

Document:-
A/CN.4/SR.2109

Summary record of the 2109th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1989, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

2109th MEETING

Wednesday, 31 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Organization of work of the session (continued)*

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau recommended that the resumed discussion on State responsibility should take place on 20 and 21 June and that consideration of the topic of the law of the non-navigational uses of international watercourses should start on 22 June and end on 28 June. The Enlarged Bureau had been informed by the Chairman of the Drafting Committee that the Committee intended to conclude its substantive work on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier on about 8 June and to make the final adjustments to the texts on 15 June. The Commission could then take up the Drafting Committee's report on that topic on 29 June, as originally planned.

2. Mr. EIRIKSSON recalled that he had already expressed some reservations about the period following the consideration of the first two topics in the Commission's provisional plan of work and that the decision taken at the beginning of the session (2095th meeting, paras. 21-22) had been based on *force majeure*, namely the lack of certain documents. Also, the Planning Group had requested that more time should be made available to the Drafting Committee and that, if necessary, the time allocated for the consideration of certain topics should be curtailed. He therefore trusted that the decision to be adopted now would take into account possible changes in the timetable.

3. The CHAIRMAN said that the Commission would, of course, allow the Drafting Committee as much time as possible for its work and would, in any event, revert to the matter later. If there were no objections, he would take it that the Commission agreed to adopt the recommendations of the Enlarged Bureau.

It was so agreed.

* Resumed from the 2104th meeting.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/413,² A/CN.4/423,³ A/CN.4/L.431, sect. B)⁴

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

ARTICLES 1 TO 17⁵ (continued)

4. Mr. BARBOZA (Special Rapporteur) referred to certain corrections to be made to his fifth report (A/CN.4/423), including some suggested by members at the previous meeting.

5. In response to a point raised by the Chairman (2108th meeting, para. 39), however, he said that he would prefer to retain the word "act" in the last sentence of paragraph 49, since it was the act that must cease, while the activity would go on. In that connection, he cited the example of a chemical plant which made a certain product using a substance that caused transboundary harm. In such a situation, it was not the activity itself that would be at issue, but the continued use of the substance in question. Alternatively, the obligation of prevention was established as an obligation of result and transboundary harm was then the consequence of a wrongful act because the result had not been achieved; or, again, the obligation of prevention was imposed as an obligation of conduct and it was the actual use of the substance in question that was prohibited. In either case, it was the use of the substance—in other words the "act"—which was wrongful, either because the result had not been achieved or because the act was directly prohibited. The act, but not necessarily the activity, must therefore cease.

6. The CHAIRMAN said that his comment had related not to paragraph 49 of the report, but to paragraph 50, and specifically to point (d), which stated that "the act would not have to cease". Would it not be better to say "the activity would not have to cease"?

7. Mr. BARBOZA (Special Rapporteur) said that, in that particular case, it was correct to say "the act would not have to cease", because, in a system of strict liability, the act was not prohibited. The act could continue; it was its effects for which there must be reparation.

8. Mr. McCAFFREY said that his comments would pertain to the introduction to the fifth report (A/CN.4/423), to the revised draft articles 1 to 9 and to the new material and draft articles relating to procedural obligations.

9. With regard to the Special Rapporteur's reference to "original fault" or "original sin" (*ibid.*, para. 5), he did not

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

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1989, 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 2108th meeting, para. 1.

think it was possible to say, without distorting the concept of fault, that fault existed in theory from the moment when an activity involving risk was undertaken. In his view, the operator received permission from society to start an activity involving risk even though the activity entailed a risk that could not reasonably be avoided and it was only if the activity caused any harm that the operator must, even in the absence of fault on his part, compensate the injured parties, at least up to a certain level.

10. He shared the view recalled in the report (*ibid.*, para. 12) that it would be better to refer, as in the French title of the topic, to “activities” rather than to “acts”, since it was the activity that was not prohibited. He had in mind in particular the activity of a nuclear plant or of a chemical factory. The Special Rapporteur had just given an example of an act likely to cause harm, but it sometimes happened that an incident occurred—that risk materialized in injury—even if there was no human intervention.

