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Summary record of the 2044th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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5. Mr. RAZAFINDRALAMBO said it was regrettable that the Commission should begin its work by considering the report on international liability for injurious consequences arising out of acts not prohibited by international law, a document that had been circulated to members only the previous day, whereas the report on the law of the non-navigational uses of international watercourses had been sent to them at their home addresses. He wondered why the Enlarged Bureau had made such a recommendation.

6. The CHAIRMAN explained that Mr. Barboza had to be absent from 23 May and that Mr. Thiam, for personal reasons, had to return immediately to Dakar. That was why the Enlarged Bureau was recommending that priority be given to Mr. Barboza's report.

7. Mr. BARSEGOV observed that relations between States and international organizations (second part of the topic) had not yet been mentioned, and also asked when members would have copies of Mr. Ogiso's report on jurisdictional immunities of States and their property, which apparently ran to 150 pages. As a former staff member of the United Nations, he was fully aware of the work-load involved in translating and reproducing a document of that length. He was also concerned that, if the Drafting Committee was to meet because there was no work for the Commission to do, those members of the Commission who were not on the Drafting Committee might be wasting their time.

8. Mr. MAHIOU said that, for reasons of *force majeure*, namely Mr. Thiam being called back to Dakar, and of documentation, in other words only Mr. Thiam's report having been issued in French, the situation was somewhat difficult. Nevertheless, members of the Commission must face up to it squarely. Some of them might, in fact, be prepared to speak after Mr. Barboza had introduced his report. The proposals of the Enlarged Bureau should be adopted, so that after the present meeting it could return in greater detail to the programme of work.

9. Mr. ROUCOUNAS said that Mr. Barboza's topic was of special interest because, on the threshold of the twenty-first century, there were psychological and other reasons why mankind was feeling the need for protection against technological and other risks. He asked whether the discussion could be resumed when the allocated seven meetings were over.

10. The CHAIRMAN said that, if necessary, the discussion could be continued when Mr. Barboza returned. In reply to Mr. Barsegov, he added that he would be submitting his own report on relations between States and international organizations at the Commission's next session.

11. Mr. PAWLAK said that, as a matter of common sense, the Commission should endorse the solution proposed by the Enlarged Bureau. He therefore supported its recommendations and asked if the Secretariat could speed up the translation of the reports submitted to the Commission.

12. Mr. KALINKIN (Secretary to the Commission) said that the Secretariat had not yet received all the reports awaited. Mr. Ogiso's report, which had arrived the previous day, would be distributed at the beginning

of July, Mr. Yankov's report at the beginning of June and Mr. Arangio-Ruiz's report towards the end of June.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the recommendations of the Enlarged Bureau.

It was so agreed.

Drafting Committee

14. The CHAIRMAN proposed that the Drafting Committee, with Mr. Tomuschat as Chairman, should consist of the following members: Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Hayes, Mr. Koroma, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas and Mr. Sepúlveda Gutiérrez. Mr. Shi would be an *ex officio* member in his capacity as Rapporteur of the Commission.

It was so agreed.

The meeting rose at 10.45 a.m.

2044th MEETING

Wednesday, 11 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

Organization of work of the session (continued)

[Provisional agenda item 1]

1. The CHAIRMAN made the following recommendations to the Commission, based on discussions held by the Enlarged Bureau.

1. A preliminary debate on agenda item 9 should be held the following week, while the Legal Counsel was in Geneva, and should cover the points included in paragraph 5 of General Assembly resolution 42/156.

2. Paragraph 244 of the Commission's report on its thirty-ninth session¹ should be interpreted and applied flexibly, the guiding principle being that the Commission should make maximum use of the time available to it, especially when there were special circumstances warranting delay in the presentation of reports by some special rapporteurs, and that all the resources made available by the General Assembly should be fully deployed.

3. The Commission should endorse all the topics on its provisional agenda (A/CN.4/408).

4. The four morning meetings each week should all be plenary meetings: the afternoons should be devoted to the work of the Drafting Committee, the Planning Group or other bodies.

¹ *Yearbook* . . . 1987, vol. II (Part Two), p. 55.

