

Document:-  
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**Summary record of the 2809th meeting**

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

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States concerned, the main beneficiaries and the operators. In that connection, he endorsed the proposal made by some Governments and referred to in paragraph 27 of the report on the involvement of the State in the scheme of allocation of loss on a supplemental basis. Since he considered that the role of the State in the scheme for liability and the allocation of loss must remain the primary one, he recommended the adoption of alternative A of draft principle 4 set out in the report.

41. As to the form that the draft should take, he thought that, for the sake of symmetry, the Commission should adopt draft articles on liability, as with the draft articles on prevention. However, if the topic did not lend itself to such treatment, since it was still a work in progress or for some other reason, nothing prevented the Commission from preparing a declaration of principles, on the understanding that it should contain no reference to the peaceful settlement of disputes.

42. Pointing out that the Special Rapporteur had very clearly laid out the elements of the topic and the options available to the Commission without taking any position, he proposed that the report should be referred to a working group to be chaired by the Special Rapporteur which would consider each of the draft principles in detail with a view to preparing a draft declaration of principles.

43. Mr. PAMBOU-TCHIVOUNDA said that the Commission had been greatly challenged by the comments made by Mr. Brownlie, the scheme for the classification of principles proposed by Mr. Gaja and the methodological approach so aptly suggested by Mr. Economides. He himself particularly welcomed Mr. Gaja's proposal, which introduced at least two major categories of rules: those relating to compensation and those defining procedures to be followed to ensure that it was provided. Provisions on definitions and final provisions were a third category that was not in any way residual. In his view, however, all of those rules lacked a guiding principle that could be the subject of the second report, namely, allocation of loss. After the provisions on definitions and scope, he suggested that there should be a title 1 composed of a general provision on the concept of allocation as a technique for fulfilling the obligation of providing compensation, which would in a sense parallel the provision that the Commission had drafted on the concept of prevention in its draft articles on prevention. Another general provision would be on the concept of victim, a cornerstone of the compensation scheme. A third general provision would deal with the role of the State in the liability scheme and would be based, on the one hand, on the obligation of diligence and the obligation of prevention and, on the other hand, on the authorization of the hazardous activity.

44. He also suggested that there should be a title 2 on compensation with, as a starting point, alternative B of draft principle 4, followed by draft principles 6 and 7, *inter alia*; a title 3 consisting of alternative A of draft principle 4, draft principle 5 and perhaps some new principles; a title 4 on compensation owed to a State as victim; a title 5 on procedural rules; and a title 6 on the relationship between internal law and international law and the settlement of disputes.

45. Those provisions would become draft articles to be included not in a declaration of principles, but in a framework convention relating to allocation of loss in case of transboundary harm arising out of hazardous activities and setting up a system to supplement that of prevention. The Special Rapporteur and others had spoken highly of the flexibility of "general principles with options on various elements, leaving States to pick and choose as they developed their national laws", but he feared that the international community would then be condemned not to have a frame of reference consisting of compulsory rules. Only a framework convention would get round that difficulty.

46. Mr. CANDIOTI, supported by Mr. MANSFIELD, said that the Commission had every interest in giving its utmost attention to the topic during the second part of the current session in order to complete the consideration of the draft on first reading and submit it to the Sixth Committee of the General Assembly at its fifty-ninth session. In so doing, it would increase its chances of finishing the consideration of the topic before the end of the quinquennium.

47. The CHAIRPERSON said that he fully endorsed that proposal, but all members of the Commission must take a decision on it at the next meeting.

#### **Organization of work of the session (*continued*)\***

[Agenda item 1]

48. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of reservations to treaties would be composed of the following members of the Commission: Mr. Al-Baharna, Mr. Candioti, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. Matheson and Mr. Pambou-Tchivounda. Mr. Comissário Afonso would serve as rapporteur.

*The meeting rose at 12.30 p.m.*

### **2809th MEETING**

*Thursday, 3 June 2004, at 10.10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

#### **International liability for injurious consequences arising out of acts not prohibited by international**

\* Resumed from the 2804th meeting.

**law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued)** (A/CN.4/537, sect. C, A/CN.4/540,<sup>1</sup> A/CN.4/543,<sup>2</sup> A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. Sreenivasa RAO (Special Rapporteur), summarizing the debate on the topic, said that it had been useful and thought-provoking; colleagues had noted the hard work involved in the preparation of his second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540) and had encouraged him in that work, but had also raised some very important points that merited further consideration. The final choices with regard to the policy options presented in the report would have to be made by Commission members and, ultimately, by States. He saw his own role simply as that of a facilitator, one who was aware of his own limitations.

