

Document:-
A/CN.4/SR.2047

Summary record of the 2047th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

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that a working group should be set up by the Sixth Committee to consider specific topics on the Commission's agenda. He hoped that the Legal Counsel would be able to attend the discussion in the Planning Group and perhaps advise the Commission on some of the financial aspects of the proposals made.

44. The success of the Commission's work was largely dependent on the results achieved in the Drafting Committee. He therefore endorsed the suggestion that the Committee's reports should be made available much earlier, and should preferably be accompanied by commentaries. It would also be helpful for those who were not members of the Drafting Committee if the Planning Group could be informed of the status of the Committee's work at the current session. He reminded members of the proposal that the Drafting Committee should be flexible in composition, so as to reduce the heavy burden of work on its members, and of the decision that the Chairman of the Commission should, whenever possible, indicate the main trends of opinion revealed by the debate in plenary.³ On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, for example, it was evident that there were two schools of thought; but the Drafting Committee should work on the basis of only one. It was therefore incumbent on the Chairman to assist the Special Rapporteur in giving the Drafting Committee the necessary guidance.

45. Mr. PAWLAK said he agreed that the number of topics considered by the Commission at each session should be reduced to two or three. That would not prevent reports on other topics from being submitted, but the Commission should concentrate on topics that were ripe for codification by the drafting of articles.

46. Co-operation between the Commission and the Sixth Committee of the General Assembly should be increased, possibly by means of an annual report submitted in advance by the Chairman of the Commission for the information of the Committee.

47. Very little information regarding the codification process in other international forums was available to the Commission. Possibly the Secretariat could submit a bulletin or an annual report on that subject. Preparations for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held in 1990, were under way, and some of the subjects proposed for discussion were related to the Commission's work, in particular its work on the draft Code of Crimes against the Peace and Security of Mankind. In its future work, the Commission might wish to take up some of the items to be discussed at the Eighth Congress, such as international terrorism and the codification of international criminal law. The Secretariat should find ways of bringing the Commission's work into the mainstream of the process of codification of international law, so as to make it more efficient.

48. Mr. FRANCIS, referring to a point raised by Mr. Pawlak, said that when he had represented the Commission at the nineteenth session of the Asian-African Legal Consultative Committee, held at Doha (Qatar) in 1978, Judge Nagendra Singh, then Vice-President of the

ICJ, had drawn attention to the need for a coordinating agency, given the multiplicity of codification efforts within the United Nations family. He hoped that the matter could be taken further at an appropriate time.

49. The CHAIRMAN, noting that there had been a full discussion on agenda item 9, said that members wishing to make further statements would be free to do so later. As to the suggestion that the question of staggering the consideration of topics should be discussed in plenary, the appropriate time for that discussion would be when the Enlarged Bureau introduced the report on the work of the Planning Group.

The meeting rose at 1 p.m.

2047th MEETING

Wednesday, 18 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, 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)

* Resumed from the 2045th meeting.

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.

³ *Ibid.*, paras. 238-239.

ARTICLE 8 (Participation)

ARTICLE 9 (Prevention) and

ARTICLE 10 (Reparation)⁵ (continued)

1. The CHAIRMAN informed members that, according to figures communicated to him by the Secretariat, the Commission had used more than 100 per cent of the time allocated to it during the first week of the session.

2. Prince AJIBOLA, after commending the Special Rapporteur's efforts to fulfil a complex task, said that the very title of the topic was inelegantly drafted and that the expression "not prohibited by international law" appeared to be both unnecessary and too restrictive. Once the words "injurious consequences" were used, perhaps the need was obviated for further explanation as to whether the act was prohibited by international law or not. If there was a need for further explanation as to the subject-matter of the topic, it would be better provided in one of the draft articles, for example by indicating in article 2 (Use of terms) that the word "activities" meant activities of a State which, though not prohibited by international law, resulted in injurious consequences to another State. In general terms, it might be said that the topic concerned illegal consequences of otherwise legal activities. If, therefore, a word such as "consequences" was employed to indicate the realm of the activities being considered illegal, there was logically no need to emphasize the question of legality. The title "International liability for injurious consequences arising out of States' acts" would be preferable to the existing title.

3. Some of the draft articles appeared to be acceptable and others less so; in that respect he was in agreement with most of the points made by Mr. Beesley (2045th meeting), and hence those made by Mr. McCaffrey and Mr. Calero Rodrigues (2044th and 2045th meetings).

4. As to the scope of the subject-matter, perhaps the Commission was not addressing the topic as ambitiously as it should. Certain aspects of the problem were already dealt with in international instruments. For example, the 1982 United Nations Convention on the Law of the Sea, particularly articles 192 to 194, dealt with protection and preservation of the marine environment. Similarly, the 1972 Convention on International Liability for Damage Caused by Space Objects governed liability for damage resulting from or caused by space objects. The United Nations Conference on the Human Environment had touched on the matter by affirming in the Stockholm Declaration⁶ that the protection and improvement of the human environment was a major issue which affected the well-being of peoples and economic development throughout the world (para. 2). The elaboration of draft articles should afford the opportunity to develop and codify once and for all that area of international law, which was especially in need of attention in view of increasing technological advances. It was the otherwise legitimate activities of States in the use of their environment within their jurisdiction that, deliberately or inadvertently, caused appreciable risk resulting in injurious consequences to other States. It

would therefore be preferable for the Commission to speak of environmental law in general rather than to attempt in the draft articles strictly to limit its scope. Why, in fact, should the Commission confine itself to the "modest objectives" mentioned by the Special Rapporteur in his fourth report (A/CN.4/413, para. 5)?

