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Summary record of the 2075th meeting

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

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tioned that conference and had informally circulated a document relating to it.

68. In pursuing its work on the present topic, the Commission had to take account of the objections raised in various influential quarters. Such opposition could not be dismissed as ideological, and the Commission should not slacken in its efforts to dispel doubt by continually bringing its work up to date and taking cognizance of developments in the same field elsewhere in the international community. By doing so, it would demonstrate that the topic was an important and highly relevant one.

69. All members of the Commission were agreed on the primary rule that no State was entitled to cause harm to another State through its activities, whether lawful or unlawful, and that if harm did occur, the State of origin had to make reparation or pay compensation to the affected State. That principle should be formulated as early as possible in the draft, perhaps even before the article on scope. The rule was widely accepted in general international law, in the jurisprudence of the ICJ and in many international legal instruments, and there was no reason to fear that it would stand in the way of the development of science and technology. The actual wording used could, of course, be adapted to accommodate any justified objections.

70. In the introduction to his report, the Special Rapporteur said that the draft related to the point where "a State, having identified within its borders an activity involving risk, realizes that the continuation of the activity places it in a new situation, together with other States which may be affected" (A/CN.4/413, para. 4). The situation thus described was open to several interpretations. The activity might be carried on by a third party without the knowledge of the State in whose territory it took place; the risk might have come about as a result of *force majeure*; or the activity might have involved no risk at first, but have been found to do so later. In any event, the State would be unable to identify such an activity until the harm had been done and the need for reparation had arisen. Accordingly, a State having introduced into its jurisdiction an activity involving risk was liable for transboundary harm.

71. The Special Rapporteur further remarked that, in the present case, the only obligations were "those governed by the general duty to co-operate, namely to notify, inform and prevent" (*ibid.*, para. 6). Without wishing to minimize the importance of that general duty, and while agreeing, in particular, with Mr. Barsegov on the primary importance of preventing pollution, he considered that the principle of liability for compensation or reparation when harm did occur was of greater importance and should not be bracketed together with the duty to co-operate. He hoped that point would be taken up later.

72. In his oral introduction (2044th meeting), the Special Rapporteur had expressed the fear that acknowledgement of the primacy of the rule of compensation for injury might lead to a one-article draft. That need not be the case, and besides, the text being drafted need not necessarily become a convention, but could take the form of guidelines or guiding principles.

73. The meaning of draft article 1 would be clearer if it were amended to read:

"The present articles shall apply with respect to activities carried on in the territory of a State or under its jurisdiction, or in territory under its effective control, when such activities cause transboundary harm."

The reference to territory was, in his view, essential. By sacrificing it, the Special Rapporteur had intended to ensure that the article covered ships and other objects, such as aircraft, spacecraft and oil installations, while at the same time avoiding the legal fiction that such objects formed part of the territory of the State controlling them. That point could perhaps be met by drafting two separate articles, one dealing with activities within the territory of a State—which undoubtedly formed the main category of activities under consideration—and the other with activities connected with extraterritorial objects under the State's jurisdiction.

74. As to the concept of appreciable risk, the legal basis for liability was the harm caused, not the risk incurred. Risk was a matter of fact, not of law. Moreover, the list of activities involving risk was becoming longer every year; the principle of risk did not, therefore, constitute a sound basis for the draft articles.

75. He fully agreed with the three principles set out by the Special Rapporteur in paragraph 85 of the report (A/CN.4/413); unfortunately, however, the draft as it stood did not appear to be constructed on the basis of those principles. He urged the Special Rapporteur to proceed along the lines of the principles he himself had enunciated.

76. The CHAIRMAN informed members that, during the previous week, the Commission had used its full allocation of working time plus 15 minutes.

The meeting rose at 1.05 p.m.

2075th MEETING

Thursday, 7 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (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
(concluded)

- 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)⁵ (concluded)

1. Mr. SOLARI TUDELA emphasized the importance of the Special Rapporteur's fourth report (A/CN.4/413), which had the particular merit of reflecting the discussion generated by the third report (A/CN.4/405) in the Commission and in the Sixth Committee of the General Assembly. Just as all international law institutions were interrelated, yet some enjoyed particularly close ties, so three of the topics now before the Commission—international liability, State responsibility and the law of the non-navigational uses of international watercourses—were especially closely interwoven. The Commission must keep those links in mind and strive to harmonize the instruments it was developing on the three topics.

2. The topic under discussion was concerned to a large extent with the preservation of the environment, which was deteriorating much more rapidly than could be offset by protective measures, the result being that man's natural surroundings were becoming more and more inhospitable. The Commission should seize the opportunity before it of helping to arrest that deterioration, not only through the calibre of its work, but also through its ability to act promptly.

3. In draft article 1, the Special Rapporteur defined the activities to be covered by the future convention as those which created an appreciable risk of causing transboundary injury. By espousing the concept of liability for risk, the Special Rapporteur had excluded from the scope of the draft harm caused by activities not prohibited by international law that did not involve ap-

preciable risk: hence he was also forced to exclude compensation for innocent victims and injury that was not appreciable, and to introduce a subjective criterion to determine whether the risk involved in a given activity was appreciable. In his fourth report (A/CN.4/413, para. 39), the Special Rapporteur expressed the view that there was no norm of general international law which stated that there must be compensation for every injury. But that should not prevent such a norm from being incorporated in the draft. The Commission was involved not only in the codification, but also in the progressive development of international law. He himself was aware that the international community was not entirely ready to accept such a norm, but believed that, faced with the sharp rise in environmental degradation, special circles among the public that had a strong influence over governmental decisions would not only be prepared to accept it, but would even demand that arrangements be made to ensure compensation for the victims of injury, whatever its origin.

