

Document:-
A/CN.4/SR.2111

Summary record of the 2111th meeting

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

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

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from the failure to take preventive measures to avoid certain harmful effects of a State's lawful activity. Liability would result from the violation of rules on such matters as prevention, co-operation and the balance of interests, which could be described as "soft law".

47. Of those two approaches, the second seemed the more appropriate. It would serve to expand the notion of traditional State responsibility into the grey area and could be adopted despite the fact that it had not been envisaged when the Commission had first taken up the topic. Admittedly, it could be argued that lack of prevention, or failure to take the required preventive measures, constituted a wrongful act under international law and was therefore beyond the scope of the subject-matter, but attempts to seek the sources of liability in acts not prohibited by international law could ultimately mean going round in circles.

48. Turning to the revised draft articles 1 to 9 submitted by the Special Rapporteur, he said that the words "throughout the process", in article 1, did not refer simply to the period of performance of the activity which had the harmful effect. As he saw it, "throughout the process" covered the whole of the period during which the harmful effect was suffered, even after the end of the activity which had caused it. Interesting in that connection was the following view expressed by the representative of Austria in the Sixth Committee of the General Assembly and cited by the Special Rapporteur in his report (*ibid.*, footnote 7):

... the concept of liability for acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident, but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions.

That representative had then added that the second situation, namely that of transboundary and long-range impact on the environment, related to the cumulative effect of certain harmful activities, a situation in which liability had two distinct functions: first, to cover the risk of an accident, and secondly, to cover significant harm caused in the territory of other States through a normal operation.

49. In subparagraphs (a) and (b) of draft article 2, the concept of "risk" had been retained notwithstanding certain objections voiced both in the Commission and in the Sixth Committee. The article posed three problems. To begin with, the expression "appreciable risk" should be replaced throughout the draft by "significant risk", which was the expression used in a number of relevant existing instruments, including some mentioned by the Special Rapporteur, such as the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (*ibid.*, para. 80), the annex to recommendation C(74)224 on "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974 (*ibid.*, para. 85) and the 1979 Convention on Long-range Transboundary Air Pollution (*ibid.*, para. 91). It was worth noting that the arbitral tribunal in the *Trail Smelter* case²¹ had used the expression "damage of a material nature", which was close to the meaning of "significant" or "substantial". Since the concept of "risk" was itself not very

explicit and contained some subjective elements, it would be preferable to qualify it with the word "significant".

50. Subparagraph (a) (ii) stated that "appreciable risk" was deemed to include "both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm". Low probability of very considerable transboundary harm could be understood to cover such cases as accidents in nuclear power plants. However, the significance of the other category, "high probability of minor appreciable harm", was not at all clear. Perhaps the idea was to cover harm to the environment caused by an accumulation of small amounts of harmful materials over a long period of time. If that was indeed the intention, it should be spelt out in the article itself by introducing wording along the following lines: "... having a cumulative effect leading to environmental pollution".

51. The Commission's report on its previous session referred to the Special Rapporteur's interpretation of the expression "appreciable risk" as "meaning that it had to be greater than a normal risk".²² If the Special Rapporteur still held that view, he would suggest that the interpretation in question be incorporated in article 2 itself, thereby clarifying the meaning of "appreciable risk", or preferably "significant risk".

52. The definition of "Affected State" in subparagraph (e) covered both a State which had in fact been harmed or was being harmed and a State which might be harmed in the future. The latter case seemed to be encompassed by the idea of "minor appreciable harm" which he had discussed in connection with subparagraph (a) (ii). It was not at all appropriate to treat the two categories of States in the same manner and he would urge that the liability towards a State which had already suffered harm and the liability towards a State which might suffer harm in the future should be treated differently.

53. The title of draft article 3, "Assignment of obligations", was difficult to understand and should be examined by the Drafting Committee.

The meeting rose at 1 p.m.

²² *Yearbook* . . . 1988, vol. II (Part Two), p. 16, para. 62.

2111th MEETING

Friday, 2 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. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter,

²¹ See 2108th meeting, footnote 9.

Mr. Roucouas, 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. OGISO, continuing the statement he had begun at the previous meeting, said that he wished first to clarify a point on which he feared he might have been misunderstood: it was only in the event of physical harm of a transboundary nature, of course, that failure to prevent it might be considered as constituting a wrongful act by the State of origin and, consequently, as the source of an obligation to make reparation.

2. Draft article 3 established the obligations of the State of origin, adding (para. 2) that that State was "presumed" to have the knowledge or the means of knowing that an activity was being carried on in its territory. That condition seemed to contradict the moral principle often cited by the Special Rapporteur that the innocent victim should not be left to bear alone the burden of the harm. It was true that, important as it was, that principle was only a moral one, and the fact that article 3 no longer made a legal principle of it was to be welcomed.

3. Draft article 8 set forth the obligations of the State of origin with regard to prevention. However, in his fifth report (A/CN.4/423, paras. 65-66), the Special Rapporteur stated that it was for those who carried on the activity in question—and consequently not only for the State, but also for private individuals or corporations—to take the necessary preventive measures. Although he had no objection as to the substance, he would point out that international conventions did not normally impose obligations directly upon individuals, but only on States, which then had a responsibility to enact the laws and regulations necessary to enforce such obligations. The text of article 8 should be amended accordingly.