5. He agreed with the Special Rapporteur that the draft articles should cover the issue of pollution: first, for the reasons already referred to, and secondly, because it was an integral part of the topic, despite the arguments advanced by the Special Rapporteur in paragraphs 9 and 10 of his report. Referring to the definition of pollution contained in article 1 of the 1979 Convention on Long-range Transboundary Air Pollution,⁷ he took the view that the question raised by the Special Rapporteur in the first two sentences of paragraph 9 called for careful analysis. However, pollution was in most cases the result of legitimate activities whose cumulative effects resulted in injurious consequences, and hence it was very much a part of the topic.

6. In the matter of terminology, too much importance was attached to the concept of "risk", which had had the effect of restricting the scope of the topic, and he believed that the concept had no place in the draft. The topic was concerned more with the result of the acts of States and, more precisely, their injurious consequences. In other words, it was concerned not with how the harm was inflicted but with whether or not the harm was the result of a State's act. Perhaps it would be preferable to define terms such as "acts", "injury", "consequences" and "harm" rather than emphasize "risk". Not only did the concept of risk narrow the scope of the topic, but it restricted the extent of liability. He associated himself with the comments already made on that point by several members.

7. It was gratifying that the Special Rapporteur had given the issue of attribution the prominence it deserved in the report (*ibid.*, paras. 56-84). For the reasons given by Mr. Beesley, it might be tempting to move along the line of absolute liability, a solution that had been adopted in article II of the Convention on International Liability for Damage Caused by Space Objects. But in the case at hand, attribution was in fact quite a complex matter. For example, although the draft articles might not present many difficulties for the CMEA countries on that point, since all their activities invariably came to the knowledge of the Government, the same could not be said for market-economy countries, and in particular for the developing countries, which, as pointed out by the Special Rapporteur (*ibid.*, para. 69), were in a very precarious position in that respect. However, draft article 3 used the words "knew or had means of knowing", which constituted an appreciable safeguard and strengthened the decision in the *Corfu Channel* case (*ibid.*, para. 63). Most reluctantly, therefore, his conclusion was that article 3 could be left as it was.

8. With regard to the principles contained in chapter II of the draft, he found the Special Rapporteur's work to be satisfactory and referred in that connection to Principles 1 and 21 of the Stockholm Declaration. However, it might be necessary to review the text of draft article 6.

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

⁶ See 2044th meeting, footnote 8.

⁷ E/ECE/1010.

He preferred the more explicit wording of the principles as set out in the report (*ibid.*, para. 85).

9. Draft article 7, on co-operation, raised some questions, such as how good faith was to be evaluated. Nevertheless, even if its effect was more psychological than practical, it should be retained, although it should be couched in better terms.

10. Draft article 8, on participation, might present some problems, for it dealt with the situation in which the affected State, although not invited to participate in the enterprise or in sharing its profits, might partly sustain the injurious consequences. For its part, the State of origin might wish to protect its trade secrets and technological know-how. However, the concern to save life, property and the environment must take precedence over subjective approaches. A more practical article, dealing with the issues of notification, information and negotiation, could be suggested in that regard and useful provisions were to be found in articles 4, 5 and 6 of the Convention on Long-range Transboundary Air Pollution.

11. Draft article 9, on prevention, was also of vital importance. The Special Rapporteur had raised significant questions on the role of prevention in the context of the draft (*ibid.*, para. 103), more particularly by asking whether prevention should be linked exclusively to reparation, whether it should be autonomous, or whether it should predominate in the instrument to the exclusion of reparation. He himself shared the latter point of view. In the words of the proverb, prevention was better than cure, especially if the patient died in the mean time. A predominant place in the draft for the concept of prevention would be in keeping with Principle 2 of the Stockholm Declaration.

12. Reparation could always be claimed under international law, whether or not the draft articles contained any provision in that regard. However, the insertion of such a provision would help to develop the law in that area and make it possible to spell out what was meant by reparation and what could be claimed. Draft article 10 could be kept in its present form for the time being, but it would require further drafting improvement in order to make it clearer and to avoid a narrow concept of "risk". In the matter of the "innocent victim", he believed that the expression "appreciable injury suffered" was not felicitous, for it restricted the scope of the affected State's claim. It was not the "appreciable injury" that justified that State's action, but the "injurious consequences", for which the State of origin was directly liable. The article should be redrafted on that point.

