sup> *Yearbook ... 2002*, vol. II (Part Two), paras. 442–457.

<sup>3</sup> General Assembly resolution 57/21 of 19 November 2002, para. 2.

<sup>4</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 450.

<sup>5</sup> *Ibid.*, para. 452.

<sup>6</sup> *Official Journal of the European Communities*, C 151 E, of 25 June 2002, p. 1322.

<sup>7</sup> See 2762nd meeting, footnote 7.

and several liability was preferable to one of the equitable apportionment, for it gave more guarantees to the victims.

12. Whether it was limited or not, the liability of the operator (subpara. (g)) should always be supplemented by additional funding mechanisms, but the word “limited” posed some difficulty. Even if there was complete liability, the operator might be financially unable to pay compensation, and hence the need for other sources of compensation. The Commission must also consider cases in which insurers were not willing to insure the activity. While the operator might have complete liability, no one would compensate the victim for his loss. Obviously, such a situation required the guarantee of additional funds.

13. With regard to subparagraph (h), States must certainly put in place domestic schemes relating to prevention, protection and national funds, but the Commission should not at the present stage discard the obligation to arrange for some sort of dispute settlement mechanism, such as arbitration, and it should discuss whether or not the mechanism should be mandatory.

14. She agreed fully with the consideration discussed in subparagraph (i). As to subparagraphs (j) and (k), damage to the environment *per se* should be compensated, and not simply as damage to persons or property. Such was the position taken in both the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the European Union draft directive.<sup>8</sup>

15. She was opposed to the Special Rapporteur’s suggestion that general rules should be drawn up as a protocol to the articles on prevention, a course that would emphasize prevention as a main obligation and compensation as a mere accessory. They should be on an equal footing. The best thing was to have a convention in two parts, one on prevention and the other on compensation for harm, with rules enunciating general principles on liability. That idea was supported by the Sixth Committee, as could be seen from paragraph 179 of the topical summary.

16. Mr. PELLET commended the Special Rapporteur for his report, the erudite and excellent quality of which merely confirmed that the topic was not one conducive to codification and progressive development of the law. He wondered just what its aim was. As the title showed, the subject focused on defining the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, although it might have been simpler to speak of compensation rather than loss, since that was what was at issue, or, as the Special Rapporteur stated more clearly in paragraph 38 of his report, “facilitating a more equitable and expeditious scheme of compensation to the victims of transboundary harm”. He would emphasize the word “transboundary”, because the Special Rapporteur did not stick fully to the topic, especially when he evoked the *Ok Tedi* case (paras. 143–149 of the report) or the Bhopal disaster (a footnote to para. 149 of the report). It was not suitable to include in an already difficult topic the question of harm caused by the activities of a transnational corporation in the territory of a host State, despite the fact that, like the Special Rapporteur (a footnote to

para. 19 of the report), he was in favour of developing a liability regime for multinational corporations.

17. For similar reasons, he was reluctant, to say the least, to see the Commission set out upon a study aimed at producing a more rapid and equitable regime for victims of transboundary harm. The report provided all the arguments needed to show it was a task that strayed from the Commission’s field of competence. The Commission’s task was to work towards the progressive development and codification of international law, and, even though it was not specifically stated in its statute, the Commission pursued that task primarily, if not exclusively, with regard to public international law. Yet the Special Rapporteur had himself acknowledged that international liability did not lend itself easily to codification and progressive development (para. 2 of his report) and any doubts that might have been voiced in the 1980s about the value or viability of the topic itself (para. 9) persisted more than ever today. The Commission had been dragging the topic around with it since the 1970s without ever having been able to complete it. Perhaps that was because, as Tomuschat had stressed (a footnote to para. 18 of the report), a global approach was not suited to yield constructive results.<sup>9</sup> The Special Rapporteur himself admitted as much in saying (para. 150) that “the legal issues involved are complex and can be resolved only in the context of the merits of a specific case”, in other words, as a function of circumstances, the nature of the harm or the risk.