4. Article 1 referred to two additional concepts: jurisdiction, which replaced the idea of territory used earlier; and effective control, which might be applied to Namibia, for example, perhaps to certain portions of Antarctica—although it was questionable whether effective control would really be involved there—and to the occupied Arab territories.

5. None of that meant that the concept of risk was no longer useful: in his view, the distinction between appreciable risk and risk which was not appreciable should come into play in determining the amount of compensation.

6. He had already spoken of the need to correlate the terms defined in draft article 2 with those used in the draft articles prepared on State responsibility and on international watercourses. In article 2 (a) (ii), for example, where it was stated that "appreciable risk" meant the risk which could be identified through a simple examination of the activity involved, the exact meaning of the expression "simple examination" was not entirely clear. Presumably it meant an examination carried out without technical assistance in order to determine the risk level of the activity. But unless he was mistaken, it was impossible to determine, through a simple examination, the risk involved in an activity that generated creeping pollution which would cause long-term harm, or to identify such an activity as one involving appreciable risk. Another point also needed to be clarified: how did the transboundary injury referred to in article 2 (c) relate to injury in outer space, on the high seas or in Antarctica?

7. Draft article 3 met the concerns revealed during the discussion about the means States might have of knowing about the activities in question. Those concerns arose primarily for the developing countries, whose limited resources might prevent them from fulfilling that control obligation, but the problem affected the entire international community as well: that fact could be acknowledged by incorporating in the article a reference to the technical assistance that a United Nations specialized agency could provide to developing countries, on request, in such cases.

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.

8. He had a number of reservations about draft article 6. The freedom of action of States had to be limited in conformity with the Charter of the United Nations and the principles of international law—for example, Principle 21 of the Stockholm Declaration⁶—otherwise an interpretation might be placed on the article that was entirely different from what the Special Rapporteur intended, particularly in the field of human rights.

9. The principles regarding co-operation and prevention in draft articles 7 to 9 should also be clarified, particularly in relation to human rights, by indicating the minimum co-operative measures to be taken by States, measures which could then be supplemented by the parties directly concerned in negotiations between themselves.

10. With regard to draft article 10, on reparation, he stood by what he had said earlier about the concept of risk: risk was not the draft's point of departure, but it should play a role in the establishment of the amount of compensation, for it was only right that that amount should vary depending on whether the harm had been caused by an activity involving appreciable risk or one that did not involve such risk. Lastly, negotiations between States to determine the amount of compensation would be the primary, but not the sole, means of reaching agreement.

11. Mr. AL-QAYSI said that the Commission's task was complex and of vital importance for the world community, particularly the developing countries. It was complex because the Commission was attempting to break new ground in terms of the progressive development of international law, and of vital importance because it was imperative to strike a proper balance between lawfulness and the avoidance of harm. The Special Rapporteur had submitted a fourth report (A/CN.4/413) which reflected a serious attempt to propose a set of basic general duties. For his own part, he would confine himself to making a number of general observations.

12. The characteristics of the present topic had gradually taken shape as the Commission's work on it had progressed. The scope of the draft, which had been established at the very outset, had been refined during the course of the discussion: the Special Rapporteur was called upon to deal with lawful activities involving danger or transboundary risk. Opinions differed on whether the time had come to take up the specific liability attributable to such activities, and whether the structure proposed by the Special Rapporteur would allow the problem to be solved. As to the form the Commission's product should take, the Special Rapporteur had chosen the approach of submitting draft articles designed to encourage States to work out specific agreements. Yet there was another school of thought which believed that the most the Commission could do was to develop a set of recommendatory rules or guidelines addressed to States.

13. Should the foundation for the draft be liability for risk or for harm? On that all-important question, he

was inclined to side with the Special Rapporteur, who favoured liability for risk. In adopting that approach, the Special Rapporteur had remained true—with good reason—to the results of the Commission's consideration of the topic with the previous Special Rapporteur. At the same time, he had set a goal that was not at variance with the Commission's mandate, although not all members shared that view. Personally, he did not believe that paragraph 7 of the report should be interpreted as meaning that the Special Rapporteur was deviating from the mandate assigned to the Commission by the General Assembly: he was simply trying to define the task that had to be accomplished at the current stage. Moreover, the Special Rapporteur pointed out that: "Here, the only obligations are those governed by the general duty to co-operate, namely to notify, inform and prevent." (*Ibid.*, para. 6.) Those were indeed the Commission's main concerns. The Special Rapporteur went on to say: "If injury occurs, there is no precisely specified compensation; instead, there is an obligation to negotiate in good faith to make reparation for the injury caused, possibly taking into account various factors . . ." (*Ibid.*) Moreover, the title of the topic as determined by the General Assembly did not in any way qualify the types of non-prohibited acts to be covered, something that had been left for the Commission to decide. He therefore did not share the view that, in basing the entire draft on liability for risk, the Special Rapporteur was pursuing an objective not in line with the Commission's mandate.

14. The part of the report dealing in detail with the subject of injury (*ibid.*, paras. 37 *et seq.*) confirmed that the Special Rapporteur had not lost sight of the Commission's mandate from the General Assembly. There again, like Mr. Mahiou (2048th meeting) he could only endorse the approach adopted by the Special Rapporteur. Paragraph 40 of the report in particular was entirely in keeping with the Commission's objectives and reflected the conclusions that could be drawn from the discussions in the Sixth Committee of the General Assembly. Nothing prevented the Commission from incorporating the concept of strict liability if it so desired. If it did not, or could not, do so, it should set a more modest objective—to which the approach taken by the Special Rapporteur would conform perfectly.