5. The following preliminary plan of work for the month of June should be adopted:

Draft Code of Crimes against the Peace and Security of Mankind (item 5): sixth report by Mr. Thiam (A/CN.4/411).....	until 10 June
The law of the non-navigational uses of international watercourses (item 6): second part of the fourth report by Mr. McCaffrey (A/CN.4/412/Add.1 and 2).....	14 to 21 June
International liability for injurious consequences arising out of acts not prohibited by international law (item 7): fourth report by Mr. Barboza (A/CN.4/413).....	22 to 24 June
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 4): eighth report by Mr. Yankov (A/CN.4/417) (if available).....	28 to 30 June

6. Any time saved from the consideration of the various topics in plenary should be allocated to the Drafting Committee, the Planning Group or other bodies, and the reports of the Drafting Committee should be considered, as appropriate, in plenary, depending on the availability of documentation.

2. The proposed plan of work should, of course, be followed with the necessary flexibility, bearing in mind the progress of the work and with a view to economizing on resources.

3. In accordance with previous practice, the representatives of legal bodies with which the Commission co-operated would make their statements on dates to be decided as the session progressed. Agenda item 10 could thus be dealt with in the light of their wishes.

4. The organization of the Commission's work for the month of July would be decided at a later stage, when the situation regarding the reports not yet submitted by special rapporteurs became clearer. In the mean time, he proposed that the Commission should adopt those recommendations.

The recommendations were adopted.

Adoption of the agenda (A/CN.4/408)

5. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/408).

The provisional agenda (A/CN.4/408) was adopted.

6. Mr. CALERO RODRIGUES expressed his concern about two topics: jurisdictional immunities of States and their property, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. With the timetable just adopted, he saw little chance of the Commission achieving the object it had set itself for the session, namely completing the second reading of draft articles on two topics, and the first reading of draft articles on two others. The second topic he had mentioned should, he thought, have at least two weeks' consideration in the Drafting Committee at the current session. As to Mr. Ogiso's report on the first topic, there would be no opportunity to present it before the end of the session.

7. The CHAIRMAN said that he shared Mr. Calero Rodrigues's concern, but pointed out that the two topics mentioned were those for which reports were not yet available. It should be possible, however, to consider at least part of Mr. Ogiso's report during the session.

8. Mr. FRANCIS said that the delay in submitting certain reports was attributable not to the special rapporteurs concerned, but to Governments which had delayed their response to the request for observations. He suggested that the Commission should include a comment to that effect in its report and inform the General Assembly that, if the trend continued, the Commission would probably be unable to meet its request for a second reading on two topics at the present session.

9. The CHAIRMAN said that, when the Commission dealt with agenda item 9, it should urge Member States to respond promptly to requests by the General Assembly for observations on specific questions.

10. Mr. YANKOV said that he regretted the difficulty of completing, at the current session, the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Because of delays in the transmission of documents, it had not been possible to reflect in his report (A/CN.4/417) the comments and observations received from Governments, but he would try to be ready for the report to be considered, provided its printing could be speeded up.

Drafting Committee

11. The CHAIRMAN proposed that Mr. Al-Khasawneh should become a member of the Drafting Committee immediately; Mr. Razafindralambo would serve on it from 1 June, and Mr. Roucounas from 1 July. If there were no objections, he would take it that the Commission agreed to those changes in the composition of the Drafting Committee.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

12. The CHAIRMAN announced that, after consultations, Mr. Graefrath, Chairman of the Planning Group, had proposed that the Group should consist of the following members: Prince Ajibola, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Shi, Mr. Solari Tudela, Mr. Thiam and Mr. Yankov. The Planning Group was not restricted and other members of the Commission would be welcome at its meetings. If there were no objections, he would take it that the Commission agreed to the proposed membership.

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,² A/CN.4/405,³ A/CN.4/413,⁴ A/CN.4/L.420, sect. D)⁵

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPOREUR

ARTICLES 1 TO 10

13. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on the topic (A/CN.4/413), containing draft articles 1 to 10, which read:

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

Article 2. Use of terms

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury throughout the process;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved;

(b) "Activities involving risk" means the activities referred to in article 1;

(c) "Transboundary injury" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in spheres where another State exercises jurisdiction under international law, is appreciably detrimental to persons or objects, or to the use or enjoyment of areas, whether or not the States concerned have a common border;

(d) "State of origin" means the State which exercises the jurisdiction or the control referred to in article 1;

(e) "Affected State" means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected.