18. The Special Rapporteur’s other objection (in para. 24 of his report) was that, as the Commission itself had concluded at its forty-eighth session, in 1996, “the trend of requiring compensation is pragmatic rather than grounded in a consistent concept of liability”.<sup>10</sup> In 1997, the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law had considered that “the scope and content of the topic remained unclear”<sup>11</sup> (para. 33 of the report). In the final analysis, neither in the literature, nor in case law, nor in practice was there any agreement on anything, and it emerged from the many conventions cited by the Special Rapporteur that “there could be no single pattern of allocation of loss” (para. 46 of the report). That was true at the international level and at the level of the domestic law of States, as was repeatedly pointed out in the report—for example, in one of the footnotes corresponding to paragraph 117 or in paragraph 125. It would be noted in passing, with regard to domestic law, that under French law, and probably under other systems that distinguished between administrative law and civil law, no-fault liability had grown considerably in the context not only of civil liability but also of administrative liability, and on a basis not referred to by the Special Rapporteur but one to which the Commission might give some consideration, namely

<sup>9</sup> C. Tomuschat, “International liability for injurious consequences arising out of acts not prohibited by international law: the work of the International Law Commission”, F. Francioni and T. Scovazzi, eds., *International Responsibility for Environmental Harm* (London, Graham and Trotman, 1991), pp. 37–72, at p. 55.

<sup>10</sup> Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 127 (para. 32 of the commentary to art. 5).

<sup>11</sup> *Yearbook ... 1997*, vol. II (Part Two), para. 165.

<sup>8</sup> See footnote 6 above.

the principle that a public burden should be shared equally by all citizens.

19. Whether in connection with causation, the duty of care, the definition of damage or proper jurisdiction, the Special Rapporteur acknowledged that no particular solution was widely favoured (para. 128) and that no general conclusions could be drawn (para. 150). Of course, there were a number of good ideas, such as the creation of national or international compensation funds, but that did not come under codification or progressive development; rather, it was a matter of negotiation between States. It might be worth investigating possibilities in the area of the development of uniform laws or in that of private international law, but that was a matter for the bodies involved in the codification of private law, above all UNCITRAL, and not the Commission.

20. Others would probably say that the Sixth Committee wanted the topic, but he was not so sure, and he wondered whether the Commission had not forced its hand. In any case, nothing prevented the Commission from explaining to the Sixth Committee that it was on the wrong track. If the Commission really decided that it should set out upon that “mission impossible”—and one that was probably pointless—the report was the best basis for doing so. But to go where? It was still a mystery.

21. To conclude on a more positive note, subject to some adjustments when it came to examining the Special Rapporteur’s conclusions at future sessions—if that was indeed necessary, which he doubted—he wished to single out a few details of substance for comment. First, the Commission must avoid references to “civil liability”, as inclusion of the adjective “civil” would trouble jurists from countries that drew a distinction between administrative law and civil law. It would be a good idea to include harm caused to the State itself, as was proposed in paragraph 40 of the report. *Pace* Ms. Escarameia, with a view to avoiding duplication of work, it would be wise to adopt the same threshold for liability in the present draft as had been adopted in the draft articles on prevention of transboundary harm arising out of hazardous activities.

22. He fully endorsed the submission in paragraph 153, subparagraph (*d*), of the Special Rapporteur’s report, to the effect that no general conclusions could be drawn as to the regime of liability. If that was the case, the only reasonable possibility open to the Commission—should it wish to launch itself into that task, of which he personally disapproved—would be to attempt to formulate model clauses that could serve only as alternatives. It was absolutely clear that no general rule regarding liability, including liability of the operator, was appropriate, and that no uniform rules could be adopted in that area.