11. The legal situation was therefore that the topic fell somewhere between *force majeure* and an internationally wrongful act and one of the pre-conditions for the operation of such an activity involving risk, both at the national level and at the international level, was the obligation to pay appropriate compensation to those who were injured as a result. There was also the possibility of such an activity causing harm through the fault of the operator, for instance if he failed to maintain his plant properly. At the international level, the State of origin would then be held responsible, at least if all the pre-conditions set forth in part 1 of the draft articles on State responsibility⁶ were met. He therefore welcomed the Special Rapporteur’s conclusions (*ibid.*, paras. 14-15) to the effect that the topic was concerned with ongoing activities and not with isolated acts. It was preferable for the Commission to concentrate on activities that could give rise to appreciable transboundary harm of a physical nature, either because of an accident or due to continuing pollution. In that connection, the Special Rapporteur had rightly included continuing pollution within the scope of the draft, in response to the views expressed by a number of members at the previous session and even though extending the scope to pollution did give rise to other problems. He also agreed with the Special Rapporteur that:

... For their continuation, such activities require that agreement be reached on a régime establishing, between States of origin and affected States, obligations and guarantees designed to strike a balance between the interests at stake. . . . (*ibid.*, para. 15.)

12. Turning to the revised draft articles 1 to 9 of chapter I (General provisions) and chapter II (Principles) of the draft, he said that he had redrafted some of them in order to make their meaning clearer. The reformulations he would read out were not, strictly speaking, proposals on his part, but simply possible ways of expressing the basic ideas more clearly.

13. He was not satisfied with the use in draft article 1 of the words “territory”, “jurisdiction”, “control” and “places” or with the expression “throughout the process”. The article might be amended to read:

“The present articles apply to activities which are carried on under the jurisdiction or effective control of a

State and whose operation gives rise to transboundary harm or entails an appreciable risk thereof.”

Since some of the terms used in that text were defined later in the draft, there was no need to give a definition of them at the outset. The word “effective” should be retained for the reasons put forward at the previous session, particularly by Mr. Razafindralambo,⁷ which related mainly to the situation of the developing countries.

14. In draft article 2, on the use of terms, it would be enough to use something close to the dictionary definition of the term “risk”, for example:

“‘Risk’ means the possibility of appreciable harm which cannot be eliminated by any reasonable precautions that might be taken in respect of an activity.”

That definition could be supplemented by a subparagraph specifying that “appreciable risk” meant “risk that is [not difficult to discover] [discoverable upon a reasonable examination] and therefore is or should be known” and that it included both the low probability of serious harm and the high probability of minor appreciable harm. The word “simple”, used by the Special Rapporteur in subparagraph (a) (ii), was unusual in legal parlance and should be replaced by one of the two expressions he had proposed. In the commentary, the Commission might include, by way of explanation, the phrase “simple examination of the activity and the things involved, in relation to the place, environment or way in which they are used” from the text proposed by the Special Rapporteur. It could also indicate that “serious” meant “very considerable”, “disastrous” or “catastrophic”.

15. Subparagraph (b) might read:

“‘Activity involving risk’ means an activity whose operation entails appreciable risk.”

If a definition of “activities with harmful effects” was required, the following text could be added to subparagraph (b):

“‘Activity with harmful effects’ means an activity whose operation results in continuing transboundary harm.”

There would be no need to add the adjective “appreciable” because the definition of “transboundary harm” in subparagraph (c) could read:

“‘Transboundary harm’ means appreciable physical harm in [places] [areas] under the jurisdiction or effective control of a State which results from an activity of the kind referred to in article 1 carried on in another State.”

It might be added that:

“ . . . The expression includes physical harm to persons or objects, to the use or enjoyment of areas or to the environment.”