Article 3. Attribution

The State of origin shall have the obligations imposed on it by the present articles provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried on in areas under its jurisdiction or control.

Article 4. Relationship between the present articles and other international agreements

Where States Parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply subject to that other international agreement.

² Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

³ Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

⁴ Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

⁵ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

Article 5. Absence of effect upon other rules of international law

The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

CHAPTER II. PRINCIPLES

Article 6. Freedom of action and the limits thereto

States are free to carry on or permit in their territory any human activity considered appropriate. However, with regard to activities involving risk, that freedom must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7. Co-operation

1. States shall co-operate in good faith in preventing or minimizing the risk of transboundary injury or, if injury has occurred, in minimizing its effects both in affected States and in States of origin.

2. In accordance with the above provision, the duty to co-operate applies to States of origin in relation to affected States, and vice versa.

Article 8. Participation

By virtue of their duty to co-operate, States of origin shall permit participation under the present articles by States likely to be affected, so that they might jointly consider the nature of the activity and its potential risks, and determine whether a régime needs to be jointly developed in this area.

Article 9. Prevention

States of origin shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no régime has been established.

Article 10. Reparation

To the extent compatible with the provisions of the present articles, injury caused by an activity involving risk must not affect the innocent victim alone. In such cases, there must be reparation for the appreciable injury suffered, the question of reparation being settled by negotiation between the parties and in accordance with the criteria laid down in the present articles.

14. Mr. BARBOZA (Special Rapporteur) first recalled that some confusion had been caused by his comments in his second report on the Spanish term *responsabilidad*.⁶ In referring to the two separate connotations of that word, namely the duty of prevention and the duty of reparation, for which two separate terms—responsibility and liability—were used in English, he had only meant to indicate that both obligations were covered by the Spanish term, without stretching its meaning.

15. Introducing his fourth report (A/CN.4/413), he suggested that, as the general debate was over, the Commission should concentrate on specific articles, in order to fulfil its mandate from the General Assembly. As far as possible, the comments made had been reflected in the report, with a view to representing the majority opinion in the Commission.

16. Two questions remained outstanding from the debate on the topic at the previous session: whether the

⁶ *Yearbook . . . 1986*, vol. II (Part One), p. 146, document A/CN.4/402, para. 5.

draft articles should include a list of the activities covered by the topic and whether polluting activities should be brought within their scope. The idea of including a list of activities had already been objected to, on the ground that such a list would quickly become obsolete owing to the pace of technological progress. A second objection raised was that the concept of danger caused by an activity was essentially relative, since it depended on circumstances: the same industry could be considered dangerous in some circumstances and safe in others. The purpose of preparing such a list would be to give the future convention on the topic a concrete subject-matter, with a view to reproducing the situation in which States negotiated a convention governing a particular activity. In such a case, the task was simpler, since responsibility could be determined on the basis of the characteristics of the activity in question. But the present topic operated at a different stage, prior to that just mentioned. As it now stood, the draft dealt with the juncture at which a State, having identified within its borders an activity involving risk, realized that the continuation of the activity might affect other States.

17. The object of the draft articles was modest: to establish a general convention obliging States to notify and inform other States which might be affected by such a risk, and, as far as possible, to prevent it from arising. If damage occurred, no specific level of compensation was prescribed; instead, there was an obligation to negotiate in good faith and to make reparation for any injury caused, taking into account factors such as those set out in sections 6 and 7 of the schematic outline. At present, there was a gap in international law relating to the negotiation of conventions on specific activities; it was not clear what principles should apply to such negotiations, or what should be done if accidents happened during them. The purpose of the draft articles was to fill that gap. International practice bore out the principle that the State in which the risk originated must take precautions to eliminate the risk and inform States which might be affected. It would be impossible to regulate all specific activities at the present time: the Commission could only try to provide the most complete definition possible of activities involving risk.