2. Over 25 years, successive Special Rapporteurs had grappled unsuccessfully with the topic of international liability, the two main stumbling blocks being the difficulty of cutting the umbilical cord linking the topic to that of State responsibility, and the concept of State liability. From the outset that concept had posed fundamental problems. In the first place, many small, poor States were simply unable to meet massive claims. Moreover, from the standpoint of market mechanisms, with the advent of globalization, Governments were under pressure to place the burden of liability on operators, who, as the primary potential beneficiaries of hazardous activities, were being called on to ensure that their activities were conducted in conditions of sufficient financial and technical security and were being held primarily liable where damage occurred.

3. Nor had the notion of strict liability been found to offer a satisfactory way out of the difficulties. By the time the Commission had decided to approach the topic from the standpoint of prevention, it had begun to realize that the concept of State liability could not serve as the basis for the project under consideration. Thus the emphasis on prevention during the period 1996–2001 had shifted the focus away from State liability. With the completion of the draft articles on prevention of transboundary harm from hazardous activities,<sup>3</sup> the Commission had been able to revert to the second half of the topic, which had been restated in terms of allocation of loss rather than liability.

4. The fact that there were several new members on the current Commission did not mean that the Commission had needed to go back to square one. The topic embraced only a few concepts; the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, established at the Commission's fifty-fourth session to consider the second part

of the topic,<sup>4</sup> had considered all the relevant issues and had informed the Commission<sup>5</sup> that the focus of its deliberations should be allocation of loss rather than liability, a recommendation subsequently endorsed by the General Assembly. That decision had allowed the Commission to hold a much more rigorous debate on the topic. Moreover, the debate in the Working Group had provided him with a number of guidelines. He therefore believed that the Commission now had a more than ample volume of material to draw on in its consideration of the topic. No further research was needed; what was required was a collaborative effort, with a view to bringing his work as Special Rapporteur to a successful conclusion.

5. During the debate at the present session, Mr. Brownlie had raised some useful and necessary points. Firstly, he had wished to know how the draft principles dealt with claims brought by a State that was a victim, either alone or in combination with individuals. Damage as contemplated in the draft principles was not limited to persons and property, but could also include damage to natural resources or the environment falling within the jurisdiction of a State. In the latter cases, the authorities designated as public trustees by national law, where they existed, could enter into recourse procedures like any other legal person. The State could also consolidate the claims of private individuals, as India had done in the *Bhopal* case, and sue the operator in the appropriate forum. As paragraph (b) of the explanatory note to principle 8 made clear, an appropriate forum could be the place where the damage had occurred or the place where the operator had his or her habitual residence or principal place of business. He had touched on such issues as forum convenience and choice of law only briefly in his first report<sup>6</sup> and thought that they should be considered further in a working group or in the Drafting Committee.

6. Mr. Brownlie had also queried the relevance of recourse procedures where compensation from a State was expected or required. That situation presented several possibilities. If a State wished to make *ex gratia* payments, there would be no need for recourse procedures. However, where a State made a contribution to supplementary funding established in connection with activities authorized by it, claims brought in anticipation of compensation from those funds would make recourse procedures necessary. It was in fact in the State's own interest to ensure that the authorized operator had sufficient funds to deal with hazardous activities and that supplementary funding was established through national or regional arrangements. While such funding mechanisms currently existed at the regional and international levels, they were uncommon at the national level, and that was another area for progressive development.

7. On the relationship between local remedies and dispute settlement as presented in principle 10, it had been asked how a State would use dispute settlement arrangements in cases involving private individuals. He believed that the matter was best resolved in accordance with the principles of international law. Perhaps general principle

<sup>1</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> See 2797th meeting, footnote 3.

<sup>4</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 90, para. 441.

<sup>5</sup> *Ibid.*, pp. 90–92, paras. 442–457.

<sup>6</sup> See 2804th meeting, footnote 4.

9, on the relationship of the draft principles with other rules of international law, ought to be modified to reflect that fact more clearly. In his view, where the mechanisms contemplated in principle 10 constituted a form of diplomatic protection, they would come into play only after domestic remedies had been exhausted. However, disputes involving two States and not private individuals would be resolved entirely under the provisions of principle 10.