4. He noted with satisfaction the introduction of the notion of a "balance of interests" in draft article 9. The only way to achieve such a balance was through negotiations in good faith between the State of origin and the affected State. However, the precise criteria to be applied in deciding how to restore that balance were likely to give rise to difficult

problems, for example in the case of an accident which had caused harm in both the State of origin and the affected State.

5. In the new draft articles 10 to 17, the Special Rapporteur proposed procedures of assessment, notification and information which constituted a régime similar to that proposed in the draft articles on the law of the non-navigational uses of international watercourses. While generally agreeing on the substance, he wondered whether the Commission should establish procedures as detailed as those proposed, since the aim of the draft articles under consideration was to deal with the liability of States when transboundary harm arose, not to establish international procedures for the prevention of all possible transboundary harm. The extent to which a State had fulfilled its obligation of prevention could constitute an important element in the assessment of its liability, but the draft articles themselves did not have to enter into those details. In order for the preventive measures to be sufficiently flexible it would be more appropriate, in his view, to establish bilateral or regional arrangements among interested States, or international mechanisms for specific purposes such as pollution prevention, rather than to try to establish a general legal régime applicable to all cases, even in the form of a framework agreement. He therefore wondered whether the part of the draft devoted to procedure should not be confined to stating a general principle and encouraging countries with common interests to establish a regional co-operation mechanism. Several members of the Commission had, in that connection, cited the example of the Economic Commission for Europe. He would also like to have some details about the practical operation of the co-operative machinery established under the regional agreements which the Special Rapporteur mentioned in his report (*ibid.*, paras. 80 *et seq.*).

6. Mr. FRANCIS said that, now that the Commission had a full set of draft articles before it, the general principles upon which the text as a whole was based needed to be brought into proper perspective. In that connection, the Commission might draw upon the example of the Charter of Economic Rights and Duties of States⁶ and place at the beginning of the general provisions an article briefly setting forth the principles to be developed in the rest of the draft. Those principles would be the freedom of action of States, the obligation of prevention, the obligation of co-operation and, lastly, the obligation of reparation—which ought, however, in his view to be renamed. In view of the provisions of article 35 of part 1 of the draft articles on State responsibility,⁷ namely that "Preclusion of the wrongfulness of an act of a State . . . does not prejudice any question that may arise in regard to compensation for damage caused by that act", and of the fact that the draft under consideration dealt, by definition, only with the consequences of activities whose wrongfulness was precluded, he agreed with Mr. Reuter (2110th meeting) that the word "reparation" was inappropriate.

7. Taking up a suggestion made by Mr. Yankov in connection with another set of draft articles, he also proposed that the article on "Use of terms" be placed at the very beginning of the draft. The positions of draft articles 1 and

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 General Assembly resolution 3281 (XXIX) of 12 December 1974.

⁷ See 2108th meeting, footnote 8.

2 would thus be reversed, and the article containing a brief summary of principles which he wished to add to the draft would come immediately afterwards.

8. With regard to draft article 1, he associated himself with the criticisms already formulated, particularly in connection with the expressions “throughout the process” and “in other places”. The text was weighed down by too many superfluous elements. In particular, he was unconvinced by the arguments advanced by the Special Rapporteur to justify the use of the expression “jurisdiction as recognized by international law”. The best solution would be to revert to the wording proposed by the Special Rapporteur in his third report⁸—“within the territory or control” of a State—since the word “control” also covered cases where a part of the territory of a State was occupied illegally by another State. In order to avoid all ambiguity, it might be specified in the commentary to article 1 that the word “control” should in no case be interpreted as legitimizing an illegal occupation; such an explanation would, however, be out of place in the text of the article.

9. Unwieldy as it was, article 1 was also inadequate, first, because it spoke only of “activities”, although isolated acts (i.e. acts not forming part of an organized activity) could also be a source of transboundary harm. Above all, however, the article failed to take account of “situations”, which he thought it essential to bring within the scope of the draft, especially bearing in mind what the previous Special Rapporteur had said in his fifth report:

... Sometimes ... it is not so much an identified activity as the existence of a state of affairs ... which gives rise or may give rise to physical consequences with transboundary effects. ...

... there are cases in which a source State has a duty to give a warning of immediate danger, whether arising from an activity or from a natural cause. ...⁹

The concept of a “situation” was thus essential and should be spelt out in the text of article 1. On the other hand, an express mention of isolated acts might perhaps not be necessary, it being sufficient to indicate in the article on the use of terms that the word “activity” should be interpreted as encompassing acts of that nature.

10. With regard to draft article 2 and, more particularly, the expressions “appreciable risk” and “activities involving risk”, he agreed with Mr. Ogiso (*ibid.*) that in view of the content of article 1 it would be preferable not to define risk or activities involving risk. On the other hand, the definition of “transboundary harm” was useful, and the expression “appreciable harm” also needed to be explained.

11. In his fifth report (A/CN.4/423, para. 32), the Special Rapporteur recognized that the expression “under the control” of the State of origin repeatedly used in the draft presented certain difficulties. Care should be taken not to disturb the balance of the draft by refusing to treat the illegal occupant of a State, to the extent that he effectively controlled the territory of that State, as though he were lawfully exercising sovereignty over it: to preclude the occupying State’s liability would be to make the State lawfully responsible for the territory liable for an activity over which it did not exercise effective control.