15. Some members questioned whether the Special Rapporteur had laid enough stress on the question of injury. A careful reading of paragraph 44 of the report revealed that he had not lost sight of the need to strike a balance between risk and injury. Risk did indeed play an important role, and could be regarded as forming a continuum with injury. The Special Rapporteur envisaged a potential obligation based on risk which became an actual obligation once harm had occurred, and pointed (A/CN.4/413, para. 48) to the other conditions relating to injury. Personally, he agreed with Mr. Mahiou that that was obviously a case of progressive development of international law; Mr. Mahiou had also quite rightly referred to the importance of the principle of good-neighbourliness.

16. It had been stated that risk was an abstract notion and that the Special Rapporteur's concept of it was unduly subjective. He did not share that view. He pointed

⁶ See 2044th meeting, footnote 8.

out that the Special Rapporteur had tried (*ibid.*, para. 22) to suggest a number of factors that could be used to transform risk into an objective, albeit abstract, notion.

17. The question of the scope of the draft had to be settled once and for all if the Commission was to make progress in its work on the articles—something it must certainly do, in view of the length of time that had elapsed since it had begun considering the topic. It could do so on the basis of the progress made in the discussion so far. It could use the draft articles submitted by the Special Rapporteur as a starting-point and attempt to refine them. While he did not wish to go into specifics, he did wish to comment on a number of proposals made by other members of the Commission concerning certain articles.

18. It had been said that the terms “jurisdiction” and “control” were not as clear as they should be. Mr. Graefrath (2047th meeting) had referred to the hypothetical case of 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. It was certainly true that such a company could fall under several jurisdictions. For what purpose, however, had the Special Rapporteur used the notion of “jurisdiction” in draft article 1? Was it to determine the legal status of the company? For his part, he believed that the Special Rapporteur had used that notion because of its links with the territory on which the lawful activity was being conducted; thus, in the event of transboundary harm, the *continuum* between the risk and the harm would come fully into play. In the example given by Mr. Graefrath, the jurisdiction of the Sudan would apply.

19. With regard to the notion of “effective control”, Mr. Razafindralambo (2048th meeting), supported by Mr. Sreenivasa Rao (2074th meeting), had urged that it should be made clear that the State of origin was responsible only for activities directly under its control, since many foreign companies established in the developing countries were outside the real control of the national authorities, which did not have adequate means for controlling their activities. The example of the Bhopal disaster had been cited in support of that argument. Without wishing to pass any judgment on the negotiations by developing countries with foreign companies to attract them to their territory, he nevertheless believed it had to be acknowledged that a foreign firm did not establish itself overnight on a State’s territory without prior negotiations with the Government of the country. The draft articles would at least be instructive in making the developing countries aware of their responsibilities and thereby help to settle the question of effective control.

20. Other points which deserved attention included the relationship between the *sic utere tuo ut alienum non laedas* principle and the principle of reparation for harm, the rule of due diligence and the question of the burden of proof. In order to make progress in examining those problems, however, the Commission first had to agree on the scope of the draft. On that point, conflicting opinions were still being expressed.

21. Under the circumstances, the question arose as to how the Commission should proceed. Should it continue to discuss draft articles despite the divergence of views? Should articles be referred to the Drafting Committee? Might it not be unwise to assign the Drafting Committee the task of settling problems which it was for the Commission to solve? It was not possible, however, to refrain from referring those texts to the Drafting Committee if the Commission agreed that the Special Rapporteur’s proposals were the outcome of its earlier discussions and if it was not prepared to alter the direction of its work. An intermediate solution was perhaps possible: it could refer the draft articles to the Drafting Committee yet at the same time request the Special Rapporteur to prepare a new report containing a thorough examination of the articles, perhaps from the standpoint suggested by Mr. Koroma (2074th meeting) and with due regard for the objective indicated by Mr. Sreenivasa Rao, i.e. endeavouring to give general form to the solutions which had already been adopted in certain conventions on pollution, outer space and nuclear energy. The Commission would consider the report at its next session, article by article, in order to see to what extent it could agree on a given part of the draft, and would thus achieve two objectives: give the Drafting Committee the necessary guidance and decide on the shape to be given to the draft articles.

22. The CHAIRMAN, speaking as a member of the Commission, said that for many years there had been long and lively discussions on the present topic, without any agreement on the method of dealing with it. When the previous Special Rapporteur had submitted a schematic outline, the Commission, after an extensive debate, had decided to communicate to the Sixth Committee of the General Assembly all members’ observations with a request for guidance from the Assembly on the direction in which it was to continue its work. Unfortunately, the General Assembly had not given a clear answer to that request. The present Special Rapporteur had thereupon decided to adopt a different approach to the topic, basing the draft articles on the concept of risk. It was a wise and intelligent solution, because it dealt at the same time with the two aspects of the question—reparation and prevention—highlighted by Mr. Calero Rodrigues (2045th meeting). That approach also had the advantage of limiting the scope of the topic, for it was a question of examining not what was lawful and what was wrongful but, in more concrete terms, transboundary harm resulting from pollution.

23. Unquestionably, the principles of law recognized at present both in State practice and in legal writings included one which was asserting itself more and more, namely that anyone creating a source of abnormal risk had to answer for the resulting harm, even if no wrongful act had been committed. In any event, international liability was conceivable for exceptional risks—“exceptional” and not “appreciable” as proposed by the Special Rapporteur. As a result of technological developments, the problems connected with liability for the possible consequences of space or nuclear activities by States were among the most serious in the world today. Yet if States were to accept international liability for the consequences of that type of ac-

tivity, perhaps the only way was to separate clearly, from the legal point of view, the obligation to make reparation—basing it exclusively on risk—from the concept of lawfulness or wrongfulness. In substance, it was not the duty to make reparation which the States in question refused to accept, but rather the idea that they could have committed a wrongful act, since their activity was not forbidden by international law (mention had been made in that respect of the case of the United States of America, which had made Japan an *ex gratia* payment in compensation for the damage caused by its nuclear tests in the Marshall Islands, without admitting thereby that it did not have the right to carry out those tests). The States concerned would doubtless be more disposed to accept international liability for activities which, though lawful, constituted a source of exceptional risk.