13. Lastly, it would be useful to insert an article providing for the establishment of judicial machinery through which the affected State might bring an action against the State of origin. A good example was provided by article 26 of the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.⁸

14. Mr. PAWLAK congratulated the Special Rapporteur on his work on a most difficult and controver-

sial topic, but one that was all the more important because of the constant advances in science, technology and industry. Thanks to the Special Rapporteur's fourth report (A/CN.4/413), the Commission was at last on the right track. Nevertheless, a few comments could be made on a number of fundamental issues raised by the Special Rapporteur.

15. The first comment was of a general character, namely that by its scope and nature, the present topic was closely connected with that of State responsibility. The Commission could therefore continue its consideration of the two topics, but should complete that of State responsibility before undertaking the final drafting of the articles now under consideration. It should be remembered that the topic of State responsibility had important repercussions on the present one.

16. The Commission had to determine the main purpose of the work, which was to establish a system of reparation for harm caused by a State to another State, its inhabitants or property when the harm could not be linked to the breach of a norm of international law. If that was indeed the actual objective, draft article 1 could not limit the scope of the subsequent articles to activities which "create an appreciable risk of causing transboundary injury". As pointed out by Mr. Calero Rodrigues (2045th meeting), it was necessary to remove from article 1 the limitation based on the concept of risk and to concentrate on defining the legal consequences of harm.

17. It followed that articles 6 to 9 had to be modified accordingly. The limitation based on risk should be eliminated from draft article 6, so as to make the article cover all activities involving harm, irrespective of any risk involved. One of the best established principles of law was that one should not do to others what one did not wish done to oneself (*sic utere tuo ut alienum non laedas*). That principle could be applied to international practice: States had the duty to exercise their rights in a way which did not harm the interests of other States. Principles 21 and 22 of the Stockholm Declaration⁹ were themselves derived from that rule, although they were of a declaratory rather than a legal character. Those principles should be reflected in article 6. In any event, the article should mention the freedom of action of all States to undertake any activity they wished on their territory or in areas placed under their control, *de facto* or *de jure*, and should stress the need for such freedom to be compatible with the safeguarding of the sovereign rights of other States. The language proposed by the Special Rapporteur only partly reflected that requirement; it should above all be freed from the strait-jacket of "risk" and lay down the more general limitation of "harm".

18. He agreed with Mr. Calero Rodrigues that draft article 7, which laid down the duty to co-operate, should be framed in the broadest possible terms. Paragraph 2 was perhaps unnecessary, since paragraph 1 stated a sufficiently general principle.

19. Draft article 8 was also unnecessary, since it dealt only with one manifestation of co-operation. Its content could probably be transferred to the commentary.

⁸ See *International Legal Materials* (Washington, D.C.), vol. XXVI (1987), p. 38.

⁹ See 2044th meeting, footnote 8.

20. Draft article 9 was satisfactory, but its scope should not be limited to "an activity which presumably involves risk". As in the case of article 6, article 9 should apply to all activities which could occasion transboundary harm.

21. The same reasoning could be applied to draft article 10, on reparation. It was a crucial article. As the Special Rapporteur explained in his report (A/CN.4/413, para. 112), he had had in mind in that connection causal responsibility, namely a system whereby harm must not be assessed by the exact amount of individual damage caused by the incident in question, and which meant that the victim would have to bear the resulting harm to some extent. That approach was perhaps justified in the case of two economically equal partners. But since such equality did not always exist, it was better to treat that principle as an exception rather than the rule. Accordingly, he supported not causal responsibility, but full responsibility for damage, with the harm being assessed by the exact amount of damage actually sustained, or the best approximation to it, as the Special Rapporteur indicated (*ibid.*, para. 114).

22. Mr. SHI said that the discussions in the Sixth Committee of the General Assembly at its forty-second session had shown that a large number of delegations attached great importance to the present topic. Some had in fact expressed disappointment at the slow headway being made. The Special Rapporteur's fourth report (A/CN.4/413), however, represented distinct progress and the Commission would no doubt be able to complete its work on the topic in accordance with the schedule contained in the annex to its report on its thirty-ninth session.¹⁰

23. The Special Rapporteur had made a strenuous effort to include a list of activities to be covered by the draft articles, but for the reasons stated by him (2044th meeting, paras. 16-17)—the relativity of the concepts of risk and danger, the emergence of new hazardous activities, the impossibility of equating the situation envisaged in the draft with the regulation of specific activities—his endeavours in that direction had remained fruitless. Accordingly, he himself did not insist on a list, an idea which he had previously endorsed, and would be satisfied with the solution adopted by the Special Rapporteur.

24. As to pollution, the Special Rapporteur was right to include in the draft polluting activities that caused transboundary harm, on the assumption that they were not expressly prohibited by general international law. One thing was certain, however, namely that there existed a number of treaty régimes which prohibited polluting activities causing transboundary harm.

25. The draft articles were acceptable on the whole, but he wished to make a few specific comments.

26. Draft article 1 took into account the views expressed by members of the Commission at the previous session. Thus the term "jurisdiction" had replaced the term "territory" used in the previous version, submitted by the Special Rapporteur in his third report (A/CN.4/405, para. 6). Moreover, the earlier version had restricted the scope of the draft to activities which

gave rise or could give rise to "a physical consequence". That limitation was not to be found in the present wording and could only be inferred from draft article 2. It was perhaps desirable to make the text more precise and mention expressly those activities which gave rise to "physical consequences".