⁸ *Yearbook* ... 1987, vol. II (Part One), p. 48, document A/CN.4/405, para. 6.

⁹ *Yearbook* ... 1984, vol. II (Part One), p. 166, document A/CN.4/383 and Add.1, paras. 31-32.

12. Remarking that, as the work on the topic progressed, the Commission was trying to ensure that the draft did not mirror part 1 of the draft articles on State responsibility too closely, he said that he would like to see the Commission revert to the schematic outline. It was not that the schematic outline was sacred and could not be departed from, but it did undoubtedly, as the Sixth Committee of the General Assembly had recognized at the time, provide the basis for the Commission’s work on the topic. In that connection, he recalled that, as Mr. Reuter (2110th meeting) had pointed out, the potentially affected State was not necessarily situated near the State of origin. He also recalled with interest that Mr. Reuter had wondered whether the Commission would achieve better results by adopting a maximalist approach or, on the contrary, by contenting itself with a minimalist approach that would leave States some latitude to conduct their bilateral relations as they deemed fit; that had been the general idea underlying the schematic outline. Mr. Tomuschat (*ibid.*) had been right to refer to primary rules; but in the view of the previous Special Rapporteur those rules came into play from the moment when a State failed to provide the necessary compensation. He personally was prepared to revert to his initial position based upon the duty of diligence. But it would be interesting to know whether, in abandoning the schematic outline, the Commission really believed that it was choosing the best solution.

13. Turning to the question of the environment and its place in the draft articles, he recalled that the matter had been raised as early as 1978 by the Working Group established by the Commission to consider the scope and nature of the topic. In his view, everything the Commission was doing with regard to the present topic was related to the environment. In that connection, he cited the following passage from the previous Special Rapporteur’s preliminary report:

If the Commission and the General Assembly accept the view that this topic is essentially concerned with the elaboration of primary rules of obligation and that its main immediate reference is to developments within the field of the environment, it might also be agreed expressly to limit the topic, as was recommended by the Working Group set up by the Commission at its thirtieth session in 1978:

[The topic] concerns the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. ...¹⁰

14. He also recalled that, at the previous session,¹¹ he had stated that, in order to avoid delaying the Commission’s work, it should be left to another body to identify the environmental issues which might be dealt with within the framework of the draft articles under consideration. However, in view of the developments which had taken place in international relations since that time, he now thought that it would be appropriate for the Commission itself to consider what problems might be addressed in the draft articles. Mr. Beesley (*ibid.*) and the Special Rapporteur were right in saying that there were perspectives to be explored in that connection, of course with all necessary care. For example, pending the establishment of the International Sea-Bed Authority envisaged in the 1982

¹⁰ *Yearbook* ... 1980, vol. II (Part One), pp. 265-266, document A/CN.4/334 and Add.1 and 2, para. 65.

¹¹ *Yearbook* ... 1988, vol. I, p. 35, 2048th meeting, para. 32.

United Nations Convention on the Law of the Sea, the Commission might have a role to play in the sphere of maritime transboundary harm. Accordingly, he suggested that, since the Commission had set up a Working Group to consider what topics it should study next (see 2104th meeting, para. 75), it should request that Group to take up the issue as a matter of priority.

15. Mr. PAWLAK said that the more the Commission learned about the present topic, the more it became aware of its complexity, and the Special Rapporteur's fifth report (A/CN.4/423) offered more food for thought.

16. He welcomed the evolution of the Special Rapporteur's views as reflected in the revised draft article 1. In conformity with the comments made in the Commission and in the Sixth Committee of the General Assembly, the text no longer made risk the basic factor in liability, but combined that concept with that of harmful activity. For his part, he would prefer liability to be based on harm, not on a combination of risk and harm, because it was not important for the innocent victim, namely the other State or its nationals, whether activities undertaken in a given country involved risk or not. What was important was that, where damage had been done, it should be repaired and losses compensated. The criterion of risk could play a role, however, with regard to prevention. It must not be forgotten that, as a result of technological progress, transboundary harm might occur at any moment, affecting not only a single State or a limited number of States, but the entire planet. That was why he attached such importance to the issue of scope dealt with in article 1.

17. There was still room for improvement in the revised text of article 1, and Mr. McCaffrey's proposal (2109th meeting, para. 13) offered one possibility for improvement that warranted further discussion. As a general rule, the Commission should give the Drafting Committee clear guidelines on the topic, the fundamental idea being that a State, a person or an economic entity undertaking a profitable, lawful but sometimes hazardous activity should bear the full cost of that activity, including the cost of possible accidents. In other words, the innocent victim of an activity that caused transboundary harm should be protected by international law. To those who argued that the first victims of such an activity were the State of origin and its nationals, he would point out that it was they, and not the foreign victims, who derived profits and benefits therefrom. As to the wording, it seemed preferable to use the word "significant" rather than "appreciable" to qualify risk and harm. There was also a need for further delimitation of "transboundary harm" through recourse to an objective assessment of the cost and the results.