24. As to the draft articles submitted by the Special Rapporteur, it would be preferable to say in article 1 that the articles applied with respect “to the consequences of activities . . .” rather than “to activities . . .”. In addition, the word “appreciable” should be replaced by “exceptional”, both in article 1 and in article 2 (a) (ii). The expression “highly likely” should be eliminated from article 2 (a) (i), since it was impossible to measure likelihood; moreover, the expression “throughout the process” was ambiguous, for it was difficult to see what the word “process” referred to. Lastly, it was necessary to clarify in the Spanish text of article 2 (a) (ii) the subject of the verb *maneja*.

25. Furthermore, the question arose whether the draft articles were intended to apply to all transboundary harm, regardless of its extent, inasmuch as the draft would cover only those activities which created an exceptional risk. In that connection, he did not believe it advisable to draw up a list of dangerous activities. The activities in question were permitted by international law and wrongfulness attached solely to their consequences, in other words to the harm they caused. The decisive factor was the risk. The risk, however, first had to be exceptional, and secondly it had to produce harm. Obviously, it would never be possible to eliminate all risks completely. On the other hand, it was possible to prevent the consequences of a lawful but exceptionally dangerous activity. In other words, the draft had to establish, for the State which permitted such an activity, the obligation to co-operate with the affected States in order to prevent and minimize the possible harm. Several definitions of the concept of “ultra-hazardous activities” already existed. The most interesting was found in the American Law Institute’s *Restatement of the Law of Torts*, published in 1938.⁷ According to that definition, ultra-hazardous activities were those which were uncommon and which necessarily involved unavoidable dangers even though the utmost precautions had been taken. That definition applied perfectly to nuclear and space activities.

26. The questions raised by the Special Rapporteur’s excellent fourth report (A/CN.4/413) which remained unanswered included the following. Was the obligation of prevention an obligation to prevent the risk (which

would involve the prohibition of the dangerous activity) or an obligation to prevent the harm? If transboundary harm was defined as that which occurred in spheres under the jurisdiction of a State other than the one under whose jurisdiction the activity took place, what would happen if the harm occurred on the high seas or in outer space? Who would have the obligation to notify and to inform in that case? Many other questions remained unanswered and it was clear that the Commission was not yet ready to take a decision on the future of the draft. For his part, he was not even fully convinced that liability should be based exclusively on risk, even exceptional risk. The best thing would doubtless be to continue to examine the subject, in the hope of finding a solution for serious problems of great importance to the international community.

27. Mr. AL-BAHARNA said he was not convinced by the Special Rapporteur’s arguments for not drawing up a list of dangerous activities, as requested by some representatives in the Sixth Committee of the General Assembly. The Special Rapporteur’s principal objection was that the draft dealt with the situation in law prior to the conclusion of detailed agreements among States regulating hazardous activities and that there was therefore no point in enumerating those activities, which would in any case rapidly become obsolete with advances in science and technology. Those objections were theoretical and failed to indicate the complexity of the problems to be covered by the topic. He therefore urged the Special Rapporteur to reconsider the question.

28. The changes in draft article 1 made by the Special Rapporteur in his fourth report (A/CN.4/413), compared with the previous text (see A/CN.4/405, para. 6), did not seem calculated to make the scope of the topic clearer. For example, the Special Rapporteur had replaced the phrase “activities . . . which occur within the territory or control of a State” by “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”. Apart from the fact that the formula “jurisdiction of a State as vested in it by international law” could give rise to certain difficulties of interpretation, the concept of territory was preferable to the less comprehensive concept of jurisdiction. In his view, the notion of sovereignty could also be introduced into article 1. Moreover, the previous text of the article had spoken of a “physical consequence . . . affecting . . . the use or enjoyment of areas”, a formula which the Special Rapporteur had replaced by “an appreciable risk of causing transboundary injury”. He was not at all certain that the Special Rapporteur had been right to introduce the concept of risk at that stage, since any activity involved an element of risk.

29. It was therefore not the risk that was the basis of the obligation to make reparation in the event of transboundary harm, but the harm itself—a fact which did not rule out the idea of prevention, because it was possible to take action as soon as the danger appeared in order to prevent imminent harm. Making the concept of injury or the threat of injury the basis of responsibility would avoid having to describe the risk as

⁷ American Law Institute, *Restatement of the Law of Torts*, 12 May 1938, vol. III, p. 42, chap. 21, sect. 520.

“appreciable” and thereby avoid obstructing new activities. In any case, the Special Rapporteur acknowledged (A/CN.4/413, para. 41) that the basis of the obligation to make reparation was the injury, but added that that obligation was subject to certain implied limitations and that, as the law now stood, injury that was not appreciable should be tolerated. Nevertheless, the fact that there were limits to the obligation to make reparation did not mean that the obligation could not be based on injury and he therefore urged the Commission to consider replacing the concept of “risk” or “appreciable risk” by the concept of “injury”.

30. Draft article 3 (Attribution), which differed only slightly from former draft article 4 (Liability), was based on the requirement that the State had to know, or have means of knowing, that the activity in question involved risk. In that connection, the Special Rapporteur explained that the expression “had means of knowing” was meant to protect developing countries, something that raised a question of principle on which the Commission might well wish to express itself. He could find no fault with the idea that it was necessary for the State to have known about the risk, but the text should specify that knowledge included presumed knowledge. The previous title was preferable to the new one, for it was less ambiguous.