27. Furthermore, the new article 1 appeared to put emphasis on risk instead of on transboundary harm. As already pointed out in the Commission, however, it was harm which constituted the decisive factor in reparation or compensation; the concept of risk was more relevant to prevention, and it must be remembered that reparation was the main object of the draft. If risk were to give rise to a form of liability without fault, the activities which caused grave transboundary harm would not be covered by the draft, because, as several members of the Commission had noted, a number of activities involved slight risks but could none the less result in very serious damage.

28. Draft article 2 could perhaps be better dealt with later, upon completion of the first reading. For the moment, he agreed with Mr. McCaffrey (2044th meeting) and Mr. Beesley (2045th meeting) that the expression "State of origin" was preferable to "source State". It was worth noting that, in international trade, the more flexible term "country of origin" was used, since it did not necessarily connote a sovereign independent State.

29. Draft article 3, on attribution of liability, was very clearly explained in the report (A/CN.4/413, paras. 56-84): attribution was based primarily on territoriality. Accordingly, the characteristic features of an "act of the State" did not come into play in the case of transboundary harm (*ibid.*, para. 59) and both activities undertaken by the State itself and those carried on by persons under its jurisdiction fell within the scope of the draft. The article also confirmed the notion of liability based on causality. The attribution of a particular activity to a State therefore implied attribution of liability for that activity, with the proviso concerning "knowledge or means of knowing". The Special Rapporteur explained very intelligently the compatibility of that proviso with the nature of causal liability. The condition was necessary, since it took into consideration the situation in developing countries, for which it was primarily designed.

30. Draft articles 6 to 10, comprising chapter II of the draft, had been elaborated on the basis of the three principles stated by the Special Rapporteur in his summing-up of the debate on the topic at the Commission's previous session,¹¹ which were also to be found in section 5 of the schematic outline. Although he himself fully subscribed to those principles, he agreed with Mr. Calero Rodrigues (2045th meeting) that it might be better to delete draft article 8—which could lead to some misunderstanding—and incorporate its content in draft article 7 on co-operation.

31. Draft article 9 dealt with prevention, and the principle should be retained on the understanding that any failure to take preventive measures could not in itself give rise to liability, as indicated in the schematic outline. It was only when such failure resulted in harm

¹⁰ *Yearbook* . . . 1987, vol. II (Part Two), p. 58.

¹¹ *Yearbook* . . . 1987, vol. I, p. 182, 2023rd meeting, para. 2.

that liability could be attributed to the State of origin. Of course, as pointed out by Mr. McCaffrey (*ibid.*), the concept of due diligence had a role to play in the assessment of reparation.

32. Lastly, he proposed that the draft articles should be referred to the Drafting Committee for consideration in the light of the views expressed during the debate.

33. Mr. GRAEFRATH thanked the Special Rapporteur for his efforts to respond to questions raised by members of the Commission and representatives in the Sixth Committee of the General Assembly. The fourth report (A/CN.4/413) was very stimulating. The statement by the Special Rapporteur that he regarded the principles proposed in chapter II of the draft as “part of the progressive development of international law” (*ibid.*, para. 90) paved the way for a consensus, because it precluded any argument that the rules and principles drafted by the Commission already formed part of existing law, something which many States would be unable to accept.

34. The Special Rapporteur had not tried to establish a system of absolute liability or of general strict liability for every kind of activity that might cause transboundary harm, and made it clear that there was no “norm of general international law which states that there must be compensation” for all damage caused (*ibid.*, para. 39). That was an important premise which might be helpful in the Commission’s future work. However, while it was advisable to try to limit the scope of the articles which defined liability, he was not convinced that the proposed criteria were clear enough to define the necessary thresholds.

35. He agreed with the Special Rapporteur that the draft articles should serve as an incentive to States to conclude agreements establishing specific régimes to regulate particular activities in order to minimize potential damage. That did not, however, seem to be a valid argument for deciding not to draw up a list of dangerous activities. Indeed, many instruments on transport and environmental protection used lists of toxic or dangerous materials to define their scope clearly, and the inevitable defects in such lists were cured by means of a periodic review procedure. Perhaps it would be worth while to study that method and not simply abandon the idea of such a list. The Special Rapporteur proposed an alternative method, namely to limit the scope of the draft by introducing some general criteria. That might not be the easier method, and the success of such a course would depend very much on how clear the criteria were and how they were applied in practice. The purpose of the criteria was to ensure, first, that not every kind of lawful activity entailed liability; secondly, that not every kind of transboundary harm founded a claim for reparation; and, thirdly, that a State could not be held liable for everything that happened on its territory and caused transboundary harm. That seemed to be a reasonable approach, in keeping with State practice.