18. Draft article 6 reflected an idea which he had expressed at the previous session,¹² namely that prevailing trends in contemporary international law, such as those incorporated in Principle 21 of the Stockholm Declaration, should be taken into account. The growing interdependence of all States required a realistic approach to the principles of sovereignty and territorial integrity of States. The mechanisms provided for in the draft articles should deal with cases where it was not one country, but all of mankind that would be affected by the consequences of a lawful but

dangerous activity. He therefore shared the Special Rapporteur's view that, in reflecting Principle 21, article 6

gives expression to the two sides of sovereignty: on the one hand, the freedom of a State to do as it wishes within its own territory; and on the other, the inviolability of its territory with regard to effects originating outside it. . . . (A/CN.4/423, para. 56.)

19. In fact, article 6 represented a compromise between the principle of limited sovereignty and that of territorial integrity. Could such an approach be accepted? That was a matter for the Commission to decide, but it was even more important to know whether Governments would be willing to accept that approach in their international agreements, for which the draft articles would create a framework. Gaining such acceptance would not be an easy task, but he saw no other solution if the planet was to be preserved. In support of that approach, the general principle of good-neighbourliness, as set out in Article 74 of the Charter of the United Nations, could also be cited.

20. The provisions of the new draft article 10 also seemed to meet a need; but there again, were States ready to accept such provisions? He suspected that most of them would not be prepared to do so. Such detailed procedures as the Special Rapporteur was proposing and which the Commission was incorporating in the draft articles on the law of the non-navigational uses of international watercourses should, of course, be limited to particular types of activities: in that regard, he shared the views expressed by Mr. Ogiso. He also thought that the task of establishing the obligations of a presumed State of origin to assess activities involving risk, to notify the States presumed to be affected and to explain the measures it proposed to take to comply with its obligation to compensate should be left to States, instead of being included in the draft framework convention which the Commission was elaborating.

21. Mr. SEPÚLVEDA GUTIÉRREZ commended the Special Rapporteur on the quality and practical usefulness of his fifth report (A/CN.4/423), which was all the more remarkable because doctrine and customary law on the topic were extremely limited. The guarded optimism he had expressed at the previous session concerning the future of the topic had not abandoned him, no matter what had been said about the draft's "grey areas" or the fear of imposing heightened responsibilities and obligations on the States that were most capable of causing harm.

22. In general, he accepted the revised texts proposed by the Special Rapporteur for articles 1 to 9, although with a few reservations, some of which had already been expressed by other members of the Commission. The grounds for agreement were actually broad enough for the Drafting Committee to find appropriate formulations accommodating the views expressed.

23. That having been said, he believed the Commission should not allow itself to be swayed by criticism that might lead it either to engage in an abstract exercise or to expand the scope of the topic unduly. It was better, for the time being, to work on a set of draft articles, however limited they might be, so that progress could be made and some of the urgent problems raised by liability for harm resolved. The articles being drafted embodied principles that bore repetition and would be of value both as doctrine and as practical reference points. On the one hand, as Mr. Boutros-Ghali had pointed out (2096th meeting) in connection with the draft Code of Crimes against the Peace and Security of

¹² *Ibid.*, p. 25, 2047th meeting, para. 17.

Mankind, the provisions would publicize a number of notions about the scope of a certain type of international obligation. On the other hand, international conferences and recently concluded agreements showed that the international community was prepared to consider proposals aimed at developing and codifying international law on the topic, and that such action actually corresponded to its need to prevent and settle disputes and to help reinforce international solidarity. The Commission should therefore persevere with its task.

24. Turning to chapter III of the draft (Notification, information and warning by the affected State), he said he was pleased that the Special Rapporteur had chosen to take on such an important issue; it had often been said in the Commission that it was important to go forward, even on unknown terrain, without waiting for customary law to be created.

25. Nevertheless, the régime foreseen by the Special Rapporteur in the new draft articles 10 to 17 required a whole range of new and unaccustomed actions and obligations for States, and a cautious approach was in order. Thus, while he endorsed the eight new articles, he believed that some of the rules set out in them should be reviewed and, in particular, the establishment of bodies responsible for performing the various procedures described therein should be envisaged.

26. He had some doubts, for example, about draft article 10 (Assessment, notification and information), which was at the heart of the proposed régime and which imposed a whole range of rather complex behaviour and duties on States. First, the text called for application of a set of procedures to determine whether an activity might cause or risk causing harm in the more or less distant future. Such an obligation would certainly require the establishment of competent State bodies, but, even so, the task of arriving at an accurate determination of whether an activity might cause or risk causing transboundary harm was a difficult and delicate one.

27. Secondly, the fact that the State of origin would be obliged to warn the State or States that might be affected raised a number of problems. Since notification entailed certain responsibilities from the moment it took place, a State which failed to adopt the necessary measures to prevent the harm or attenuate the risk could hardly dissociate itself from the consequences of a given activity. The State would have to accompany the notification with certain technical data and announce the measures it intended to adopt. That first stage of the process leading to the creation of a régime of prevention and co-operation should be approached with the utmost care, but the Special Rapporteur would surely be able to find appropriate wording.

28. He had no comments to make concerning draft article 11. On the other hand, draft article 12 (Warning by the presumed affected State) presented certain problems for him, in that a State which believed it was affected might, because of lack of means, have difficulty in providing the documented technical explanation required of it by that article.