16. Subparagraph (d) could be amended to read:

“‘State of origin’ means the State exercising jurisdiction or effective control over an activity [whose operation gives rise to transboundary harm or entails an appreciable risk of transboundary harm within the meaning of article 1].”

⁶ See 2108th meeting, footnote 8.

⁷ *Yearbook* . . . 1988, vol. I, pp. 36-37, 2048th meeting, para. 42.

Subparagraph (e) could be replaced by the following text:

“‘Affected State’ means the State within whose territory or under whose jurisdiction or effective control transboundary harm occurs or may occur.”

17. With regard to draft article 3, he agreed with the change in the title, where the word “attribution” had been replaced by “assignment”, which did not have the same connection with the field of State responsibility. He also had some suggestions on the wording of that provision and on that of draft articles 4 to 9, but they were not as detailed as in the case of articles 1 and 2 and he would therefore make them in the Drafting Committee.

18. Concerning draft article 8, he would only stress that the commentary must carefully explain restrictive expressions such as “in so far as they are able” and “the best practicable, available means”, because the explanations the Special Rapporteur had given orally were not contained in the relevant passage of his report (*ibid.*, paras. 65-66).

19. As to draft article 9, he said he was afraid that the term “reparation” might lead to confusion between the topic under consideration and the draft articles on State responsibility. Another term would have to be found in order to indicate that the consequences of activities which were not prohibited by international law could be different from those of a breach of an international obligation. Perhaps article 9 could simply state that “. . . the State of origin shall be liable for appreciable harm” and that “the nature and extent of such liability shall be determined by negotiation between the State of origin and the affected State . . .”. The term “liability”, taken from the title of the topic, would then be defined either in article 2 or in the commentary.

20. Turning to the Special Rapporteur’s comments on the revised draft articles 1 to 9, he reiterated his view that it would be desirable, in the interests of the developing countries, to reintroduce the concept of “effective” control in article 1.

21. With regard to draft article 5, he generally endorsed the Special Rapporteur’s comments (*ibid.*, paras. 40-44) concerning the relationship between the draft articles under consideration and those on the law of the non-navigational uses of international watercourses. As he had explained at the previous session, however, his interpretation of article 23 (Breach of an international obligation to prevent a given event) of part 1 of the draft articles on State responsibility was somewhat different from that of the Special Rapporteur.⁸ It was clear to him that a régime of strict liability could coexist with one based on “fault”, or failure to exercise due care, but everything depended on the primary rule involved and specifically on whether that rule said that “State A shall exercise due diligence to prevent harm to State B” or that “State A shall ensure that no harm is caused to State B”. That was a crucial point because it was quite common for the exact meaning of the primary rule not to be perfectly clear. The Special Rapporteur considered (*ibid.*, paras. 45-46) that the obligation under the draft articles on international watercourses belonged to the first category and that the obligation referred to in the draft articles under consideration belonged to the second category. In that

connection, it should be noted that the Special Rapporteur introduced the interesting idea (*ibid.*, para. 46) of the reduction of the amount of compensation payable under a régime of strict liability, the amount being determined through negotiation. However, he could not share the view that “in normal cases of pollution . . . the defence of ‘due diligence’ is virtually unthinkable” (*ibid.*, para. 47). To begin with, the concept of “due diligence” was a flexible one that might well be appropriately invoked by the developing countries, which did not always have the necessary means to exercise the same degree of diligence as the industrialized countries. It was, moreover, quite common in the event of the pollution of an international watercourse, and probably even more so in the case of air pollution, for the State of origin not to know that a particular activity was causing transboundary harm or that such harm had occurred. Lastly, as he had pointed out in paragraph (11) of his comments on draft article 16 [17] on pollution as submitted in his fourth report on international watercourses,⁹ the concept of due diligence was broad enough to take account of the common practice in many countries with heavily polluted international watercourses of allowing the State of origin a reasonable period of time to reduce the pollution to an acceptable level, provided that it made its best efforts to do so.