36. Under draft article 1, the scope of the articles would be confined to activities which “create an appreciable risk of causing transboundary injury”. By “appreciable risk”, the Special Rapporteur meant a risk which could be identified by a simple examination of the

activity and the things involved (art. 2 (a) (ii)) or, as he said in his report, of the “way in which they are used” (A/CN.4/413, para. 24); and, as he himself understood the word “appreciable”, it meant that the danger—not the actual incident, but the possibility of an incident or of a harmful effect—was foreseeable. It was that foreseeability of danger that led to the demand for preventive measures and for the establishment of a régime of liability.

37. It had rightly been said that risk called for the adoption of preventive measures. Accordingly, if the Commission did not wish to control, under the draft, lawful activities in general, nor to recognize that States were liable for any kind of transboundary harm caused within their territory, the concept of risk could be useful, but it should be defined in one way or another. The term “appreciable”, however, lacked precision and its value as a filter was questionable. The Special Rapporteur equated “appreciable risk” with “significant risk”, an expression often used in environmental instruments. The latter expression, however, contained a far greater quantitative element than did “appreciable risk”: it was no mere chance that the Special Rapporteur explained that an appreciable risk could be identified by simple examination. Did that mean activities that were known to create a risk of causing transboundary harm, or activities that created a significant risk? The Commission should replace the word “appreciable” by a clearer and narrower term, particularly if it wished to relate the obligation to take preventive measures to the risk involved in the activity. For instance, article 11 of the proposed principles for environmental protection and sustainable development adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (Brundtland Commission)¹² referred to activities which created a significant risk of substantial harm. That seemed to be much narrower and clearer than the expression “appreciable risk”. Furthermore, he did not see why, in draft articles 3, 6, 9 and 10, the Special Rapporteur referred to activities involving “risk”, when according to article 1 the draft was concerned with activities which created an “appreciable risk”. If the word “appreciable” was used as a means of limiting the scope of the draft, it should not appear in that article alone.

38. To limit the scope of the draft, the Special Rapporteur had also introduced the criterion that not all transboundary harm would be automatically covered, but only such harmful effects as were caused by the physical consequences of an activity (art. 2 (c)), which meant that economic and financial activities were excluded. Yet those were the very activities which, in modern times, produced the most widespread harmful transboundary effects. If the real intention was to limit the scope of the topic entrusted to the Commission, as members wanted, then why not say so, without further ado?

¹² *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Dordrecht, Martinus Nijhoff, 1987); summarized in the report of the World Commission on Environment and Development, “Our common future” (A/42/427), annex I.

39. Another criterion intended to limit the scope, as provided for in draft article 3, was knowledge, in the sense of knowledge of an activity which created an appreciable or significant risk, and not merely of an activity involving risk. If the Commission adopted the term "appreciable" or "significant", however, it should use that term throughout the draft wherever reference was made to an activity involving risk. He therefore proposed that an attempt should be made to pin-point an activity involving risk more closely, and once a suitable adjective had been found, not to depart from it.

40. Admittedly, nobody could be held responsible for acts he had no knowledge of or of which he had no means of knowing. Since the *sedes materiae* was territorial sovereignty, it was necessary that the State had knowledge of what was happening on its territory. It should not be forgotten that the Commission was dealing not with civil-law liability or responsibility for an act attributable to a State, but with the liability of a State for transboundary harm caused by activities conducted within its territory. That raised the question of the need for a preventive rule whereby all activities likely to create an appreciable risk would have to be licensed and monitored by the State in order to ensure that certain safety standards were observed. Under such a rule, in the event of accident the accountability of the State would be reduced to mere liability if it had taken preventive measures. In other words, a State which did not take measures to prevent, as far as possible and within its jurisdiction, activities which created an appreciable risk of causing transboundary harm would be violating an international obligation and, should harm be caused, would be responsible for an internationally wrongful act. But did the Commission wish to go that far? In his view, that important aspect of the question required clarification.

41. He did not understand why, in his report (A/CN.4/413, paras. 82-84), the Special Rapporteur seemed to relate the criterion of knowledge to the activity as such. That seemed to be in contradiction with his earlier statement that "there must be a general knowledge of the existence *and characteristics** of that activity" (*ibid.*, para. 79). The Special Rapporteur should instead refer to the appreciable risk of causing transboundary harm which stemmed from the characteristics of the activity.

42. He was not sure that those various criteria sufficed to limit the scope of the topic: "appreciable risk" and "means of knowing" left so much room for disputes regarding interpretation that States might encounter many problems. Also, he did not think that the draft articles solved or excluded the problem of liability for damage caused by permanent pollution. Many activities led to creeping pollution, which involved an appreciable risk of transboundary harm. That was tolerated, in a sense, because there were no technical or economic means of avoiding or replacing such activities. The principles, rights and obligations concerning transboundary natural resources and environmental interferences laid down by the Expert Group on Environmental Law took those economic factors into account, distinguishing between, on the one hand, situations where the overall technical and socio-economic cost involved in risk prevention or reduction far exceeded in the long run the

benefit of preventing or reducing the risk, and on the other, situations where the transboundary environmental interference involved harm which was far less than the cost of prevention.