29. He had no difficulty in accepting draft articles 13, 14 and 15. He also accepted the principle behind draft article 16 (Obligation to negotiate), but believed that the utmost care should be taken over the wording, for the article dealt

with a delicate and crucial method of settling disagreements on liability and means of reparation. As for draft article 17 (Absence of reply to the notification under article 12), the final part of the text needed to be developed, but that was merely a question of drafting.

30. Mr. Sreenivasa RAO, congratulating the Special Rapporteur on the open-minded spirit and fresh approach evident in his fifth report (A/CN.4/423), noted that he had attempted, albeit not entirely successfully, to define the scope of the topic. By incorporating the concept of risk and by addressing activities—not isolated acts—within the jurisdiction or control of a State which “knew or had means of knowing” (art. 3) that those activities could cause appreciable harm to the people or property of another State or States, the Special Rapporteur had delineated to some extent the limits of actionable claims for reparation. He had emphasized some basic postulates: that the problem of liability should be dealt with at the inter-State level, and that the innocent victim of a harmful transboundary effect should not be left to bear the loss. He had also brought out the concepts of co-operation between the State of origin and affected States, prevention and redress.

31. In dealing with co-operation, the Special Rapporteur emphasized that the duty to co-operate was placed equally on the affected State where it “has the means to do so, for instance if it has more advanced technology” (*ibid.*, para. 62), while rightly warning immediately afterwards that harm caused by an accident arising out of otherwise lawful activities should not be used “to seek political advantage or to air rivalries of any kind”. Indeed, such action could be construed as being contrary to good faith in negotiations, as had been clearly stated by the arbitral tribunal in the *Lake Lanoux* case,¹³ and would jeopardize the need to restore the balance of interests between the State of origin and the affected State. Restoring that balance of interests, which was the fundamental objective of reparation for harm, brought into play several important criteria which the Special Rapporteur enumerated (*ibid.*, para. 70): the benefit which the affected State itself might derive from the activity; the interdependence of the modern world; the costs of prevention; and the allocation of the costs of the activity to the State which was its principal beneficiary. Of course, that list was not exhaustive and other criteria might apply in given cases. He himself did not believe, however, that the failure of the State of origin to request the assistance of a competent international organization should be interpreted to mean that it had not complied with its obligation to co-operate, as stated in the report (*ibid.*, para. 62). Further consideration should be given to the matter, but, above all, requesting assistance from an international organization should not be made a formal obligation.

32. With regard to prevention, the Special Rapporteur, conscious of the limits of that concept, specified that the obligation in the matter was not absolute and that if, for example, an activity was carried on by private individuals or corporations, it would not be the State but those private individuals or corporations that would have to institute the actual means of prevention, the only duty of the State being to convert that obligation into a rule of domestic law and to enforce it (*ibid.*, para. 66). For the special case of

¹³ See 2110th meeting, footnote 13.

the developing countries, the Special Rapporteur indicated that States had to use the means of prevention "in so far as they are able" (*ibid.*, para. 67).

33. In chapter III of the draft, the Special Rapporteur had submitted new articles on notification, information, warning by the affected State and steps following notification—all of them procedural provisions which dealt with the duty of the State of origin and the affected State to co-operate, to negotiate and to reach agreement, on the understanding that, failing such agreement, fact-finding machinery would be established, the conclusions of which would, however, have only an advisory character.

34. In response to the concern aroused by problems connected with the environment, the Special Rapporteur had taken a bold step by including in the definition of "transboundary harm" (art. 2 (c)) the appreciable harm caused not only to persons or objects and to the use or enjoyment of given areas, but also to the environment.

35. He urged the Special Rapporteur to persevere along that road and to continue to seek to define the scope of the topic, to identify criteria for restoring the balance of interests between the State of origin and the affected State and, still more important, to enunciate basic policies which the international community should adopt in the common interest.

36. The Special Rapporteur was not alone responsible for the fact that consideration of the topic had not yet gone beyond the stage of technical details, with discussion continuing on the distinction between "significant" and "appreciable" risk and between "harm" and "injury", on the basis of liability (causal, strict or absolute liability) and on the question whether it was desirable to cover, in addition to States, all participants in national life (private enterprises, multinational corporations) in order to ensure that no innocent victim remained without protection. There was a need to consider the topic in greater depth, to consult the experts and the competent international organizations and to hear States themselves. It was also necessary, as had already been observed, to apprehend the subject not in the abstract, but in the light of actual situations and specific activities which were generally agreed to pertain to the topic. There was also a need to avoid indulging in excessive generalization or conceptualization, or paying undue attention to the criterion of "acts not prohibited by international law".

37. He also had some doubts regarding the régime of notification and negotiation proposed by the Special Rapporteur. That régime, which was inspired by the one envisaged for the law of the non-navigational uses of international watercourses, was not appropriate in the present context, particularly where there was more than one affected State. More importantly, unless the proposed notification procedure was further circumscribed and explained, it would amount to an expression of guilt and could result in the assertion of a right of veto by the affected State. In an age when the effects of a unilateral activity, action or decision were not confined to the State of origin, the principle of prior consultation could not be considered as giving rise to an obligation for the affected State to give its consent, and still less as conferring upon it a right of veto. If the prior consultations did not lead to an agreement or an accommodation, they should not have the ef-

fect of making a lawful activity an unlawful one, which would then fall under the topic of State responsibility.