22. He could nevertheless agree with the Special Rapporteur’s analysis of hypotheses (a) and (b) as referred to in the report (*ibid.*). It was obvious that the issue at stake was whether the draft articles under consideration should provide for a régime of strict liability for the State of origin in which harm resulted not from an “activity involving risk”, but from continuing pollution. That seemed to be the conclusion which followed from hypothesis (b). To the best of his knowledge, that was the first time it had been proposed that such a régime should be established under the present topic. He was not sure that it was such a bad idea, however, since the result would simply be that the States concerned would have to negotiate on the nature and extent of liability. That was what happened in State practice in any event, as the Special Rapporteur explained in his report. For all those reasons, he agreed with the Special Rapporteur (*ibid.*, para. 49) that wrongful “acts” had their place in a set of draft articles on liability for the injurious consequences of “activities” which were not prohibited by international law. In that connection, he agreed with the Chairman (see para. 6 above) that the word “act” in paragraph 50 (d) of the report should be replaced by “activity”.

23. He found paragraph 52 of the report somewhat puzzling, since he had always thought that an obligation of due diligence was an obligation of conduct. He would therefore welcome a clarification by the Special Rapporteur of that point.

24. Turning to the Special Rapporteur’s comments on draft article 7, he welcomed the reference (A/CN.4/423, para. 62) to the possibility that, in certain cases and under certain conditions, the affected State might have to use all possible means to assist the State of origin to mitigate the harmful effects of an activity. That was also consistent with

⁸ *Ibid.*, pp. 9-11, 2044th meeting, paras. 47-49, and 2045th meeting, paras. 1-4.

⁹ *Yearbook . . . 1988*, vol. II (Part One), pp. 240-241, document A/CN.4/412 and Add.1 and 2.

State practice, at least with respect to international watercourses, and it was that idea which was inherent in the concepts of equitable utilization and participation embodied in article 6 of the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted by the Commission at its thirty-ninth session.¹⁰

25. With regard to the Special Rapporteur's comments on draft article 9, he said that, as he had already stated, he had doubts about the appropriateness of the term "reparation" in the present topic. He wished to stress that, if the obligation of the State of origin lay in restoring the "balance of interests" between the States concerned, it seemed crucial to have a clear understanding of what that expression meant. The Special Rapporteur rightly stated (*ibid.*, para. 71) that it did not mean reparation for *all* the injury suffered. But some additional guidance would be required with regard to the measures that must be taken to satisfy that obligation in order not to prejudice the primacy of the law and the legal protection of the weaker party.

26. Referring to chapter III of the draft (Notification, information and warning by the affected State), he noted that the new draft articles 10 to 17 on procedural rules submitted by the Special Rapporteur were based on the provisions of part III of the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted by the Commission at its previous session.¹¹ Although the procedures proposed by the Special Rapporteur would undoubtedly work in many of the situations to be covered, it was not clear whether they would be suitable in all cases. For example, those provisions could be applied without much difficulty to transboundary water pollution and in some localized cases of transboundary air pollution, but not in cases of less localized transboundary air pollution, long-distance air pollution (acid rain), massive deforestation (leading to an increase in the amount of carbon dioxide in the Earth's atmosphere) or a major nuclear accident, or indeed in the case of harm to the "global commons" (such as the current oil spill in Antarctica). The fact was that, while the relationships between watercourse States could easily be seen as bilateral relationships for the purposes of procedural rules, that was not always the case in the topic under consideration. In other words, the draft articles must contain provisions specifically indicating that notification, or negotiation, should be effected in certain cases through a clearing-house or an international organization. In that connection, it was to be noted that the Executive Body established under the 1979 Convention on Long-range Transboundary Air Pollution¹² had, *inter alia*, that function (art. 8). Admittedly, draft article 7 required that States should request the assistance of international organizations in some cases, but that provision should be supplemented by provisions in chapter III of the draft setting out the specific circumstances in which States might—or would be required to—have recourse to international organizations in fulfilling their obligations of assessment, notification and negotiation.