31. He would refrain from commenting on draft articles 4 and 5 because it seemed too early to consider the relationship between the present articles and other international agreements, on the one hand, and other rules of international law, on the other.

32. He had read with interest the Special Rapporteur’s comments (*ibid.*, sect. III) on the articles of chapter II of the draft (Principles) and found the three principles set out in paragraph 85 of the report to be unassailable. Viewed as a pointer to the progressive development of international law, as the Special Rapporteur proposed (*ibid.*, para. 90), they certainly deserved support, but the question of transforming them into practical norms of international law was another matter. The Commission should avoid formulations which States found unacceptable. The draft’s success would largely depend on the clarity with which the Commission developed certain classical concepts such as sovereignty, co-operation or reparation in their application to the topic under consideration. Draft articles 6 to 10 could be improved in that respect by including a reference to sovereignty in article 6, to mutuality in article 7, to the range of preventive measures in article 9, and to compensation, in addition to reparation, in article 10.

33. Mr. BEESLEY said that he wished to raise three specific questions concerning the principles outlined in section III of the fourth report (A/CN.4/413). First, had the Special Rapporteur had in mind the elaboration of precise articles based on those principles, or had he merely wished to seek the Commission’s advice on the subject? Secondly, did the Special Rapporteur envisage circumscribing chapter II of the draft, as he had done with chapter I, by the concept of “appreciable risk” or “exceptional risk”? Thirdly, did the Special Rapporteur intend chapter II to address transboundary activities which caused appreciable injury without involving appreciable or exceptional risk? In other words, was the

Special Rapporteur proposing in chapter II to take into consideration the rules referred to by many members of the Commission and founded in essence on the *Trail Smelter* case (*ibid.*, para. 2), Principle 21 of the Stockholm Declaration¹ and Part XII of the 1982 United Nations Convention on the Law of the Sea?

34. Mr. REUTER, remarking that in dealing with the topic under consideration the Commission had been grappling with shadows for many years, paid tribute to the Special Rapporteur, whose efforts and sacrifices—possibly painful ones—had helped to clear away a number of uncertainties pertaining both to terminology and to the ideas expressed. The Special Rapporteur had succeeded in transforming many shadows into living realities, so that the topic was beginning to take shape.

35. Mr. FRANCIS reiterated his intention to submit to the Drafting Committee in due course a definition of the word “risk” within the framework of draft article 2.

36. Mr. OGISO said he hoped that the Special Rapporteur, in summing up the debate if he thought it opportune at the present stage, or better still in his next report, would state his views on the final form of the draft. Views within the Commission differed as to whether the draft should take the form of a framework agreement, guidelines or a convention, and future work would be facilitated if a decision on the issue could be taken soon. The Special Rapporteur’s proposal would perhaps not resolve all differences, but in that case the Commission would be able to proceed on the basis of an international convention binding upon the parties. That was perhaps not very likely, but the possibility could not be discounted.

37. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

38. Mr. BARBOZA (Special Rapporteur) thanked those members of the Commission who had spoken in the debate. Their thoughtful statements would help him better understand the complexities of the topic and to reflect the Commission’s wishes in the draft articles.

39. The topic’s complex nature called for efforts to reconcile individual preferences; in some cases, difficult choices had to be made. It was also necessary to define the topic’s limits so that a practical answer in the form of a workable legal régime might be found to the very real problems involved.

40. On the question of including polluting activities in the draft articles, several members had maintained that a general prohibition on causing appreciable harm by pollution existed in general international law. For his part, he had adopted a pragmatic position in the matter in his fourth report because, as he said there (A/CN.4/413, para. 10), he did not think that the Commission would unanimously accept the idea. That doubt was, of course, expressed at the operative level of “express prohibition” and not at the level of principles. On the other hand, if such a prohibition existed, polluting activities would be left outside the topic. To violate a legal prohibition was a wrongful act, and activities pro-

¹ See 2044th meeting, footnote 8.

ducing harmful effects would not be activities “not prohibited by international law”. That, in turn, would have the consequence of leaving the victims of pollution defenceless except in cases governed by a special treaty. By not excluding polluting activities from the scope of the topic, the Commission would not be taking a position on the matter: it would merely leave open to a State that was the victim of pollution the option of applying the solutions and procedures to be set forth in the future instrument.

41. In the same spirit, he had suggested that it was not the Commission’s purpose to establish “whether the principles in question reflect general international law” (*ibid.*, para. 89). It should be understood that, by adopting certain principles as applicable to the topic, the Commission was not pronouncing as to whether or not they were already part of international law or simply a step in the progressive development of the law.

42. With regard to terminology issues, he would of course defer to the Commission’s native English-speaking members in the matter of whether “injury” or “harm” was a better translation of the Spanish term *daño*. The title of the topic did speak of “injurious consequences of acts”, but he noted that there seemed to be a preference for the term “harm”. Again, there seemed to be general agreement that the expression “State of origin” was preferable to “source State”. Lastly, the term “substances” in draft article 2 (a) would have to be changed. The word “things”, which would correspond to the Spanish *cosas* and the French *choses*, had been proposed and he had no objection to it.

43. Mr. McCaffrey (2049th meeting) had asked whether the causality referred to in the context of the present topic was factual or legal—in other words, proximate causality. Without entering into too many subtle distinctions, he wished to refer to Administrative Decision No. II of the United States-German Mixed Claims Commission mentioned in his report (A/CN.4/413, para. 52), a decision in which the idea of “proximate causality” seemed to be accepted in the conclusion that “all indirect losses are covered, provided only that in legal contemplation Germany’s act was the efficient and proximate cause and source from which they flowed”.⁹ In his report, however, he had discussed attribution of conduct and of result (*ibid.*, paras. 71-77) only to show that, at the present stage, he saw no need to open a new chapter of causality in connection with the topic, since it did not differ essentially from causality in responsibility for wrongfulness. The dividing line between attribution in the topic under consideration and responsibility for wrongfulness was not the causal, physical attribution of a result to a certain act, but rather the attribution of the act to a State—in other words, the characterization of the act as an act of the State and, once that characterization was established, its qualification as a wrongful act (an act in breach of an international obligation). It was only then that the intention of the agent might play a certain role.