23. He failed to understand why a distinction was drawn between “reasonableness” and “causality” in subparagraph (*e*); causality was the reasonable criterion. Submissions (*f*) to (*k*) clearly showed that the topic was not ripe for codification. Nor was it clear what form the finished product might take: certainly not a convention, though model rules might perhaps be appropriate. Finally, the present topic should not be grafted on to the topic of prevention, for, unlike the latter, it did not lend itself readily to codification.

24. Mr. GAJA said that the Special Rapporteur’s report represented a remarkable attempt to give an overview of all the issues involved in a very difficult topic. It contained an impressive amount of material which would no doubt be helpful for the continuation of the Commission’s work. In the final part of the report, the Special Rapporteur briefly outlined some tentative submissions and awaited the Commission’s reaction. Given the divisions within the Commission regarding the feasibility of the work proposed, it might have been wiser if the Special Rapporteur had left it to the Commission to react before taking any further steps. Instead, he had created difficulties for the reader.

25. The main difficulty in responding to the Special Rapporteur’s suggestions was that it was not yet clear what kind of end product was envisaged. It was not clear whether, on the one hand, the “model of allocation of loss” was a model for a treaty regime or for parallel national legislation, or whether, on the other, it was a set of recommendations or guidelines enabling States and other persons concerned to comprehensively assess the issues when setting up a regime. For the time being, it seemed that the latter model was the one proposed; indeed, that might be the easier way out.

26. Part II of the report showed the existence of a series of treaty regimes, mostly intended to cover specific risks. Their great variety reflected the needs of the specific sector involved and cast doubt on the usefulness of an attempt to outline a general and residual regime. As Mr. Pellet had recalled, the Special Rapporteur himself had noted in paragraph 46 of the report that those treaties “indicate that there could be no single pattern of allocation of loss”. Before they were taken as a source of inspiration, those treaty regimes should first be assessed in terms of their adequacy for the specific sector. The number of ratifications of the relevant treaty was not necessarily decisive for that purpose: a treaty might be widely ratified simply because it said little. Furthermore, not all the treaties concerned the intended subject matter of the Commission’s work, namely, transboundary harm, and thus their contents might prove not to be transposable.

27. As to some of the submissions in the final part of the report, he would hesitate to recommend a regime that was “without prejudice to claims under civil liability”, as was suggested in paragraph 153, subparagraph (*a*). It seemed more reasonable to envisage a comprehensive regime that covered all the aspects of the allocation of losses. If the operator was held liable under a treaty or other regime, it was unreasonable to expect that another source of liability should be added. Allocation of losses should be studied in a comprehensive manner that also took account of municipal law systems.

28. The suggestion in paragraph 153, subparagraph (*d*), that “the person most in control of the activity” should bear the brunt might have to be reviewed in the light of the need to secure assets in the event of loss. That seemed to be the main reason why the shipowners rather than the charterers were held liable for harm caused by ships. Shipowners thus had an incentive to insure against the risk, and they might transfer the costs to the charterers.

29. In the case of activities within a State causing transboundary harm, some harm was also likely also to take place within the territory where the cause was located. In a comprehensive regime, that harm should not be ignored. Article XI of the Convention on Supplementary Compensation for Nuclear Damage sought also to protect those who suffered damage in the installation State.

30. Finally, since the amount for which the operators were liable under a strict liability regime might be inadequate to cover all the damages, a viable scheme should envisage the participation of a large number of States that could provide part of the compensation in case of harm, irrespective of their involvement in the actual hazardous activity. Such an arrangement was provided for in article IV of the Convention on Supplementary Compensation for Nuclear Damage. It would be difficult to generalize the solution adopted by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage complementing the International Convention on Civil Liability for Oil Pollution Damage, to which reference was made in paragraphs 47 and 48 of the report, since a comparable situation did not exist in other cases. If it was wished to establish a viable regime for compensation, the role of States could not be ignored.

31. Mr. MANSFIELD said that the Special Rapporteur's report not only made it clear why the Commission could not fail to deal with the topic of allocation of loss in case of transboundary harm, but also provided an excellent basis on which the Working Group established at the previous session<sup>12</sup> could take the issues forward.