43. It seemed that the Special Rapporteur wanted to exclude permanent pollution from the draft as long as it did not result in substantial transboundary injury. Unfortunately, that could not be deduced from the text of the articles proposed. The oft-quoted provisions of the 1982 United Nations Convention on the Law of the Sea and of article 11 of the proposed legal principles adopted by the Expert Group on Environmental Law did not, in the matter of liability for substantial transboundary harm, make the State liable, but they imposed an obligation on the State to ensure that compensation was provided. If, however, restricting the draft to activities involving an appreciable risk was to serve any real purpose, accidents caused by activities which had not thus far been regarded as involving any appreciable risk must necessarily be excluded. The Commission should give thought to the matter so as to avoid any unjust consequences. The Expert Group on Environmental Law, which had also discussed the matter, had overcome that difficulty in paragraph 2 of its article 11, which required States to ensure that compensation was provided should substantial transboundary harm occur even when the activities were not known to be harmful at the time they were undertaken.

44. A system of preventive measures was needed. Such a system should, on the one hand, lay down the criteria for defining the obligations which were involved in the concept of due diligence and which, when violated, could trigger State responsibility. On the other hand, where the State complied with its commitments, that would reduce, or even extinguish, its accountability in the event of an accident. Obviously, preventive measures could serve different legal purposes. Furthermore, it might perhaps be useful to recognize that there were different kinds of precautionary measures, depending on whether they were intended to reduce the risk of accident or to minimize the damage. In both cases, there might be a duty to notify and inform States that might be affected and to co-operate in minimizing the danger or damage.

45. With regard to attribution of liability, the territorial criterion did not really cover the scope of the draft, because there were many other areas of activity under the control of the State. That did not mean that all reference to territory should be dropped, for it was exclusive territorial sovereignty that produced duties in relation to other States. The Special Rapporteur had tried to overcome the difficulties by introducing the terms "jurisdiction" and "control", which were widely used in the United Nations Convention on the Law of the Sea and in a number of other international instruments. Unfortunately, for the purposes of the draft, those terms were not as clear as they should be. For instance, a company established under the law of the United States of America, with its head office in Madrid, controlled by Canadian shareholders and working mainly in the Sudan, would fall under several jurisdictions. Again, had the accident at the Union Carbide plant at Bhopal in India in 1984 caused transboundary harm, it would perhaps have been difficult to say

which State had jurisdiction or effective control in the matter. States were now very often seen to claim and enforce extraterritorial jurisdiction on foreign companies simply because they manufactured under licence or used certain foreign technology. It was not quite clear from the draft articles whether a State claiming to have jurisdiction in such cases could or should be held liable in the event of an accident which caused transboundary harm. Most activities involving appreciable risk were closely connected with modern technology, which was to a large extent in the hands of multinational corporations and was often protected by provisions on industrial secrecy. Consequently, a corporation would more readily know and have the means of knowing the potential dangers than the State on whose territory it carried on its activities. In his view, therefore, the references to jurisdiction in draft article 1 and draft article 2 (c), (d) and (e) were not sufficiently clear and required further reflection. It was easy to refer to national jurisdiction so long as the State was being asked to protect some interest by adopting laws, regulations or other measures. It was a different matter when the question was to determine who was liable for activities which, in one way or another, fell under that jurisdiction, especially in cases of several simultaneous jurisdictions.

46. The Special Rapporteur had tried to formulate the basic principles of liability in the form of draft articles. If the Commission was successful in that undertaking, it would make an important contribution to the progressive development of international law. It should therefore take a careful look at the proposed wording. He agreed with some of the suggested drafting improvements, but supported the general approach adopted by the Special Rapporteur. It was also true that the word "reparation" was much broader than "compensation" and that reparation in the case of State responsibility could be quite different from reparation in the field of liability. Perhaps a more detailed provision than draft article 10 was required in that connection in order to determine which damage should be covered by the duty to make reparation, and to what extent. He would also be grateful if the Special Rapporteur could explain what was meant by the expression "appreciable injury" in article 10, where it appeared for the first time. Should it be given the same meaning as in draft article 16 submitted by Mr. McCaffrey (see 2062nd meeting, para. 2)? He would make his drafting suggestions at a later stage.

Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

47. The CHAIRMAN invited Mr. Vanossi, Observer for the Inter-American Juridical Committee, to address the Commission.

48. Mr. VANOSSO (Observer for the Inter-American Juridical Committee) said he was honoured to be able to address the Commission on behalf of the Inter-American Juridical Committee, the doyen of legal consultative bodies in the field of international law. The

Committee had been unable to hold its usual January session because of financial constraints, and he would accordingly outline the work accomplished over the past year and the topics on the agenda for the August 1988 session.

49. The Committee's activities in 1987 had culminated in a seminar on improvement of the administration of justice in the Americas, and the Committee had adopted a resolution on that subject. It had also adopted a resolution on the establishment of an inter-American system for nature protection. The usual course on international law had also been held. Progress had been made on studies already under way: the development of directives concerning extradition in cases of drug trafficking; the drafting of an additional protocol to the 1969 American Convention on Human Rights (Pact of San José);¹³ environmental law; co-operation in prosecutions involving bank accounts; and review of the inter-American conventions on industrial property.