¹⁰ For the text and the commentary thereto, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

¹¹ For the texts of articles 11 to 21 of part III (Planned measures) and the commentaries thereto, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 45 *et seq.*

¹² E/ECE/1010; to be published in United Nations, *Treaty Series*, No. 21823.

27. Noting that the title of chapter III and of draft article 12 referred to a "warning" by the presumed affected State, he pointed out that it was usually the State of origin which would be issuing the "warning". That might simply be a problem of translation, but it would perhaps be more appropriate to use a formula such as: "Request for information by the potentially affected State".

28. He welcomed the fact that the Special Rapporteur had introduced an obligation of impact assessment and fact-finding. As pointed out in the report (*ibid.*, paras. 80-83), there was considerable international practice in that regard. In addition to the examples given by the Special Rapporteur, however, account should be taken of the work of OECD and of the draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context, which was being prepared by the Economic Commission for Europe. The latter instrument was particularly instructive in that it used and defined many of the terms—or their equivalents—used in the articles proposed by the Special Rapporteur and in that the procedures established were similar to those laid down in the draft articles on international watercourses. It was also to be noted that, in the ECE draft, the basic obligation was that the parties should, either individually or jointly and by all appropriate and effective means, take preventive measures to avoid, reduce and control any significant adverse transboundary environmental impact from planned activities.

29. In conclusion, he commended the Special Rapporteur for having outlined the approach to be followed in achieving the purpose of the draft articles under consideration, namely to meet the concern to prevent pollution and protect the environment, particularly with regard to the harm which could occur in the "global commons" of mankind.

30. Mr. HAYES congratulated the Special Rapporteur on his brilliant analysis of highly complex problems and on his success in arriving in his fifth report (A/CN.4/423) at specific provisions reflecting the views expressed in the Commission and in the Sixth Committee of the General Assembly. For the time being, he would confine his remarks to chapters I and II of the draft articles and would speak at a later stage on chapter III.

31. Recalling that he had said at the previous session¹³ that the role then assigned to the "risk" factor in the draft articles was too limitative and liable to hamper the implementation of one of the three principles endorsed by the Commission, namely that "an innocent victim of transboundary injurious effects should not be left to bear his loss", he said he was pleased to note that the Special Rapporteur now agreed that that role should be more circumscribed and that liability could arise either from risk or from harm. In addition, he agreed with the Special Rapporteur that it was "activities" rather than "acts" which formed the subject-matter of the draft articles under consideration, including activities giving rise to harm through cumulative effect. He therefore endorsed the Special Rapporteur's conclusions (*ibid.*, para. 15) concerning the consequences which followed from liability under the draft articles and led into the part dealing with prevention and reparation.

¹³ *Yearbook . . . 1988*, vol. I, pp. 207-208, 2074th meeting, paras. 3-4.

32. Turning to the revised draft articles 1 to 9 submitted by the Special Rapporteur, he welcomed the substantive changes in article 1 (Scope of the present articles), which provided that liability could arise from harm as well as from risk and thus formed the basis for the two remedies of prevention and reparation. In response to the Special Rapporteur's invitation of views on the matter (*ibid.*, para. 25), he said that he was in favour of retaining the word "appreciable" as the adjective to qualify the word "risk". The proposed alternatives would convey the idea of higher thresholds, and he agreed with the Special Rapporteur that that would be undesirable. The Drafting Committee should address the problem that the expression "throughout the process" did not seem, either in its placing or in its wording, at least in English, to correspond to the underlying idea (*ibid.*, para. 22) that risk should be covered by the draft articles whether its effect was one-off, continuous or cumulative.