18. As to the second outstanding question, that of polluting activities, the preliminary conclusion had already been reached that such activities should be brought within the scope of the draft articles, since he doubted that the Commission accepted the existence of a rule of international law, at an operative level, prohibiting States from causing appreciable injury through transboundary pollution. At the previous session, Mr. Reuter⁷ had raised the issue of continuous pollution—the case in which pollutants that caused no appreciable damage in small quantities could, in time, accumulate and cause transboundary injury. As Mr. Reuter had pointed out, it was sometimes difficult to prove the connection between cause and effect in cases of continuous pollution; but, on close examination, it appeared that reparation for such damage was not the primary concern, especially where there was a régime—such as that of the present draft articles—whose provisions prevented the damage from becoming serious. Yet

the difficulty of proving the facts did not justify abandoning the attempt to deal with continuous pollution: it would be better to have a régime of responsibility than to be without any legal safeguards for the affected State. It was therefore considered that the question of continuous pollution should be included within the scope of the topic. Where accidental pollution was concerned, there was little difficulty in proving the facts, the cause being well known; on the other hand, the question of reparation became very important.

19. Introducing article 1, he pointed out that the basic situation contemplated in the draft articles was territorial. The topic dealt with activities in the territory of one State which caused harm in the territory of another State. In modern international law, however, the position was more complicated. The activities in question could be carried on outside the actual territory of the State of origin. For that reason, article 1, instead of referring to the territory of the State of origin, referred to the jurisdiction vested in it by international law. The jurisdiction of a State extended to its ships, its aircraft and its space vehicles and the formulas used in articles 1 and 2 (c) covered activities conducted in such craft and also damage to them. There were also areas where, under international law, the jurisdiction of more than one State was exercised, as in the case of a foreign ship in a State's territorial sea. If an activity of the type in question was conducted in the exercise of one jurisdiction and caused damage in another jurisdiction, the situation would be covered by the draft articles.

20. The words “or, in the absence of such jurisdiction, under the effective control of the State” had been introduced in order to deal with such cases as that of Namibia, where South Africa exercised *de facto* control, although it had no jurisdiction vested in it by international law.

21. He pointed out that, in an earlier version, article 1 had referred to activities which “give rise or may give rise to” transboundary harm. That formula had, however, appeared redundant: if an activity created appreciable risk, it would be covered by the draft articles and, accordingly, its results would also be covered. Therefore, if any reference to activities which caused harm was to be included, it should be qualified. As would be seen later, the reference should be to an activity which created an appreciable risk, whether or not it caused transboundary harm.

22. The concept of “situations” had not been retained in article 1, since most of the comments made during the 1987 discussion had been critical of that concept. The reason for including it had been to cover cases in which the activity concerned could not be described as dangerous in itself, but nevertheless created a dangerous situation. An example was the construction of a dam, which, although not dangerous in itself, could upset hydrological conditions, affect the rainfall in the area or even cause floods. When dealing with the part of his report relating to causality he would explain why it was possible to dispense with the concept of “situations”.

23. The purpose of article 2 was to explain the meaning of terms employed in the various articles submitted so far. As the work progressed it would, of course, become necessary to introduce further definitions.

⁷ *Yearbook* . . . 1987, vol. I, p. 142, 2016th meeting, para. 11.

24. Subparagraph (a) attempted to give a comprehensive definition of a “dangerous activity”, without providing a list of such activities. Most, if not all, known dangers arose from the use of dangerous things: *cosas peligrosas* in Spanish or *choses dangereuses* in French. The term “substances”, used in the English text of the report, was not satisfactory: a spacecraft, for example, was not a substance. Besides, the term “things” had a wider meaning: it could be used to refer, for example, to laser beams. The concept involved was essentially a relative one: it depended on the intrinsic properties of the things concerned (e.g. dynamite, nuclear materials), the place in which they were used (near a border), the environment in which they were used (air, water, etc.) and the way in which they were used (e.g. oil transported in great quantities by large tankers).