32. Some members still wished to avoid the topic, but his own view was that the Commission must address it, for a number of reasons. First, it was the Commission itself that had conceived the topic of State responsibility as being limited to internationally wrongful acts. That had not been the only possible approach, as some writers of considerable standing had been at pains to point out. Nonetheless, it had been the approach chosen by the Commission. Second, the prevention and response obligations developed by the Commission were important—a matter to which he would revert; but they could never entirely eliminate the risk of an accident. Third, if loss occurred despite fulfilment of the prevention obligations, there was no wrongful act on which a claim could be founded. Fourth, unless that loss was to lie where it fell, in other words, potentially on the innocent victim, there was a gap in the Commission's work to date—a gap that was sufficiently obvious to require the Commission to address it if it was not to lose credibility.

33. The survey of existing regimes was very useful indeed. He would not comment on the different approaches adopted for loss allocation, or on the reasons behind those approaches, except to note that something common to all of them was the idea that prevention was better than cure. Admittedly, there had been various degrees of success on the prevention front in the various sectoral areas: it was a regrettable fact that in some sectors preventable accidents continued to occur all too frequently. Yet in general there was an increasing recognition by all operators engaged in

hazardous activities, whether State or private and whether in developed or developing countries, that the costs associated with accidents, irrespective of any liability to pay compensation, were very high and represented perhaps the single biggest preventable cost to their business, in terms of down time of machinery and staff, loss of production, failure to meet orders and loss of reputation. It was the recognition of those factors, rather than a legal obligation to take prevention measures or to pay compensation, that was increasingly the reason that drove operators to adopt state-of-the-art prevention techniques and seek to follow continuous improvement procedures and work against complacency. In fact, no operation involving hazardous activities anywhere in the world could any longer ignore those managerial insights and hope to stay in business.

34. There were two implications for the Commission's work, both of which were acknowledged in the Special Rapporteur's report. First, it needed to ensure that the result of its work supported the incentives for those with the effective ability to control the risk to follow best-practice risk management techniques. Second, the allocation of loss that the Commission was attempting to deal with was residual in character. It could not be part of the intention to replace existing regimes, still less to discourage the development of new tailor-made sectoral regimes or to attempt to provide some new detailed comprehensive regime that would cover all conceivable circumstances.

35. Obviously, there was much to be said for tailoring specific regimes to the specific circumstances of the activities in question. But it must be acknowledged that they had had limited success to date. More generally, it might be the case that a specific regime was intended to ensure that there was an appropriate allocation of loss in the event of accidents, and, in particular, that it did not fall on an innocent victim who had had no participation in or no benefit from the activity in question. However, there were various reasons why that result might not be achieved: the regime might not be enforced; the relevant State or States might not be party to it or covered by it; the particular risk of harm or the nature of the harm itself might not have been foreseen and not be covered by the regime; or the best-practice prevention might have proved not to be effective in the circumstances of the particular accident.

36. The Commission needed to consider carefully how there could be some residual obligations to avoid a situation in which an innocent victim was in fact left to bear the full loss without any support in circumstances where it had not been a participant in the hazardous activity and had gained no benefit from it. Nevertheless, it needed to do so without distorting the incentives to those in the best position to manage risk. It might not be satisfactory or sufficient, but at the very least there needed to be some residual obligation on the relevant States to address the issue of allocation of loss in unforeseen circumstances after the event. That, however, was a matter for further reflection.

37. He agreed with the proposition set forth in paragraph 152 of the report that the model should be general and residual in character, and he also endorsed the submissions in paragraph 153, subparagraphs (a) and (b), to the effect that the model should be without prejudice to remedies under domestic law, private international law

<sup>12</sup> See footnote 2 above.

or public international law relating to State responsibility. Although he had some reservations, he could for the moment accept the recommendation in subparagraph (c) about limiting the scope to that of the draft articles on prevention. However, at some point in its work, the Commission would need to consider further the question of harm to the global commons.