33. Any work done now on draft article 2 (Use of terms) should be provisional. When the first reading had been completed, it might be found that some of the terms contained in the article would no longer need to be defined, while others would. He nevertheless welcomed the change in emphasis in the two definitions in subparagraph (a) and was in favour of retaining the words "very considerable" rather than the word "disastrous" in the definition of "appreciable risk". The Drafting Committee might consider the following questions: Should "activities" be part of the definition of "risk"? Where should the words "notwithstanding any precautions which might be taken in their regard" be placed in subparagraph (a) (i)?

34. He welcomed the direct reference to the environment in subparagraph (c), but wondered whether that subparagraph would not need adjustment if the Commission decided, as he hoped it would, that the draft articles should cover harm to "the commons" of mankind. For practical reasons, he thought that it was necessary to retain the word "control" to facilitate the protection of the population in areas where legitimate jurisdiction had been displaced.

35. With regard to subparagraph (d), he preferred the expression "source State" to "State of origin". He welcomed the amended text of that subparagraph suggested by Mr. McCaffrey (para. 16 above), but wondered whether the text should not be further simplified to read:

"(d) 'State of origin' means the State under whose jurisdiction or control the activities referred to in article 1 take place."

He also welcomed the revised text of subparagraph (e) proposed by the Special Rapporteur and its explicit reference to the environment.

36. He was not satisfied with the title of draft article 3 (Assignment of obligations), at least in English, and thought that a more accurate translation of the original Spanish text might solve the problem. Otherwise, he thought that the article was an improvement on the previous text and he was especially pleased that the article itself expressly provided that the burden of proof of lack of knowledge or means of knowing fell on the source State.

37. He preferred alternative B of draft article 5 (Absence of effect upon other rules of international law). As for draft article 6 (Freedom of action and the limits thereto), he noted

that, in accordance with the hope he had expressed, it had been redrafted in order to reflect more closely Principle 21 of the Stockholm Declaration.¹⁴

38. He welcomed the fact that, in draft article 7 (Co-operation) prevention and reparation had been dealt with separately; that was a logical consequence of the wording of article 1. He was not certain, however, whether the obligation to co-operate with international organizations should be absolutely binding, for in some cases that might not be wholly desirable. He also wondered why the occurrence of an accident should be a factor in the requirement for the affected State to co-operate to minimize the effects in the territory of the source State.

39. He noted with satisfaction that the previous draft article 8 (Participation)¹⁵ had disappeared from chapter II of the draft; its substance could be appropriately included elsewhere. As for the present draft article 8 (Prevention), it properly placed the responsibility for prevention on the source State, regardless of the duty of co-operation set out in article 7. He was not sure, however, that the second sentence of article 8 was an improvement on the expression "reasonable preventive measures" used in the previous draft article 9.

40. He was disappointed that draft article 9 (Reparation) did not refer to the innocent victim of transboundary harm. He recalled that, at the end of the Commission's discussion of the topic at its thirty-ninth session, the Special Rapporteur had identified three general principles which should apply in the area:

(i) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;

(ii) States must respect the sovereignty and equality of other States;

(iii) An innocent victim of transboundary injurious effects should not be left to bear his loss.¹⁶

He had expected that those three principles would be reflected in chapter II of the draft (Principles), but only the first two were reflected in draft article 6. The third should be reflected in draft article 9. He also thought that the words "bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm" at the end of article 9 related more to the criteria governing negotiations on reparation and that they should therefore not be included in that provision. At the previous session,¹⁷ he had indicated what he thought should be the content of the article (then draft article 10) and he now suggested that it be amended to read:

"Where transboundary harm results from an activity as referred to in article 1, reparation shall be made by the source State. The nature and the extent of the reparation shall be determined by negotiation between the source State and the affected State or States, in accordance with the criteria set forth in these articles and in the light of the requirement that the innocent victim of transboundary harm should not be left to bear the loss."

He was aware that part of the Special Rapporteur's reason for deleting the reference to the innocent victim was that it

¹⁴ See 2108th meeting, footnote 6.