38. The fact was that the obligations of the State of origin were only to consult the potentially affected State, to take into consideration its views and interests and, in the event of an accident or damage, to make reparation or bear the legal consequences arising therefrom. He therefore thought that the Special Rapporteur should envisage a régime of consultation—and not of notification—more flexible than the one being proposed. He also entertained doubts regarding the role which a fact-finding commission could play in regard to environmental issues, transboundary harm due to cumulative effects, etc. Opinions might well differ and certain facts might escape scientific observation, with the result that a commission of that kind could create more problems than it would solve.

39. He agreed with Mr. Pawlak that the question of transboundary harm should not be treated only as one of inter-State relations but should be broadened to embrace mankind as a whole and the "global commons". The Special Rapporteur had therefore been right in extending the relevant part of the topic to transboundary harm caused to the environment. The problems of *locus standi* which had been raised in that connection were not insurmountable: there were international institutions which were competent to deal with matters relating to those global commons and which could represent the international community *vis-à-vis* the State of origin.

40. He agreed with Mr. Ogiso (2110th meeting) that it was necessary to go beyond "soft law", namely the principles of good-neighbourliness and good faith in negotiations.

41. Whether, in the case of the present topic, it was engaged in codification or in progressive development of international law, the Commission, with the help of the Special Rapporteur, should formulate within well-defined limits a comprehensive and coherent set of principles governing activities having visible and appreciable transnational—and not solely transboundary—effects, emphasizing not only liability and redress, but also prevention, co-operation and assistance: sharing of information, transfer of technology, disaster prevention and control, insurance, and civil protection at the national and international levels. Those were the elements which would give its full meaning to a topic which, for the time being, did not have a broadly acceptable practical basis.

42. The CHAIRMAN, speaking as a member of the Commission, said that, before commenting on the draft articles submitted by the Special Rapporteur, he would concentrate on four more general issues: the scope of article 1 and the concept of risk; the notion of "appreciable harm"; the obligation to negotiate; and the applicability of the proposed procedure to existing activities.

43. With regard to the problem of scope as defined in draft article 1, he noted that the Special Rapporteur, taking into account the opinions expressed in the Commission and in the Sixth Committee of the General Assembly, had decided not to apply the concept of risk as a factor limiting the scope of the draft to ultra-hazardous activities, but to extend the scope also to dangerous activities and to activities causing permanent harm (creeping pollution). It was doubtful whether that approach would prove acceptable

to States, which would wish to know the precise scope of the obligations they were assuming. Perhaps that could be achieved by formulating stricter wording for articles 1 and 2, or by attaching to them a list of activities which would include both categories—activities involving risk and activities causing permanent harm—making it clear from the outset that they were different categories which needed different treatment.

44. State practice showed that a “list approach” was not as impracticable as had been argued during the debate at the previous session. That approach had been adopted in many international instruments. Mention could also be made in that connection of the draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context which was being prepared by the Economic Commission for Europe and which contained a list of activities, leaving it to the parties to agree on a bilateral basis on further activities which did not appear in the list. Whether or not a list was included, the wording of draft articles 1 and 2 had to be improved and made more specific. That general definition could be supplemented by a list of specific activities which might be shortened or broadened by agreement between the States concerned.

45. In his fifth report (A/CN.4/423), the Special Rapporteur gave a more precise definition of the activities covered by the draft and provided a better picture of what was meant by the expression “jurisdiction or control”. It could be noted in passing that it was unnecessary to speak of “effective control”, not only for the reason given in the report (*ibid.*, para. 21), but also because the adjective “effective” in no way helped the cause of the developing countries. Moreover, the term “control” had not been introduced to limit the notion of jurisdiction but to cover situations where control without jurisdiction was exercised. The notion of “jurisdiction or control” was, however, limited in draft article 3 by the use of the formula “in its territory or in other places”. Yet jurisdiction was not normally confined to “territory or other places”. The use of that formula would seem to exclude the responsibility of States for the conduct of transnational corporations which were clearly under their control but which operated in other territories; such an exclusion was surely not intended by the Special Rapporteur. Another formula would have to be found, based perhaps on Mr. McCaffrey’s proposal (2109th meeting, para. 13).

46. The second issue was whether the term “appreciable” or “significant” should be used to qualify “transboundary harm”. Notwithstanding the extensive debate on that subject, many questions remained unresolved. It was true that, as pointed out by the Special Rapporteur, it was difficult to find a suitable formula to set a reasonable limit or threshold to transboundary interference; there was also agreement on the need to strike a balance between the protection of the environment and the increasing transboundary effects of human activity. Moreover, whatever the term chosen, it would necessarily be imprecise and lend itself to differing interpretations. It was also agreed that there was a difference between “appreciable” and “significant”: “significant harm” constituted to a higher threshold than “appreciable harm”.