50. Special attention should be drawn to the seminar he had mentioned. While it might be of little interest to countries of the northern hemisphere, which had a satisfactory legal apparatus, the South and Central American countries still had great difficulties to overcome and significant gaps to fill. That situation accounted for the initiative taken by Mr. Seymour Rubin, a member of the Committee, with the co-operation of Mr. Roberto MacLean, to include the subject in the work programme and to convene a seminar on it. The Committee had decided to request the two Rapporteurs to continue their work and had resolved to establish a working group comprising experts in various branches of the law, and particularly representatives of specialized agencies. The purpose was not so much to obtain immediate results as to pursue long-term objectives, so that the shortcomings of the administration of justice could be discerned and remedied on the basis of inter-American co-operation, for the problem could not be solved by each country on its own.

51. The development of an inter-American system for the protection of nature was a subject which had been included on the agenda after a visit to the Committee by the Vice-President of Argentina, Mr. Victor Martínez, who was a specialist on the matter. The resolution adopted in that connection was intended to move ahead with the revision of a fairly old instrument, namely the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,¹⁴ which dated back to 1940. Using the experience acquired in other parts of the world, and prompted by scientific advances, the new threats to nature and developing standards on the subject, the Committee wished to establish an inter-American system for nature protection by updating the 1940 Convention and by looking into other regional integration schemes so that the efforts made by each country could be used to benefit the entire continent. For that purpose, the Committee had deemed it advisable to set up, within OAS, a permanent technical bureau that would act as an information and co-ordination centre to reinforce and promote national training and research initiatives and serve as a sec-

¹³ United Nations, *Treaty Series*, vol. 1144, p. 123.

¹⁴ *Ibid.*, vol. 161, p. 193.

retariat for any regional agreements that might be concluded. The Committee had determined that it would be useful to convene a specialized conference for that purpose and had decided to recommend that the OAS secretariat undertake the technical studies required for the preparation of a draft convention.

52. The fourteenth course on international law had afforded the customary opportunity for dealing with issues in public international law, private international law and matters directly related to the inter-American system, as well as topics of general interest.

53. As for studies already under way, the first was on the development of directives concerning extradition in cases of drug trafficking. Instead of producing a new international instrument, the Rapporteur, Mr. Manuel Vieira, intended to investigate more practical and expeditious enforcement machinery, since the drafting of a convention required lengthy negotiations and action by parliaments. The purpose was accordingly to develop something comparable to a uniform law that would achieve the desired objective as quickly as possible. In the case of drug trafficking, broad-based co-operation was required, for without it the action taken might be inadequate or even invalid. The Rapporteur envisaged a rule under which, when a State learned of the presence in its territory of a drug trafficker, it would notify States which wanted to prosecute the individual so that they could request his or her extradition, a request which that State would grant. As he was reluctant to confer powers on the executive to order that a drug trafficker be handed over to another State, the Rapporteur had proposed a formula under which a decision adopted by the executive must conform to certain rules of law. He had indicated that it would be desirable to standardize procedure and the enforcement of penalties and was continuing to investigate the prohibition of double jeopardy, which, if followed mechanically, might be detrimental to requests for extradition.

54. The draft additional protocol to the American Convention on Human Rights (Pact of San José) had been included on the agenda on the understanding that the existing rules related essentially to the rights of the individual and that the protocol would cover economic, social and cultural rights, which were currently addressed only in article 26 of the Pact of San José. One matter still pending was systems for protecting the rights enunciated in the protocol, for in the rapporteur's opinion some régimes should be instituted forthwith (in the area of labour), whereas others should be developed progressively (in education, culture and family matters). In the first area, existing procedures within the bodies instituted by the Pact of San José (the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights) would be followed. In the other fields, it had been suggested that periodic reports should be submitted to OAS's technical councils, which would be assisted by groups of experts and the specialized agencies that worked closely with the Inter-American Commission on Human Rights, and would also be called upon to make recommendations. It had been said that the Inter-American Juridical Committee was competent to prepare or review instruments on human rights, while the role of the Inter-American Court of

Human Rights was to give advisory opinions and hand down decisions.

55. The rapporteur on environmental law had submitted a well-reasoned report that would probably result in the adoption by the General Assembly of OAS of a draft declaration or resolution on various aspects of transboundary pollution. The rapporteur, conscious of the legal and cultural dimensions to the problem, had sought to formulate general principles on prevention of transboundary pollution in the marine environment, on land and in the atmosphere, and on the international responsibility of States in cases of pollution for which they themselves or their nationals were responsible. The rapporteur had drawn on the 1972 Stockholm Declaration,¹⁵ but owing to the deterioration of the natural environment since that date had also scrutinized the laws adopted by many countries of the region on environmental protection, pollution control, penalties (imprisonment, fines, partial or total shut-down of the sources of pollution, confiscation of polluting objects) and liability. The countries concerned were Barbados, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Mexico and Venezuela. It was worth noting that some of the laws in question specified the standards for measuring environmental quality, so that any deterioration could be assessed and the acts which thus constituted infractions could be determined. In his opinion, environmental law was one of the most interesting topics before the Inter-American Juridical Committee, particularly as the Committee was considering it not merely from the financial point of view, which was limited to the "polluter pays" principle, but in connection with five domains: penal (sanctions), civil (compensation), fiscal (withdrawal of privileges of those whose activities had harmful effects), administrative (prevention) and cultural (public opinion).