¹⁵ *Ibid.*, footnote 5.

¹⁶ *Yearbook . . . 1987*, vol. II (Part Two), p. 49, para. 194 (d).

¹⁷ *Yearbook . . . 1988*, vol. I, p. 208, 2074th meeting, para. 14.

had been misunderstood in the previous draft article 10. In his own view, however, the principle was important enough to be given its rightful place, in some clear form, in the draft articles.

41. In reply to a question by Mr. BEESLEY, the CHAIRMAN said that the secretariat would issue working papers containing the specific drafting proposals which had been made on the topic.

The meeting rose at 11.15 a.m.

2110th MEETING

Thursday, 1 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, 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 (continued) (A/CN.4/384,¹ A/CN.4/413,² A/CN.4/423,³ (A/CN.4/L.431, sect. B)⁴

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 1 TO 17⁵ (continued)

1. Mr. SHI thanked the Special Rapporteur for his concise and well-documented fifth report (A/CN.4/423) and commended him on the submission of 17 draft articles, the first nine being revisions of the 10 articles referred to the Drafting Committee at the previous session.⁶

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

² Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1989*, 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 2108th meeting, para. 1.

⁶ See 2108th meeting, footnote 5.

2. In draft article 1, the Special Rapporteur had extended somewhat the scope of the articles to include activities causing appreciable transboundary harm. It was a compromise formula, adopted to take account of the divergent views expressed in the Commission and in the Sixth Committee of the General Assembly. As he had stated at the previous session,⁷ risk as a basis of liability could exclude activities which, though not involving risk, could cause harm of great magnitude. He agreed with the Special Rapporteur that there should be a limit to liability under the draft articles and that absolute liability should not be incurred. In that connection, the Special Rapporteur had rightly drawn a distinction between activities and acts: liability should be linked to the nature of the activity, and acts, if they were to be covered by the draft, must be linked to an activity involving risk or having harmful effects and must not be isolated and unconnected with any activity.

3. Draft article 7 circumscribed in specific terms the area in which the duty of co-operation arose, namely the prevention and control of harmful effects. The article should, however, like the corresponding provision in the draft articles on the law of the non-navigational uses of international watercourses, also state the fundamental principles of international law upon which co-operation between States of origin and affected States rested. It was gratifying to note that the previous draft article 8, on participation, had been dropped, since participation was implicit in the article on co-operation and the wording of the earlier article had been vague and open to misunderstanding.

4. Under the present draft article 8, which was a revised version of the previous draft article 9, a breach of the duty of prevention was made contingent upon use of the best practicable, available means. He maintained the view he had expressed at the previous session⁸ that failure to take preventive measures did not in itself give rise to liability or to a right of action. Only if such failure resulted in harm, or if harmful effects occurred in spite of the measures taken, could liability be ascribed to the State of origin. The basic issue concerned the kind of legal régime to which the draft would apply. Although the Special Rapporteur believed (*ibid.*, para. 42) that, in the absence of harmful effects, no one would verify whether the means used to prevent such effects were adequate or not, the affected State could, under article 7 on co-operation and under the subsequent articles on notification, demand inspection and verification of preventive measures. If the affected State then found that the preventive measures adopted by the State of origin were not the best practicable and available means to prevent or minimize the risk of transboundary harm, would that failure on the part of the State of origin constitute a wrongful act giving rise to State responsibility? That was a point of some importance and, in that regard, article 8 was vaguely worded.

5. The revised articles were no doubt an improvement and any drafting problems could, of course, be ironed out in the Drafting Committee. He agreed with Mr. Hayes (2109th meeting) that draft article 2, on the use of terms, should be provisional, and that it should be revised thoroughly upon completion of the first reading of the draft.

⁷ *Yearbook . . . 1988*, vol. I, p. 26, 2047th meeting, para. 27.

⁸ *Ibid.*, pp. 26-27, para. 31.