47. It was therefore a matter of determining the threshold that would seem acceptable to States. For that purpose, it

was best to stay as close as possible to State practice and to study the new trends which were emerging. That was in fact what the Special Rapporteur had done by citing a large number of examples from international law and referring to the material presented by Mr. McCaffrey on the topic of international watercourses. However, the Special Rapporteur had then proposed the term “appreciable”. It was there that it was difficult to follow him, for all the examples from State practice which he cited (A/CN.4/423, paras. 80 *et seq.*) referred without exception to “significant risks”, to “significant impacts”, to “significant effects”, etc.: none of them spoke of “appreciable risk”. An analysis of more than 60 international instruments, judicial decisions, arbitral awards and other documents had also shown that the term “significant”, or an equivalent word, was the one most often used. In the circumstances, it was difficult to see on what basis the Special Rapporteur stated that “the concept of ‘significant risk’ . . . is in line with . . . ‘appreciable risk’” (*ibid.*, para. 91).

48. It could, of course, be argued that the threshold expressed by the term “significant” had already become obsolete, given the deterioration in the environment, and that there was therefore a tendency to use the term “appreciable”, which would then be included in the draft as a matter of the progressive development of international law. There again, however, it was apparent from an analysis of the most recent instruments which were or would become legally binding on States that the term “significant” continued to be the preferred formula. That was true of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities¹⁴ (art. 4) and the ECE draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context (paras. 1 and 5). The only conclusion to be drawn was that the Commission would be well advised to use the generally recognized term “significant harm”.

49. A similar problem of terminology arose with regard to the third issue on which he wished to comment, namely the obligation to negotiate as opposed to the obligation to hold consultations (chapter III of the draft). The obligation to negotiate represented in a sense the concluding stage in a series of procedural steps which had to be performed by all the parties with respect to the activities referred to in article 1 and the question was to determine the content of the procedural obligations of States.

50. The obligation to notify and inform the potentially affected State or an international organization seemed to be well established. In his view, international organizations should be mentioned because of the importance of their role in that field and the references made to them, for instance, in the 1982 United Nations Convention on the Law of the Sea.

51. There remained, however, the question of the further obligations incumbent on the State of origin. Was it under an obligation to hold consultations or also to conclude an agreement? According to the formulation of draft article 16, and as reiterated by the Special Rapporteur in his oral introduction (2108th meeting), an obligation to “negotiate a régime” was involved. That was obviously more than an

¹⁴ *International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868.

obligation to hold consultations or even to negotiate: it was an obligation to conclude an agreement. But that kind of obligation differed from the rule of general international law whereby States were required to settle their disputes by peaceful means, as stipulated in Article 33 of the Charter of the United Nations. The Special Rapporteur's proposal raised the question whether there existed in general international law or, more specifically, in the law governing the subject of liability an obligation of the kind he advocated.

52. In order to deal with that problem, a distinction had been drawn in the doctrine and practice of international law, and especially in environmental law, between "consultation" and "negotiation". The former involved talks between official representatives of States for the purpose of clarifying the respective points of view and, if necessary, of finding a solution or preparing negotiations, while the latter involved formal deliberations conducted with a view to the conclusion of an agreement. The difference was particularly evident in the annex to recommendation C(74)224 on "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974 (A/CN.4/423, para. 85), which provided only for an obligation to hold consultations. Moreover, all the instruments cited by the Special Rapporteur in illustration of State practice (*ibid.*, paras. 80 *et seq.*), as well as others which he did not cite, provided for an obligation to hold consultations, not to negotiate. That also applied to recently adopted conventions and conventions still in preparation. In other words, the obligation laid down in draft article 16 went well beyond the obligations currently incumbent on States and, if it were treated as a condition for the pursuit of the activities to be covered by the future instrument, it would certainly impair the chances for ratification of that instrument.

53. With regard to the last issue he wished to raise, namely the applicability of the proposed procedure to existing activities, the Special Rapporteur had pointed out that, although such activities were covered in draft article 10 by the reference to an activity which "is being, or is about to be, carried on", chapter III of the draft was actually formulated with a view only to planned activities. The Special Rapporteur also sought the Commission's views on whether the procedure provided for should be modified to take account of existing activities, stating that, in his view, such changes would be minor (*ibid.*, para. 119).

54. The differences between planned and existing activities, however, and still more between activities involving the risk of an accident and activities actually causing permanent harm, were far-reaching and could warrant different procedures requiring changes that were far from being "minor". Consequently, he would suggest that, for the time being, the procedure in chapter III should be applied only to planned measures and be confined to a provision of a general nature.

55. Turning to the texts of the draft articles, he reiterated that the reference in article 1 should be to "significant risk" and "significant harm" and that the possibility of including a list of such activities should be left open.

56. Draft article 2 did not adequately reflect the changes introduced by the Special Rapporteur in the scope of the draft. Since both activities involving risk and activities causing permanent harm were now covered, those two categories obviously had to be defined separately. Accord-

ingly, instead of laying down three definitions of risk in that article, it would be better to speak of activities involving significant risk of causing significant harm through an accident and of activities causing significant transboundary harm, meaning ongoing activities, and to define the two types of activities. He noted in that connection that the word "accident" was used for the first time in draft article 7 but had not been introduced or explained before.

57. Draft article 2 (*b*) qualified both categories as "activities involving risk", which was obviously incorrect since an activity which caused permanent harm no longer involved the "risk" of doing so because it had actually caused such harm.