25. The risk contemplated in the draft articles was the risk created by such things. That element constituted one of the most essential features of responsibility; the “risk” in question had to be greater than a normal risk. It must be remembered that there was some risk involved in most activities; the risk contemplated in the present instance had to be relatively high. Moreover, the existence of the risk had to be visible to the professional eye. Occult risk did not lie within the scope of the draft articles, unless it was known to exist because of some other circumstance: for instance, if it became evident at a later stage by causing some transboundary injury. The purpose of the proposed wording was to protect the freedom of the State of origin. Otherwise, it would be under an obligation to set the procedures of the draft articles in motion for any new activity. The proposed definition was in conformity with Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁹ which was also reflected in draft article 6. It introduced a new “threshold” which could not be measured with precision. In that connection, he drew attention to footnote 9 in his fourth report (A/CN.4/413), which was particularly important.

26. As stated in subparagraph (b) of article 2, “activities involving risk” meant the activities referred to in article 1.

27. Subparagraph (c) referred to the jurisdiction rather than to the territory of a State, in line with the wording of article 1. He proposed that the inappropriate term “spheres” (*ámbitos*) be replaced by “places” (*lugares*). The provision would thus cover ships, aircraft and space vehicles. Subparagraph (c) dealt with the transboundary element, in other words the fact that the activity concerned and its effects occurred in different jurisdictions. In the commentary, an attempt would be made to construct a general theory of harm for the purposes of the present topic.

28. Much had been said in the previous debate on the subject of terminology. He himself had doubts about the use of the term “injury” to render the original Spanish *daño*, which was a neutral word used to describe anything detrimental to persons or property. Of course, a special rapporteur was in no position to

suggest equivalents in the various languages of terms used in legal systems other than his own. Hence if the debate revealed some difficulties regarding the meaning of a term or expression, he would endeavour to explain the way in which he had used it in the original Spanish text.

29. The position was that not all types of harm had to be compensated for. Everything depended on the type of liability which it was intended to impose on the parties. In international law, not all harm gave rise to compensation. In the *Barcelona Traction* case, as he pointed out in his report (*ibid.*, para. 38), the ICJ had stated:

... evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility . . .

In other words, the present topic concerned only harm that was appreciable and arose from an activity creating appreciable risk. Risk that was not appreciable was not covered by the draft articles and hence would not be covered by a general convention deriving from them. Of course, other forms of risk would be covered by specific conventions on particular matters; and risks other than appreciable risk would be covered by general international law. The fact that damage must be compensated for when it occurred as a result of dangerous activities made the concepts of “risk” and “harm” a real continuum: harm was compensated for because of the risk created by the activity. There was an *a priori* obligation for whoever created the risk to provide compensation for any harm which occurred in such circumstances. As he stated in his report (*ibid.*, para. 45), compensation was due not merely because injury had occurred, but because it corresponded to “a certain general prediction that it was going to occur”, since the activity which caused it created a risk and was dangerous.

30. It had been seen that, in order to be covered by the topic, harm had to result from the physical consequences of the activity concerned; but harmful social consequences must also be taken into account—an idea underlying the arbitral award in the *Lake Lanoux* case⁹—as well as harmful economic consequences.

31. With regard to transboundary harm, he agreed that subparagraph (b) of former article 3 as submitted in his third report (A/CN.4/405, para. 6) was unnecessary. The situation for which that subparagraph provided, namely the attribution of liability in cases where an activity in one country created in areas beyond national jurisdictions a “situation” which, in turn, caused injury in areas within the jurisdiction of another State, would be covered provided that the chain of causality between the activity in one national jurisdiction and the effect in another remained unbroken. Indeed, that seemed to be the rule laid down by the United States-German Mixed Claims Commission in relation to certain emergency war measures taken by Germany during the First World War, to which he referred in his

⁹ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁹ Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports*, 1957 (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

fourth report (A/CN.4/413, para. 52). He therefore suggested that the case referred to in subparagraph (b) of former article 3 should be omitted from the draft and that the point should be clarified in the commentary.

32. With regard to subparagraph (d) of article 2, he preferred the expression "State of origin" to "source State". The former expression was more neutral and better reflected the basic situation of a purely territorial attribution.