38. He agreed with the recommendation on the threshold of significant harm, even though, as a practical matter, the threshold was unlikely to be an issue at any time. In a residual regime, the character of the harm to be dealt with would never be anything less than significant. As to subparagraph (d), he had already indicated that it was the person most able to control the risk who needed to have the fullest incentive to manage the risk, including the responsibility for compensation.

39. In general, there was much to be said in support of the comments in subparagraphs (e) to (i), though some aspects of the very condensed material contained there needed further discussion in the Working Group. Subparagraphs (j) and (k) raised difficult questions that called for further thought. The world had moved a long way in its attitude to damage to the environment. The notion that such damage was a matter of concern only to the State in which it occurred was not in accordance with the growing understanding of the global interconnectedness of environmental considerations. With regard to subparagraph (k), on tourism and loss of profits, liability as such might be a difficult concept. Nevertheless, if there was a clear causal link, grounds might exist for a claim if there had been a breach of State responsibility. Furthermore, it should be acknowledged that loss of tourism might be well-nigh catastrophic for some smaller economies: the notion that they might have to bear those losses totally unsupported was difficult to square with any sense of equity. The report provided an excellent framework for further refinement of those difficult issues in the Working Group.

40. Finally, a decision on the final form of the work could, in his pragmatic view, be left to emerge from the continuing work of the Working Group.

41. Mr. BROWNLIE said that the report raised issues with which he had considerable difficulties. It was not the fault of the Special Rapporteur, who had provided a helpful overview, but the Commission needed guidance on addressing serious structural problems. The proposed regime would be both general and residual. It would not be a regime of general international law because the Commission was not codifying such law: it was inventing an entirely new regime.

42. The only treaty models available were highly political. For instance, the European nuclear regime had been designed to limit responsibility in order to protect the nascent development of civilian uses of nuclear energy. It thus represented an attempt to balance risk against the possibility of conducting a given activity. Regimes of that kind clearly had no bearing on the Commission's present task. He remained to be persuaded, therefore, as to the character of the residual regime that would emerge from the Commission's deliberations.

43. The approach taken by Mr. Quentin-Baxter in his various reports on international liability continued to exert an influence in that regard. Mr. Quentin-Baxter had made no distinction between State responsibility and other considerations, and all the examples he had cited in his reports had been straightforward examples of State responsibility.

44. The Commission would indeed have to provide for the possibility of arbitration, but he wondered what would be the applicable law in that case. Treaty regimes were self-contained and dealt with arbitration in their own way, but it remained to be seen how the Commission would tackle the issue.

45. It was clear that the Commission must address those serious structural problems and avoid causing a reaction in the Sixth Committee that might damage its existing work on State responsibility.

**The responsibility of international organizations (continued)\* (A/CN.4/529, sect. E, A/CN.4/532,<sup>13</sup> A/CN.4/L.632)**

[Agenda item 7]

REPORT OF THE WORKING GROUP

46. Mr. GAJA (Special Rapporteur), introducing the report of the Working Group, said that, in view of several criticisms made in the plenary, he had submitted to a meeting of the open-ended Working Group a revised text of draft article 2 which omitted any reference to "governmental functions". Following a discussion, the Working Group had reached a consensus on a new text that he was now submitting to the plenary for referral to the Drafting Committee.

47. The new text proposed a definition of "international organization" that was designed to cover all international organizations established by a treaty or other instrument of international law and possessing international legal personality. It made no reference to "capacity", because when an international organization breached an obligation under international law, that would in any case entail its international responsibility. The definition stressed the central role of States, although it acknowledged that members of the organization might include non-State entities, such as other international organizations, territories or private entities. The text adopted by the Working Group read:

**"Article 2. Use of terms**

For the purposes of the present draft articles, the term 'international organization' refers to an organization established by a treaty or other instrument of international law and possessing its own international legal personality [distinct from that of its members]. In addition to States, international organizations may include as members, entities other than States."