44. Having noted that the majority of members agreed with the suggestion made in his previous reports that the

topic should be limited to activities having physical consequences, he had thought at first that the introduction of the concept of a physical consequence in the definition of the expression “transboundary injury” in draft article 2 (c) would be sufficient. However, after hearing some of the statements made, he was persuaded that it would be better if the concept appeared in draft article 1 as well.

45. Some members had spoken of the draft in terms of a convention on the law of the environment. Yet it should be borne in mind that the point at issue was to regulate certain types of State activities with certain consequences attaching to them. Under the régime thus established, States would be asked to take preventive measures, to consult with potentially injured States and to make reparation in the event of injury, all of which presupposed an identifiable State of origin and injured State and identifiable injury or harm. How could such a régime be applied to the environment, outer space, the high seas, the ozone layer, or any other area where there were many States of origin and where virtually the whole of mankind was the injured party. With whom would the State of origin negotiate concerning preventive measures? To whom would it make reparation? For what harm? The topic under consideration dealt with the human environment only to the extent that the criteria mentioned in article 1 were met; environmental activities whose consequences affected the whole of mankind belonged in another framework. Of course, if an activity in State A produced some harmful effects in a zone beyond national jurisdictions, and if that situation had adverse repercussions in the territory of State B, the latter State might bring an action against the State of origin under the present articles.

46. In the earlier version of the draft (see A/CN.4/405, para. 6), the term “situation” had been used to define the state of affairs created by an activity conducted in such zones—in the same way that that term was used in referring to the creation of a certain dangerous state of affairs as a result of activities which could not be considered dangerous in themselves. For instance, the activity of building a dam could in itself hardly be considered an activity involving risk; yet the creation of an artificial lake could bring about a “situation” capable of causing some transboundary harm such as floods or a climatic change. Certain criticism voiced at the previous session had induced him to eliminate the term “situation”, which was not strictly necessary because the causal chain would still exist, and since the term would require precise definition. However, the term had some advantages, as Mr. Francis (2048th meeting) had pointed out, and its reintroduction into the draft might be considered.

47. The debate on draft article 3 had raised two different issues: the existence of a certain activity within the territory of the State of origin and the risk involved in that activity. In order to be held responsible for the obligations imposed by the draft, the State of origin was required to know or have the means of knowing that an activity involving risk was being carried on in its territory. But if the activity in question was really one involving risk, and if the risk involved was appreciable, the State of origin could not invoke its lack of means of

⁹ United Nations, *Reports of International Arbitral Awards*, vol. VII (Sales No. 1956.V.5), p. 30.

knowing about the risk in order to be exempted from responsibility. The reason was simple: since “appreciable risk” had been defined as “the risk which may be identified through a simple examination of the activity and the things involved” (art. 2 (a) (ii)), knowledge of its existence did not require special means.

48. Another point raised was how the requirement of knowledge by the State of origin should be formulated. In other words, how was the presumption of knowledge to be formulated? Was it to be presumed that the State knew or that it did not know? The question was important because it involved the issue of the burden of proof. In order to provide an answer, it had to be recalled that article 3 was intended to take into account the interests of certain developing countries with vast territories and insufficient financial and administrative means of monitoring what was going on in all parts of their territory. The article was also intended to be fair and to reflect the generally accepted idea that a State could not reasonably be expected to know of everything that was going on in its territory or, to use the terms of the draft, under its jurisdiction or control. Those two primary purposes, however, as Mr. Ogiso (2049th meeting) had pointed out, should not mean overlooking another important principle, namely that an innocent victim of transboundary injurious effects must not be left to bear his loss (A/CN.4/413, para. 85).

49. A glance at the map of the world was sufficient to show that there were more developing countries bordering on other developing countries than on developed countries. It was therefore very likely that activities within a developing country might produce harmful effects in another developing country; consequently, developing countries could be protected only up to a certain limit, beyond which their own interests might be prejudiced. That was the conclusion he arrived at in his report (*ibid.*, para. 70). The wording of article 3 should perhaps be made more explicit by expressly stating that the burden of proof did not rest with the affected State. It had also been proposed that the words “had means of knowing” should be replaced by “should have known”; but that, conversely, seemed to make the situation of the State of origin too difficult. How was it to prove that it “could not” have known? If, for example, the reason for its ignorance was lack of sufficient naval means to supervise a vast exclusive economic zone, would it not be told that it “should have” acquired such means? He therefore thought it preferable to keep the text in its present form.

50. Despite the doubt expressed by some members, he remained convinced that the concepts of “jurisdiction” and “control” were more appropriate to the topic than the concept of “territory”. While activities pertinent to the topic were in most cases conducted in the territory of a State, in some cases they were conducted outside such territory, for example on the high seas, in the territorial sea, in the exclusive economic zone, in outer space, or even in the territory of another State. Those situations, which might well produce transboundary harm, should not be excluded from the scope of the topic simply because they did not meet the territoriality requirement.

51. Moreover, if the concepts of “territory” and “territorial rights” were considered in terms of the appli-

cation they had received in similar contexts, it became clear that they had a jurisdictional dimension and that, in those earlier cases, the term “territory” had been used in the sense of the jurisdictional capacity of the State over certain activities or events. The other aspect of “territory”, that of the right to ownership or “title”, was irrelevant to the responsibility issue. A distinction therefore had to be drawn between those two aspects of territoriality. In the topic under consideration, it was the jurisdictional component that prevailed, for the rights and obligations of States under international law were determined not only by their sovereign rights to a territory, but also by their competence to make and apply law, i.e. their jurisdictional competence.