8. Some colleagues had drawn attention to the need to highlight more clearly in principle 10 the obligation of States to settle disputes in an expeditious manner. He urged members to put forward concrete proposals on that and other issues, not only in the Drafting Committee but also in a small working group that might usefully be convened for that purpose.

9. There appeared to be general agreement on the “polluter pays” principle and the concept of operator liability, and there was no need for further research to document their importance. That being said, the draft principles sought to clarify several aspects of the role of the State that, while not pertaining directly to liability, should nevertheless be taken into consideration.

10. Firstly, States were under an obligation to exercise due diligence, which included the authorization and monitoring of hazardous activities. Secondly, if an accident caused harm even though a State had discharged its obligations of due diligence, the State of injury would provide the necessary assistance and claim the costs incurred from the operator, as had been done in the *Amoco Cadiz* case. Thirdly, States were being pressed to ensure that operators engaging in hazardous activities had proper insurance cover and other financial security enabling them to meet any claims that might arise. Almost all the conventions that the Commission was looking at as models emphasized that point. Lastly, States should contribute to supplementary funding. Thus, the concept of allocation of loss imposed an obligation on States to ensure that innocent victims did not have to bear the loss entirely on their own.

11. It might then be asked just how much loss innocent victims would have to bear. The answer was simple: placing a cap on compensation presupposed that the operator had a finite amount of funds; moreover, its liability might be limited in certain jurisdictions, and if the claims were vast, there was no way that all claimants could be compensated for the totality of their losses. Thus, a hierarchy of claims had to be established, as had been done in the United Nations Compensation Commission.

12. With regard to the contention that the Commission should not be content with a soft law approach to the topic, he stressed that the principles that he had proposed were general in nature. A soft law approach was appropriate because it made it possible to accommodate a wide range of ideas. The fact that the principles that he had presented were general made them more accessible; were they to be couched in the form of a convention, they would become less acceptable to States.

13. While he had an open mind as to the form that the final outcome might take, he was strongly of the view that

the time had come to complete the task at hand expeditiously. A working group should be created to consider the various proposals briefly, before returning the draft principles to the Commission for referral to the Drafting Committee and onward transmission to States. Only a few years previously, the idea of an international criminal court had seemed to some no more than an utopian dream; yet that dream had now become a reality. In the same way, the general principles he proposed might be the seed from which a series of binding provisions would eventually grow.

14. The CHAIRPERSON invited members of the Commission to give their views on the Special Rapporteur’s proposals regarding the best way forward, and particularly regarding the creation of a working group.

15. Mr. CHEE drew attention to a resolution adopted in 1997 by the Institute of International Law<sup>7</sup> which supported the position taken by the Special Rapporteur.

16. Mr. MANSFIELD said that he supported the Special Rapporteur’s suggestion. However, if the Commission was to meet the objective of presenting material to the next session of the General Assembly, the working group to be established and the Drafting Committee would have to finish their work before a certain date, to enable translations to be prepared. Could the Secretariat predict when that date was likely to fall?

17. Mr. MIKULKA (Secretary to the Commission) said that the key question was not when the work of the Drafting Committee had to be completed, but rather how much time the Special Rapporteur would need for the preparation of commentaries, which would form an integral part of the Commission’s report.

18. Mr. YAMADA said that he supported the Special Rapporteur’s summing up. There seemed to be general agreement that a working group needed to be established. The group’s mandate should be a very broad one: to rapidly review the draft principles submitted, taking into account all the views expressed in plenary, and to decide which principles should be referred to the Drafting Committee, with a view to completing their consideration on first reading by the end of the current session.

19. Mr. PELLET said that he was in favour of creating a working group, since that appeared to be the will of a majority of members. However, there was no call for undue haste. Even if the majority was right in believing that work on the draft must be finished by the end of the quinquennium, there were still two years remaining. The draft had been described by many, including himself, as providing all the elements necessary for discussion; but to strive, in the five weeks before the end of the current session, not only to establish a working group, but also to discuss the entire draft, send it to the Drafting Committee, give it time to improve on the text and request the Special Rapporteur to elaborate commentaries seemed unrealistic. On the other hand, if the Commission wished to set itself the objective of preparing a draft by the end of the session, all well and good. Indeed, he was not against

<sup>7</sup> See 2805th meeting, footnote 5.

sending such a draft, unexamined by the Drafting Committee and unadopted in plenary, to the General Assembly in order to sound out States on their views; but to suppose that a fully fledged draft with commentaries could be prepared for adoption on first reading was not only unrealistic, but absurd. The objective should rather be to prepare as complete a draft as possible, on the understanding that its consideration on first reading would have to be completed in 2005. He entirely agreed with the Special Rapporteur's proposal, but was not in favour of attempting to take matters any further at the current session, for practical reasons.