33. Article 3, which dealt with the highly complex question of attribution, introduced a new element into the basic rule by providing that the State of origin must know or have means of knowing that an activity involving risk was being carried on in areas under its jurisdiction or control. The State's liability in such cases was thus the counterpart of its exclusive territorial jurisdiction, as laid down in the arbitral award in the *Island of Palmas* case (*ibid.*, para. 61). If that decision applied within the territory of a State, it must *a fortiori* apply beyond the borders of that State. He could not, however, agree that a State should be made responsible for anything that happened, irrespective of whether or not it had means of knowing that a certain activity was being carried on in its territory: as he stated in his report (*ibid.*, para. 63), he did not believe that the judgment in the *Corfu Channel* case embodied the presumption that States knew, or should know, of all activities being carried on within their territory.

34. The reasoning in the *Corfu Channel* case, however, applied to wrongful acts, whereas the present topic was concerned with causal responsibility, which meant that the mechanisms of the draft should be readily operative. Thus a presumption that the State of origin had means of knowing could work in favour of the affected State, although such a presumption could be rebutted by evidence to the contrary: a developing country would, for instance, merely have to show that it lacked the necessary naval or air facilities to monitor the vast area of its exclusive economic zone.

35. Although attribution of result automatically followed attribution of conduct, there was a conceptual gap between the two. Attribution of an activity to a State meant that, in regard to that activity, the State had all the obligations under the present articles, and such attribution was basically determined by a territorial criterion. Attribution of a result to an activity, on the other hand, was determined by a causal criterion, in that there had to be a causal chain between the activity and the result. There was thus no difference in the latter case between the rules governing responsibility for wrongful acts and those governing the topic under discussion, which was concerned with the realm of causality. There was, however, a world of difference between the two types of responsibility as far as the attribution of an act to a State was concerned. For the purposes of the present topic, attribution of an activity was, generally speaking, purely territorial, whereas in the case of State responsibility the question was far more complex, since it involved the requirements referred to in the fourth report (*ibid.*, paras. 73 and 75).

36. Attribution and knowledge, considered together, raised the question whether the requirement that the State should have prior knowledge that a certain activity

was being carried on in its territory did not distort the nature of causal responsibility. In his view, it did not, for even causal responsibility required a minimum of participation on the part of the person accountable for the activity. That point was underlined by the comparison made in his report (*ibid.*, paras. 80-81) with the liability, under internal law, of a car-owner whose vehicle was involved in an accident when driven by an unauthorized third party.

37. A related concept was that of appreciable risk, concerning which the former article 4 (A/CN.4/405, para. 6) had provided that the State of origin should be bound by the present articles "provided that it knew or had means of knowing that the activity in question . . . created an appreciable risk of causing transboundary injury". He had decided to delete that idea from the draft because the expression "means of knowing" involved subtle distinctions of meaning which, in his view, precluded its application to the concept of appreciable risk. It had been said, for example, that an appreciable risk was one that could be appreciated, in an objective manner, by any expert and by a simple examination of the activity and the things involved. Hence to provide that a State must have the means of knowing that there was an appreciable risk of harm would be tantamount to placing that State in an inferior position *vis-à-vis* a person having professional knowledge.

38. With regard to chapter II of the draft (Principles), he thought that the language of the three principles he had proposed at the previous session was too general. It was, however, essential to have a set of principles for the topic, and the Commission need not concern itself with whether those principles should be regarded as a reflection of general international law or as part of the progressive development of that law. He would welcome members' comments on whether or not the principles were applicable to the topic. It should be remembered that the Commission was breaking new ground and would have to proceed by trial and error.

39. Clearly, the principles should be inspired by Principle 21 of the Stockholm Declaration; that, indeed, was the essence of draft article 6 (Freedom of action and the limits thereto). He considered, however, that the article should speak of "rights" rather than "interests", for, as stated in his fourth report (A/CN.4/413, para. 94), an interest was something which a State wanted to protect because it might represent a gain or advantage for that State or because its elimination might cause a loss or disadvantage, but which did not have legal protection. If there was a legal régime that provided for compensation, or obligations of prevention whose violation had some impact on the way compensation was provided, then that régime would vest certain rights in the affected State, as established by article 6.