52. In that connection, he gave three examples: the *Trail Smelter* case (*ibid.*, para. 2), the *Corfu Channel* case (*ibid.*, para. 62) and the *Island of Palmas* case (*ibid.*, para. 61), and quoted the awards at some length. He recalled that, according to the award rendered by Max Huber, the arbitrator, in the *Island of Palmas* case, “territorial sovereignty . . . involves the exclusive right to display the activities of a State”,¹⁰ and he emphasized the word “exclusive”. Max Huber had added: “This right has as corollary a duty: the obligation to protect within the territory the rights of other States . . .”. Clearly, the arbitrator had been referring in that context to the State’s jurisdiction within its territory, and not to its title. In those three cases, the issue of a State’s responsibility had been raised in relation to an activity or act within its territory, and the State’s duties and obligations had been established from the point of view of its jurisdictional competence over that territory.

53. The concept of jurisdiction was useful because it was not limited to a territorial State and hence could encompass activities with harmful transboundary consequences conducted outside the State’s territory, for example the jurisdiction exercised by a flag-State over its ships navigating on the high seas, or for certain matters within the territorial sea or internal waters of another State. The 1958 Geneva Conventions on the law of the sea and the 1982 United Nations Convention on the Law of the Sea covered many jurisdictional capacities of that kind. There was also the case of the belligerent State which, for certain matters, exercised jurisdictional competence within the territory it occupied and was held liable for the consequences of activities over which it exercised jurisdiction. Again, there was the case of Mandate, Trust and Non-Self-Governing Territories, which did not come under the territorial sovereignty of the caretaker State, although the latter was held liable in the event of transboundary harm. Lastly, there was the case of mixed jurisdiction, where several States were authorized by international law to exercise their jurisdiction—navigation and passage in the territorial waters, the contiguous zone or the exclusive economic zone, incidents on the high seas or in space—and where liability for injury was attributed to the State having jurisdiction over the event or activity that caused the injury.

54. Noting, in connection with the concept of jurisdiction, the points raised by Mr. Graefrath (2047th meeting) and Mr. McCaffrey (2049th meeting)

¹⁰ *Ibid.*, vol. II (Sales No. 1949.V.1), p. 839.

concerning the multiple meanings of the term “jurisdiction”, he remarked that, in order to be held liable for an activity entailing harmful consequences, the State had to have power to make and apply laws. As for the point concerning the risk of unilateral extensions of jurisdiction by States, it was in his opinion dealt with by the phrase “as vested in it by international law”, which qualified the words “jurisdiction of a State” in draft article 1 and made it clear that the article concerned only internationally recognized jurisdiction. The Commission could not, within the limits of the topic, deal with unilateral extension of jurisdiction.

55. Jurisdictional questions were highly complex and might one day form the subject of a separate convention. For the purposes of the work in hand, it seemed sufficient to state clearly what was meant by “jurisdiction”. The term was broad enough to apply to most of the situations that had been mentioned. Moreover, it appeared in a number of instruments, including the 1982 United Nations Convention on the Law of the Sea. There remained the case of a State which could demonstrate that it had been ousted by another State from the objective exercise of its jurisdiction: that was where the concept of “control” or “effective control” became applicable. He had no strong preference for either of those terms, although “effective control” corresponded more closely to the situations envisaged.

56. Unlike the concept of jurisdiction, the concept of control was a factual determination. In other words, it meant *de facto* jurisdiction, a situation which had the properties of jurisdiction except that it was not recognized as such in international law. There again, it should be recalled that the term was already in use, and that the ICJ had given it a legal content in the *Namibia* case:¹¹ the judges at The Hague had certainly not had in mind South Africa’s title to Namibia, but the control—the *de facto* jurisdiction—which South Africa exercised over that Territory. When international law did not recognize the jurisdiction of a State but acknowledged its “control”, it imposed obligations on that State without recognizing any corresponding rights. Strictly speaking, control was the ouster of jurisdiction. That interpretation of the concept of control made it possible to meet situations where the State having jurisdiction over a particular territory or particular activities explicitly or implicitly surrendered its effective control over that territory or those activities to another State. From the point of view of liability and of the obligation to make reparation, the most common cases of control were unlawful occupation, annexation or intervention. There could also be other cases, for example an oil platform of State A on the high seas that was occupied by State B, or a slot in the geostationary orbit of State C occupied by State D.

57. The expressions “jurisdiction” and “effective control” employed in draft article 1 were the most appropriate to define the scope of the topic. They were broad enough to include the activities pertinent to the topic and had sufficient legal content to avoid any am-

biguity. Replying in that connection to Mr. Barsegov (2074th meeting), who had questioned the expression “vested in it by international law” in article 1, he added that he would have no objection to using a more neutral phrase such as “accepted by international law” or “in accordance with international law”.

58. With regard to the concept of attribution (art. 3), Mr. McCaffrey (2044th and 2045th meetings), noting that the term also appeared in article 11 of part 1 of the draft articles on State responsibility,¹² had made the point that it should not be implied that an act of the State was necessary in order for responsibility to be attributed to that State under the terms of the present draft. He had also said that responsibility should be “direct”, as opposed to “attributed”. However, the term “attribution” was not applied to responsibility for wrongfulness alone. It should perhaps be explained in the commentary that it was not the activities referred to in draft article 1 that were attributed to a State, but, simply and directly, their harmful consequences. Article 3 clearly stated that the only conditions for the attribution of responsibility were that the activity was carried on under the State’s jurisdiction or control and that the State knew or had means of knowing that it was being carried on. As to the question of “direct” attribution, it had to be recognized that in international law all attribution of responsibility was indirect, because the State was a legal person which could act only through individuals. That was particularly true in the case of the present topic, since the State was made responsible for activities carried on by persons who could in no sense be regarded as official organs of that State. It seemed impossible to avoid the principle of indirect attribution, but that did not mean that such attribution was established through equivocal means or complicated mechanisms.