58. He supported the elimination of the term "attribution" from draft article 3, for that pointed to the lawful nature of the activities covered by the draft. However, the article raised the problem of presumption. The State of origin was presumed to know or have "means of knowing" what was happening in its territory or in other places under its jurisdiction or control. That presumption should depend not only on quantitative criteria such as the number and type of vessels and aircraft available in relation to the areas to be monitored, as the Special Rapporteur suggested (*ibid.*, para. 37), but also on qualitative factors such as the availability of technology, which was of special relevance to developing countries. It might not be so easy, therefore, for a State to prove that it had no means of knowing. Moreover, as formulated, the presumption would work against the territorial State but not against a State having control over a transnational corporation operating outside its territory, since the reference to "jurisdiction or control" was limited to the "territory" or "other places". Furthermore, if the presumption was to be retained, good reasons should be given: it could not be taken for granted. As the ICJ had held in its judgment in the *Corfu Channel* case, the mere fact of the control exercised by a State over its territory and waters did not necessarily mean that it knew of any unlawful act perpetrated therein: such control did not in itself give rise to the responsibility of the State.¹⁵

59. Draft article 7, on co-operation, implied that the State of origin and the affected State should join efforts in combating transboundary pollution or the risk thereof. The reference it now contained to international organizations was timely and useful. The article therefore deserved support.

60. Draft article 8 likewise deserved support. As worded, however, it seemed to limit the obligation in question to the prevention or minimizing of the risk of harm, whereas it should also provide for the obligation to minimize actual harm. Furthermore, articles 8 and 9 rightly referred to any activity, whether undertaken by private or State entities, whereas most internationally agreed liability régimes provided for the liability of the operator. He wondered to what extent that should be reflected in those two articles.

61. Draft article 9 stressed the special nature, under the present topic, of reparation, which was concerned not with cessation and restitution but with restoring the balance of interests. The Special Rapporteur had found a form of wording that was flexible enough to allow for different forms of reparation in accordance with the diverse nature

¹⁵ *I.C.J. Reports 1949*, p. 18.

of the activities covered by article 1, and had rightly stressed that reparation would have to be the subject of negotiation between States.

62. In draft article 10, which dealt with the bulk of the obligations of the State of origin, the reference to existing activities or activities "being . . . carried on" should be placed between square brackets or deleted until the Commission had established a procedure for such activities.

63. Draft article 11 provided for a procedure for protecting national security or industrial secrets. It was a traditional provision, of the kind adopted by the Commission in the draft articles on the law of the non-navigational uses of international watercourses,¹⁶ and similar provisions were to be found in such instruments as the 1982 United Nations Convention on the Law of the Sea and the annex to the 1974 OECD recommendation to which he had already referred (para. 52 above). It would be useful to follow those provisions and adapt the wording of article 11 to them by deleting the reference to "procedure" in the title and, instead of granting the State of origin the right to invoke reasons of national security, simply to stress that nothing in the present articles would prejudice the right of that State to protect sensitive information.

64. Draft articles 13 and 14 did not call for any comment except to note that they referred to the "potential effects" of an activity, which was an indication that they were indeed directed at planned activities and not at existing activities.

65. Draft article 15 provided for the case in which, in the absence of a reply to notification, the legal régime proposed by the State of origin became operative. It was a reasonable solution. However, the rights of the potentially affected State should perhaps not be unlimited, since it could re-evaluate its position and put forward claims at a later stage. There was therefore a need to formulate some form of estoppel to enable a State of origin which received no reply to continue its activity without fear.

66. On the whole, articles 13 to 15 were based on a bilateral approach, as Mr. McCaffrey had pointed out, and further consideration should be given to whether they would be appropriate in the event of an accident causing widespread harm or in the case of creeping pollution, the effects of which were difficult to localize. The procedure envisaged in chapter III of the draft demonstrated, on the whole, how difficult it was to deal with ultra-hazardous activities and permanent transboundary harm at the same time.

67. Draft article 16 raised the problem to which he had already referred of the difference between the obligation to negotiate and the obligation to hold consultations. Consultations could, of course, lead to an agreed legal régime governing the activity in question, but it would be too inflexible to impose an absolute obligation on all States parties to conclude an agreement on all activities referred to in article 1. As to the two alternative texts proposed by the Special Rapporteur in paragraph 1, they seemed to complement each other rather than to be mutually exclusive.

¹⁶ See article 20 (Data and information vital to national defence or security) of the draft articles on international watercourses, provisionally adopted by the Commission at its previous session (*Yearbook . . . 1988*, vol. II (Part Two), p. 54).

68. Mr. BEESLEY said that he wished to draw attention to a book by the eminent jurist, Jan Schneider.¹⁷ It contained an excellent analysis of the distinction between strict liability and absolute liability¹⁸ and also some very good passages—which he quoted—on notification procedure, with many examples taken from recent conventions.¹⁹ Some of the precedents cited might allay fears over the idea of creating a precedent for an obligation to negotiate. The same author provided authoritative quotations (rather than interpretations) from the *Trail Smelter, Lake Lanoux* and *Corfu Channel* cases.²⁰

The meeting rose at 12.30 p.m.

¹⁷ J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979).

¹⁸ *Ibid.*, pp. 163-164 and 168.

¹⁹ *Ibid.*, pp. 52-53.

²⁰ *Ibid.*, pp. 48-50 *et passim*.

2112th MEETING

Tuesday, 6 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Bahama, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, 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. Roucouas, 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)

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.