40. He had not found it easy to accept that the principle of co-operation, laid down in article 7, constituted one of the bases for the obligations set forth in the draft relating to notification, information and prevention. In his view, the attitude of a person who refrained from causing harm to another could not be interpreted as co-operation when the occurrence of harm depended on that person alone. On reflection, however, that was perhaps a somewhat simplistic approach. In the context

of the topic, things could not be seen as only black or white. In the face of modern technological development and of the introduction of activities which involved risk, but were of use to society, individuals and societies found themselves in a dilemma, because, despite all the precautions taken, the new activities could not be fully controlled. That was perhaps why a disaster which caused transboundary injury was considered, in a sense, as a misfortune for all. Co-operation, therefore, must be one of the foundations of the obligations set out in the draft, although the obligation of reparation rested on justice and equity.

41. The expression "in good faith" had been included in article 7 in order to accommodate the concern expressed at the previous session that States should avoid acts intended to take advantage of accidents such as those falling within the topic. The expression was not meant to imply that co-operation should be free in all cases.

42. Article 8 concerned participation, which appeared to be the reverse side of co-operation and applied to the same types of obligation, namely notification, which informed the affected State that there was a risk and requested its participation in the common task of establishing a régime, and information, which was intended to enable the affected State to participate as a valid partner in the prevention efforts.

43. Article 9 established the principle of prevention, which had occupied a considerable part of the Commission's debates. The drafting of that principle was a central concern, and there were three possibilities: prevention might be linked exclusively to reparation; obligations of reparation might exist together with autonomous obligations of prevention; or, as one member had suggested, the draft might embody only norms of prevention. In the first case, it was clear that the preventive effect, under a régime of liability for risk, was achieved through the conditions imposed by the régime with respect to reparation, which provided the incentive for a State to take precautionary measures by itself. The second possibility gave equal weight to prevention and reparation, although some members had considered that prevention had an acceptable predominance over reparation. Others had seen a contradiction in making obligations of prevention autonomous, since the sanctioning of their violation would bring the Commission into the field of wrongfulness. That was a view to which he personally did not give great weight, but which had been repeatedly expressed. The principle had therefore been drafted in a neutral way, but it could be given more specific meaning in a subsequent article.

44. Article 10 dealt with reparation, a principle which would prevail if there were no agreed treaty régime between the State of origin and the affected State or States. The central concepts were: (a) when injury resulted from an activity covered in article 1, there should be some form of reparation; (b) reparation should be established by negotiations between the State of origin and the affected State; (c) the negotiations should be guided by the principles embodied in the draft, particularly that injury must be assessed as was usually done in the field of strict liability, not in its ac-

tual dimensions, but taking account of other factors. That concept of injury was peculiar to causal responsibility and was very different from injury resulting from wrongfulness, since the activity in question was not prohibited and was presumably a useful activity, not only to the State in which it was conducted, but also to the State accidentally affected by the harm. It must also be taken into account that measures of prevention could impose a heavy financial burden on the State of origin. Activities based on modern technology and involving risk were conducted in nearly all countries, and an affected State might well become a State of origin one day.

45. Mr. McCaffrey said that the topic under discussion overlapped at times with the one for which he himself was responsible, namely the law of the non-navigational uses of international watercourses; but to the extent that the standard of liability under the present topic was one of strict liability, there was a clear line of demarcation between the two subjects.

46. With regard to terminology, he agreed with the Special Rapporteur that "harm" was a more appropriate term than "injury", that "State of origin" was a broader and more satisfactory expression than "source State" and that the term "thing" should replace "substance", which was too narrow a term. He also agreed with the Special Rapporteur's conclusion in his fourth report (A/CN.4/413, para. 7) that it was neither possible nor desirable to draw up an exhaustive list of the activities covered by the draft articles.