59. On the question of the scope of the articles, Mr. McCaffrey, among others, had expressed the fear that the present wording of article 1 could be interpreted to exclude activities involving a low risk of great damage. He would amend the text in such a way as to leave no doubt on that score.

60. A great deal had been said about the concept of risk. Some members had argued that “risk” should be referred to only in the context of prevention and that the concept of “duty to make reparation” should apply where effective harm was caused, whether or not the activity concerned had involved risk. That would amount to creating a dual régime, one for the duty to prevent, which would require the existence of “appreciable risk” as a pre-condition for the requirement that a State should adopt measures of prevention, and the other for the duty to make reparation, which presupposed harm which, in turn, presupposed risk. As had been said, if there was harm, there was risk—a maxim which, incidentally, took care of the hypothetical case of hidden risk.

61. Others had expressed a preference for a hard core of obligations applying to activities involving risk and extending progressively therefrom, in other hypotheses and other instruments, to responsibility for “harm

¹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

¹² See 2045th meeting, footnote 6.

caused". Members had rightly pointed out that all existing conventions dealt with specific activities involving risk—nuclear power, transport of certain substances by sea, space activities, and so on. International practice in that respect supported the present text of the articles.

62. Lastly, some members had expressed a considerably more conservative view regarding the functioning of a system of liability for activities not prohibited by international law and had said that they would find it difficult to accept a text along the lines he had proposed.

63. The trends having thus been clearly established, it seemed that the Drafting Committee would be the best forum in which to seek grounds for a consensus, with his help as Special Rapporteur. Possibly, too, as Mr. Beesley (2074th meeting) had said, the gap between the two positions was not in fact so very wide.

64. The principles proposed in chapter II of the draft appeared to be generally acceptable except for the point made that the principle of participation (art. 8) might be included together with that of co-operation in article 7, or be expressed in some other way. Various drafting changes had also been suggested and he would bear them in mind in his future work.

65. He had been reproached for abandoning Principle 21 of the Stockholm Declaration.¹³ That had not been his intention; he had sought only to adapt the principle to the present subject-matter. As to the idea of imposing a positive obligation to protect the marine environment, by analogy with the provisions of the law of the sea, draft article 6 was in his view sufficient for the purpose inasmuch as it limited the freedom of States by the obligation to protect the rights emanating from the sovereignty of other States.

66. Some members, including Mr. Bennouna (*ibid.*), had wondered who would be empowered to qualify an activity as dangerous and what mechanisms would be employed for notification and consultation. Provisions covering those points would probably be included in his next report.

67. Mr. Barsegov had wondered whether the Commission was not trying to construct the edifice of the draft from the roof down. He did not agree with that view and pointed out that the draft was concerned with the stage preceding that of conventions on specific activities. Such conventions represented the ideal outcome of the Commission's work, but in the mean-time it was necessary to lay down certain principles to guide States towards those future instruments.

68. The title of the topic had been the subject of some comments, of which he had taken good note. It had earlier been decided that the question should be left in abeyance until the final stage. That decision was, in his view, a wise one since the topic broke new ground in international law.

69. In conclusion, he wished to take up the question of the interrelationship between three topics at present on the Commission's agenda: State responsibility, the law of the non-navigational uses of international water-

courses and the present topic. The parallel treatment of those three topics was a fruitful exercise and helped to identify correctly some of the problems common to all three. For example, views expressed in connection with the watercourses topic had helped him to clarify his own ideas, and the consideration of State responsibility would doubtless yield the same benefits. Waiting for the development of one of the topics before starting with the others might oblige the Commission to revert to the one that was most advanced in order to alter some of the conclusions reached.

70. Regarding the future method of work, opinions appeared to diverge on the way to deal with the draft articles submitted in his fourth report. In his opinion, the texts should be referred to the Drafting Committee. The only point on which there seemed to be a marked difference of views was that of the respective roles of the concepts of "risk" and "harm". A compromise solution was not impossible and the Drafting Committee was the best forum in which to find it. The general debate on the delimitation of the topic might continue indefinitely and the General Assembly would then be entitled to call the Commission to account. If the topic could not be dealt with, the Commission should say so. If there were members who did not want the project to succeed, they should shoulder their responsibilities before the General Assembly.

71. Mr. KOROMA said that he was not opposed to referring the draft articles to the Drafting Committee. However, the Special Rapporteur had said that he would redraft parts of the text in the light of comments made during the discussion, particularly those by Mr. Beesley (2045th meeting), which meant that the work could not be resumed before the next session.

72. Mr. BARSEGOV said that he, too, would agree to referring the draft articles to the Drafting Committee were it not for the fact that, since the Special Rapporteur was still to modify the texts, the Commission might find itself faced, as it were, with a *fait accompli*. Perhaps it would be best, as was generally done, to refer the texts which had been considered to the Drafting Committee together with the comments made on them.

73. Mr. BEESLEY said he had advised the Special Rapporteur to change the wording of the draft on the basis of the three principles listed in paragraph 85 of the fourth report (A/CN.4/413). He continued to feel that those three principles would provide a firm basis for chapter II of the draft. Nevertheless, he had no objection to the articles being referred to the Drafting Committee.

74. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 1 to 10 to the Drafting Committee together with the comments made during the discussion.

It was so agreed.

The meeting rose at 1.15 p.m.

¹³ See 2044th meeting, footnote 8.