20. Mr. BROWNLIE said that he acknowledged a point made at an earlier meeting by Mr. Yamada that the Commission must find out as soon as reasonably possible what States thought about the draft. On the other hand, the Commission could proceed only as rapidly as was reasonable and safe, and therein lay the dilemma. By presenting material to States for their comments, the Commission would be placing itself on firmer ground. Otherwise, he supported the idea that the Commission should transmit the draft to a working group, with one or at the most two guidelines to indicate that, both as to form and to content, the draft should be consequent upon and congruent with the prevention topic.

21. Mr. PAMBOU-TCHIVOUNDA said that he was in favour of creating a working group to be chaired by the Special Rapporteur. As to what the Commission might be able to submit to the General Assembly in a few months' time, the working group could provide an evaluation of the draft principles, supplemented by an assessment of which principles were currently workable and which could benefit from fuller consideration, on the basis, *inter alia*, of comments that members of the Sixth Committee could usefully provide.

22. Ms. ESCARAMEIA said that she strongly endorsed the proposal to establish a working group and subsequently to consider the principles in the Drafting Committee. However, in the light of the discussion that had taken place, it was clear that some of the principles were ready to go directly to the Drafting Committee, whereas others should go to a working group as they required further consideration. It remained to be seen whether the draft could be finished in time for submission to the next session of the General Assembly.

23. Mr. ECONOMIDES said that three things seemed particularly important at the present stage. Everyone agreed, firstly, that priority must be given to consideration of the topic, and, secondly, that a working group should be established. Most of the principles were ripe for adoption, but there was much material in the commentary that could strengthen the draft and deserved to be promoted to the status of principle. Looking into that question would be the main brief of the working group, which would then adopt a decision on the future direction of the project. Thirdly and lastly, the next stage offered two possibilities: one maximalist, involving the adoption of the draft on first reading during the second half of the session; the other minimalist, whereby the draft would be submitted to States at the next session of the General Assembly for

their comments. Only time, and the progress made during the second half of the session, would tell which possibility prevailed.

24. Mr. KATEKA said that it was time for the Commission to move forward. While Ms. Escarameia's suggestion about sending certain principles directly to the Drafting Committee was a reasonable one, it might be wiser to first refer the draft principles as a whole to the working group. The working group could select those that were not controversial and bring them back to the plenary for referral to the Drafting Committee. In any case, the Commission should move ahead without worrying about whether it could finish the draft in time for the next session of the General Assembly.

25. Mr. AL-BAHARNA said that he supported Mr. Kateka's suggestion, which reflected the near consensus that had emerged within the Commission.

26. Mr. CANDIOTI said that he, too, endorsed Mr. Kateka's suggestion. It might be useful to schedule a short meeting of the working group before the end of the first half of the session, for the purpose of starting work on the task of sorting out the principles that could go directly to the Drafting Committee. In performing that task, the working group should keep in mind the important comments and proposals made by Mr. Koskenniemi on the subject at an earlier meeting.

27. The CHAIRPERSON, summing up the discussion, said that the Commission considered that a working group to be chaired by the Special Rapporteur should be established, with the mandate of quickly reviewing the proposals submitted in his second report and, taking into account all the views expressed during discussion, referring to the Drafting Committee those principles that were ready for final drafting work, while simultaneously continuing to examine those issues that remained unresolved. He suggested that three meetings should be scheduled at the start of the second half of the session for meetings of the working group, after which its chairperson would be asked to present the group's recommendations to the plenary. The topic of international liability was to be considered a priority item for the Commission and sufficient time would be allotted in the second half of the session to enable progress to be made.

28. In response to queries from Mr. PELLET and Mr. AL-BAHARNA, he said that the composition of the working group would be announced at the following meeting. However, it would be open for all members to attend.

29. If he heard no objection, he would take it that the Commission wished to endorse that course of action.

*It was so decided.*

*The meeting rose at 11.40 a.m.*