47. As for polluting activities, he wondered whether the question asked in the report (*ibid.*, para. 9) was the appropriate one. Perhaps it should rather be asked whether there were instances of transboundary pollution which might be the grounds for a standard of liability higher than normal, that was to say strict liability rather than liability based on fault. For example, a chemical plant or nuclear reactor might go awry, causing extraterritorial harm. In such a case, the activity itself was not prohibited, but the international community assumed that it would be subject to a minimum level of regulation and control. If that minimum level had not been met and a breakdown occurred, resulting in transboundary injury, the State of origin would have committed an internationally wrongful act in failing to fulfil its obligation and its liability would be engaged under State responsibility. If the minimum level of control had been met, however, and a breakdown none the less occurred, there would be damage but no internationally wrongful act. Practically speaking, the problem would be to determine whether the duty of care had been fulfilled. That was a crucial issue, since, if the duty of care had been met and transboundary harm resulted, there was no internationally wrongful act, and therefore no liability under the normal principles of State responsibility. There would, however, be liability under the present topic if the requirements explained by the Special Rapporteur had been satisfied, in other words if the activity in question had created a foreseeable and abnormally high risk of transboundary harm.

48. Those considerations demonstrated the importance of régime building, to enable the States concerned

to agree on which activities would give rise to liability even without the "fault" of the State of origin. That was a crucial question, for without such agreement there would always be a dispute over whether the State had complied with its duty of care. For that reason, he disagreed with the Special Rapporteur when he said he did not think that the Commission unanimously accepted the idea that there was a prohibition under international law against acts giving rise to appreciable injury through transboundary pollution (*ibid.*, paras. 9-10). He himself dealt at some length with that subject in his fourth report on the law of the non-navigational uses of international watercourses (A/CN.4/412 and Add.1 and 2), to which he would refer at another time. If the State of origin had failed to comply with its duty of due diligence, it was clear that it was liable for the resulting transboundary harm. But regardless of whether international law prohibited transboundary polluting activities, the State of origin could not discriminate against another State with regard to a potentially damaging activity by so locating that activity that the resulting pollution would affect a neighbouring State more than itself. That principle of non-discrimination, which derived from the sovereign equality of States, had been developed at length by OECD.

49. With regard to article 3 and the question of attribution, the Special Rapporteur had referred, in his oral introduction, to the requirement of a certain minimum participation of the State of origin. That point was also covered by the obligation of due diligence, which implied a certain degree of vigilance on the part of the State of origin, as he himself discussed in his fourth report. The issue was not the attribution to the State of the conduct of private individuals, but the direct liability of the State for a breach of its international obligation to exercise due care. The question for the Commission was whether the State would be liable even if it had not violated that obligation.

The meeting rose at 1 p.m.

2045th MEETING

Friday, 13 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/405,² A/CN.4/413,³ A/CN.4/L.420, sect. D)⁴

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Attribution)
- ARTICLE 4 (Relationship between the present articles and other international agreements)
- ARTICLE 5 (Absence of effect upon other rules of international law)
- ARTICLE 6 (Freedom of action and the limits thereto)
- ARTICLE 7 (Co-operation)
- ARTICLE 8 (Participation)
- ARTICLE 9 (Prevention) *and*
- ARTICLE 10 (Reparation)' (*continued*)

1. Mr. McCaffrey, continuing his statement from the previous meeting, said he had difficulty with the title of draft article 3 (Attribution). The term had a very specific meaning in the context of the Commission's work and was also used in article 11 of part 1 of the draft articles on State responsibility.⁶ As Mr. Ago, the then Special Rapporteur for that topic, had explained in his fourth report,⁷ the responsibility of the State of origin had to be regarded as "direct" responsibility and not as attributed—in other words "indirect" or vicarious—responsibility. It was important to bear in mind that point of terminological consistency.

2. With regard to draft article 9, the obligation of prevention had two aspects: one relating to mechanisms and procedures and the other relating to substance. From a procedural point of view, the duty of prevention involved a number of practical steps: assessment of the possible transboundary effects of the activity contemplated; preventive measures on the part of the State of origin to ward off accidents; consultation with those States likely to be affected by the activity; participation by those States in the preventive action; and so on. All those procedures should enable the potentially affected States to protect themselves against the risks they ran, risks that could be very slight in themselves but could well have enormous harmful consequences, as in the case of an accident in a nuclear power-station.

¹ Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

⁴ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

⁵ For the texts, see 2044th meeting, para. 13.

⁶ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁷ *Yearbook . . . 1972*, vol. II, p. 100, document A/CN.4/264 and Add.1, para. 72.