56. The Committee had also undertaken a study of co-operation in prosecutions involving bank accounts, including the question of numbered accounts and their use for drug-trafficking purposes. The rapporteur on the subject would soon be submitting detailed documents to the Committee.

57. The Committee was considering one other matter: a review of the inter-American conventions on industrial property in the light of technical progress and, in particular, the need to protect new inventions in the fields of biotechnology and genetic engineering and integrated circuit and software designs. Inter-American regulation was required in order to reflect the interests of the Latin-American countries in the protection of intellectual property in general—a sphere which encompassed copyright and industrial property (patents, industrial designs and models, trade marks, commercial marks and service marks) and constituted an area of confrontation between highly industrialized countries and developing countries. In some countries, like his own, even if the Paris Convention for the Protection of Industrial Property had been ratified, there was some resistance to granting patents for certain types of inventions or products, such as pharmaceuticals.

58. The agenda for the Committee's next session, to be held in August 1988, comprised items proposed by

¹⁵ See 2044th meeting, footnote 8.

OAS and by the Committee itself, namely: legal issues pertaining to drug trafficking, including principles governing the extradition of drug traffickers, co-operation in prosecutions involving bank accounts, and harmonization of national legislation on drug trafficking; environmental law; the draft additional protocol to the American Convention on Human Rights; international legal problems relating to multilateral guarantees of foreign private investments; improvement of the administration of justice in the Americas; review of the inter-American conventions on industrial property; interpretation and development of the principles of the Charter of OAS, as amended by the 1985 Cartagena Protocol,¹⁶ with a view to strengthening relations between the States members of OAS; the principle of self-determination and its scope of application; the right to information; expulsion and international law; maintenance grants for minors in international law; and returning of minors as between States. In addition, at its seventeenth session, in November 1987, the General Assembly of OAS had called on the Committee to investigate why more States were not parties to the 1948 Pact of Bogotá.¹⁷

59. The Inter-American Juridical Committee's work over nearly 50 years attested to the foresight of the founders of OAS, who had acknowledged that specialized legal consultative services were the keystone of the inter-American system.

60. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his statement. The Committee's work, some aspects of which were related to the Commission's endeavours, was of great interest not only for inter-American law, but also for international law in general. One example was the Committee's work on drug trafficking and environmental law. He was convinced that members of the Commission, and particularly the special rapporteurs, would benefit from the comments made and the information provided by the Observer for the Inter-American Juridical Committee, and that the relations between the two bodies could only be mutually advantageous. As a member of the Commission and as a Latin-American, he welcomed the Committee's past achievements and its ongoing efforts.

61. Mr. BARBOZA, speaking on behalf of the Latin-American members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement. He was particularly impressed by the size and scope of the Committee's agenda and the utility of its course on international law. The benefit to be derived from exchanges between the Commission and other international law bodies had been demonstrated once again.

62. Mr. McCaffrey, speaking on behalf of the Western European and other members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement and asked him to convey to the other members of the Committee his gratitude for the welcome he had received when he had

spoken on the Commission's behalf at the Committee's most recent session at Rio de Janeiro in August 1987, during which he had been able to acquaint himself with its working methods. He had also spoken to participants in the course on international law organized by the Committee and thought that that procedure should become a regular practice, in so far as time permitted. He was particularly interested in the Committee's activities in connection with environmental law and hoped that its documentation on the subject would be made available to the Commission, and particularly the special rapporteurs.

63. Mr. PAWLAK, speaking on behalf of the Eastern European members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement, which had provided much food for thought. The problems of Central and South America, as the statement had shown, were very serious and called for very careful consideration by the Inter-American Juridical Committee. They were similar to many of the problems faced by the Eastern European countries, although they occurred in differing degrees. He wished the Committee every success in its endeavours.

64. Mr. MAHIOU, speaking on behalf of the African members of the Commission, thanked the Observer for the Inter-American Juridical Committee for the detailed information he had provided. The Committee's work programme and the number and diversity of topics it covered were impressive. Those subjects were of interest for international law in general and also of regional, purely intra-American value. Africa, whose legal problems were not without some similarity to those of the American continent, could not fail to follow the work of the Inter-American Juridical Committee with interest.

The meeting rose at 1 p.m.

2048th MEETING

Thursday, 19 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

Visit by a member of the International Court of Justice

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome

¹⁶ See OAS, *Anuario Jurídico Interamericano 1985* (Washington (D.C.), 1987), p. 113.

¹⁷ American Treaty on Pacific Settlement (United Nations, *Treaty Series*, vol. 30, p. 55).