\* Resumed from the 2756th meeting.

<sup>13</sup> See footnote 1 above.

48. He thanked the many members who had attended the meeting of the Working Group for their constructive contributions.

49. Mr. PAMBOU-TCHIVOUNDA said that, since he was not a member of the Drafting Committee, he wished to express his full support for revised article 2, on condition that the phrase in square brackets was deleted.

50. Ms. XUE said she had been unable to attend the meeting of the Working Group, but it seemed the plenary was still expected to comment on the policy considerations underlying the new text. She agreed that article 2 was one of the most difficult of the draft articles. Previous conventions had used the term “intergovernmental organization” without defining it, but since the Commission had agreed that “intergovernmental organizations” were the target of the draft articles, it might be worthwhile trying to arrive at a definition.

51. She had some reservations regarding article 2 as originally proposed by the Special Rapporteur in his report (A/CN.4/532, para. 34), but the new version still contained some problematic terms. For instance, the wording “established by a treaty or other instrument of international law” did not necessarily reflect the real practice of States and international organizations. With regard to the phrase “possessing its own international legal personality”, although in the 1949 Advisory Opinion in the *Reparation for Injuries* case, ICJ had said that an international or intergovernmental organization possessed “international personality” [p. 15], it was still not clear that this phrase was meant to include “intergovernmental organizations” only. It was meant to include other types of organizations as well. However, not all international organizations necessarily possessed such personality, and including that essentially theoretical concept in the revised text made it more confusing than the original draft article. Finally, with regard to the wording “in addition to States ... may include as members entities other than States”, she felt that the organization’s composition was a matter to be decided by its constituent instrument. If the Commission retained that wording as it stood, it would have to make clear the relationship between the character of such an organization and the status of such non-State entities. Otherwise the scope might become too broad.

52. The revised version was confusing. If there was already a consensus on policy considerations, meaning that the text could be referred to the Drafting Committee, the Committee would have to work very hard to make plain what international organizations the Commission intended to include.

53. Mr. Sreenivasa RAO thanked the Working Group and the Special Rapporteur for accommodating the diversity of views on the definition of “international organization”. There was a kernel of truth, however, to what Ms. Xue had said about the drafting of the revised text. The first sentence referred to the organization’s establishment by a treaty or other instrument under international law, which did not make it clear whether such an instrument could be negotiated by non-State actors as well as States. As long as an organization was established by an instrument negotiated only among States, no problem arose if the instrument created a membership that could include

non-State entities. Otherwise, there would be a gap which the Drafting Committee would have to fill.

54. Mr. ECONOMIDES noted that the definition chose three criteria. The first, namely establishment by a treaty or other instrument of international law, posed no problems because it was true of all international organizations. The second, that of international personality, was true of all international organizations that had international powers, such powers being implicit. If an organization did not have international personality, but simply internal legal personality in the territory where it operated, the draft articles would not apply to it. The third criterion, relating to membership, was a useful addition, in that it reflected the fact that an increasing number of international organizations had non-State members. The revised text was perfectly acceptable, although the Drafting Committee might refine it further.

55. Mr. CHEE said that in the Working Group he had raised the issue to which Ms. Xue had referred, namely, what was meant by “instrument of international law”. Ms. Escameia had said that it could include a resolution of the General Assembly. The term was very broad and imprecise. He had also raised in the plenary the issue of the distinction between “international personality” and “international legal personality”, which had a bearing on the term “instrument of international law” and needed to be clarified.

56. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to refer article 2 to the Drafting Committee.

*It was so decided.*

57. Mr. PELLET said that the definition in article 2 was excellent. He emphasized that, if the plenary referred to the Drafting Committee an article already discussed at length in the Working Group, the Committee was bound to respect the position of the full Commission and not reopen the debate on the many problems that had led to the adoption of the article in question.

*The meeting rose at 11.30 a.m.*

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## 2764th MEETING

*Wednesday, 28 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivouna,