

Document:-
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Summary record of the 2113th 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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For subparagraph (d), he would seek a definition of "appreciable risk" and "appreciable harm" based on a definable threshold.

Article 3

"1. The State of origin will not have the obligations set out in the present articles with respect to an activity referred to in article 1 unless it knew, or had the means of knowing, that the activity was being or was about to be carried on in its territory or in other areas under its jurisdiction or control."

Paragraph 2 of article 3 would be as proposed by the Special Rapporteur and the title would be "Limitations on applicability".

Article 6

"The exercise by a State of origin of its sovereign right to carry on or permit human activities in its territory or in other areas under its jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States."

Article 7

"1. States of origin shall co-operate in good faith with affected States in trying to prevent transboundary harm resulting from activities which create an appreciable risk of causing such harm.

"2. Where transboundary harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects."

Article 8

"States of origin shall, in accordance with chapter III, take appropriate measures to prevent or minimize the risk of transboundary harm."

84. He warmly thanked the Special Rapporteur for his efforts and looked forward to a comprehensive set of articles on the topic.

Organization of work of the session (*concluded*)^{*}

[Agenda item 1]

85. Mr. TOMUSCHAT asked whether for the next agenda item to be considered, jurisdictional immunities of States and their property, the articles dealt with in the Special Rapporteur's second report (A/CN.4/422 and Add.1) would be discussed separately or together.

86. The CHAIRMAN said that, since the Drafting Committee needed the views of the Commission on all parts of the draft, members should not be restricted to commenting on separate articles.

87. Mr. OGISO (Special Rapporteur) said that he was willing for the Commission to proceed either with an initial general discussion or on the basis of individual articles. However, since his preliminary report (A/CN.4/415) had not been discussed at the previous session, members might wish to comment first on that report, taking up the second report at a later stage if time permitted.

88. Mr. BARSEGOV said that, if members were not ready to comment on the topic of jurisdictional immunities

immediately after the introduction by the Special Rapporteur, the time saved at the next day's meeting could be used by any members still wishing to comment on the topic of international liability. The new concepts involved in the 17 revised or new articles on the latter topic warranted extra time for discussion.

89. The CHAIRMAN said that there could be no question of imposing a time-limit on speakers; however, any time saved from the next day's meeting would be needed by the Drafting Committee.

90. Mr. McCAFFREY suggested that, in order to facilitate orderly consideration, the draft articles on jurisdictional immunities of States and their property should be arranged in groups for discussion purposes. He pointed out that the preliminary and second reports on the topic were inter-related, and it was not feasible for members to deal with them separately.

91. The CHAIRMAN said that the practical problem would be resolved by consultation.

The meeting rose at 1.05 p.m.

2113th MEETING

Tuesday, 6 June 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, 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. 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)

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.

* Resumed from the 2109th meeting.

ARTICLES 1 TO 17⁵ (continued)

1. Mr. THIAM welcomed the efforts made by the Special Rapporteur to give substance to a topic that had been controversial from the start. It was true that the controversy was purely theoretical and would not stop States from using natural resources and placing the technologies available to them at the service of their activities. The Commission was nevertheless required to propose to States the rules that should govern their activities and to indicate the limits beyond which they must not go, the responsibilities they incurred and the means of settling their disputes. In order to be acceptable, those rules had to be clear, coherent, balanced and equitable.

2. He continued to believe that there was no clear-cut dividing line between the topic of State responsibility and the topic under consideration and that the two topics should have been dealt with at the same time, in a single draft. Proposals to that effect had, moreover, been made from the outset, but the fact was that responsibility had been divided into two parts and the Commission had embarked on a theoretical discussion of the underlying principles of both.

3. The Special Rapporteur was certainly trying to justify the autonomy of his topic in relation to that of responsibility for wrongful acts, but the introduction to his fifth report (A/CN.4/423) and, in particular, the part relating to the concept of risk showed that it was difficult for him not to refer at all to the concept of fault: the word itself was used repeatedly, as demonstrated by the examples he read out. He inferred that the Special Rapporteur identified risk with a kind of "original fault", which was triggered only if an accident occurred for which the person undertaking the activity was considered to be "at fault". All that sounded very much like responsibility for wrongful acts. The Special Rapporteur actually admitted (*ibid.*, paras. 40 *et seq.*) that the two types of responsibility might coexist within one and the same draft and went into a number of interesting details in discussing that possibility.

4. The question whether there really were two different types of responsibility had thus still not been answered. In that connection, it should be noted that, although the distinction between fault and risk had its origins in legal writings and case-law, the two elements derived from the same basic texts. What was being discussed now was, of course, international liability. But was it necessary for all that to seek basic differences between the two types of responsibility, since that would mean formulating specific rules on the concept of harm and the forms of reparation? Was it not significant that all the rules stated in draft articles 6 and 7 of part 2 of the draft on State responsibility (see 2102nd meeting, para. 40)—cessation of the act, *restitutio in integrum*, reparation by compensation, etc.—also applied, *mutatis mutandis*, to the topic under consideration?

5. The distinction between an "act" and an "activity" was even more delicate. An activity was a series of acts that were all linked together and, even if it was lawful in itself, it could consist of one or more wrongful acts. The Special Rapporteur pointed out that some wrongful acts were inextricably linked to an activity which was not prohibited and agreed that, in such a case, the activity could continue

provided that the wrongful act was discontinued. Yet if the wrongful act really was indissociable from the activity, how could the activity continue? In fact, the distinction between an "act" and an "activity" was more theoretical than real.

6. Generally speaking, the concept of activities not prohibited by international law was not sufficient to delimit the scope of the topic. To speak of "activities not prohibited" amounted to saying that whatever was not prohibited was allowed—a dangerous thing to say in law, where accuracy was of the essence; and to refer to custom or to the peremptory rules of international law was not enough to establish the distinction between what was lawful and what was wrongful. The solution of drawing up a list of the activities in question—which could be amended in the light of technological advances—therefore appeared to be called for.

7. The draft articles submitted by the Special Rapporteur embodied concepts which the Commission had already discussed at length, such as co-operation (art. 7), which had been dealt with in connection with the topic of the law of the non-navigational uses of international water-courses, and prevention (art. 8).

8. Reparation (art. 9) was a more difficult matter and he regretted that the concept had been dissociated from that of the innocent victim. On the one hand, innocent States did, of course, exist; in most cases, they were the victims of highly technical activities which they themselves did not have the means to undertake. On the other hand, however, the term "reparation" was not to be excluded, for it applied in cases where a wrongful act was committed in the context of an activity that was itself lawful and where the classical rules of traditional responsibility had to be invoked.

9. It was often said that the topic under consideration was very close to that of labour law, which offered examples of the type of situation where reparation did not cover all of the harm suffered. However, there was a danger of confusion on certain points: labour law applied in a national context, where solidarity was more pronounced, where the employer's interests were often linked with those of the worker and where everyone had a stake in the smooth operation of the enterprise. In such a case, reparation could not be based on the rules of ordinary law because account had to be taken of the need to ensure the survival of the enterprise. The same was not true of the topic under consideration, where solidarity was less strong in the regional or global context than in a bilateral situation. That was, moreover, why the regional framework would lend itself best to specific solutions. It was at the regional level that solidarity was most likely to operate, as shown by the tangible results achieved in that regard by regional organizations.

10. Bearing in mind that it was not possible to impose anything on States, but only to propose a kind of *à la carte* menu of possible solutions, the Special Rapporteur might shape the draft more along the lines of a framework agreement. A global solution, if not unattainable, still belonged to the very distant future.

11. In conclusion, he noted that, after years of work, the Commission had made no progress on the difficult topic before it, which was based on concepts that gave rise to endless controversy. That was why the proposed articles

⁵ For the texts, see 2108th meeting, para. 1.

were acceptable only in so far as they said nothing new in relation to other drafts on other topics.

12. Mr. BARSEGOV said that he first wished to emphasize that the question of the liability of States for transboundary harm was relatively new. It had been separated from the topic of State responsibility on the basis of the idea that liability could derive either from a fault—the violation of an international obligation—or from a lawful activity. The formulation of rules governing strict liability as a general principle was complicated by the fact that, in international law, that type of liability was an innovation and did not derive from agreements or conventions between States.

13. The absence of a general principle of strict liability was a recognized fact. In his fourth report (A/CN.4/413), the Special Rapporteur had already noted it as an objective reality. To arrive at that conclusion had not been an easy matter. Some members of the Commission had referred to national law, had invoked precedents which sometimes had only a very remote bearing on the topic under consideration or had ignored practice which was contrary to their opinions. Others had argued that internal legal practice was not a source of international law and that those few decisions of the ICJ which had been invoked were not related to liability: thus, in the often cited *Corfu Channel* case,⁶ the aim had been to define the right of innocent passage in territorial waters, not to settle the question whether a rule of strict liability existed in international law. As for the *Lake Lanoux* case,⁷ it was an exception to the rule. What mattered now was to find a realistic and balanced solution that would take account of the interests of all States and of mankind as a whole.

14. The Commission's task was to lay legal foundations and identify guiding principles as a basis for conventions and treaties regulating relations between States with regard to specific activities in the case of no-fault liability. The task was difficult because regulation by way of convention was extremely limited and could not serve as a source of rules on which new principles would be based. It had been necessary to proceed by trial and error and to improvise. After years of work, the Special Rapporteur had succeeded in sketching out a concept on which agreement seemed to be taking shape. Out of concern to find a balanced solution, he himself had supported the referral of the previous draft articles 1 to 10 to the Drafting Committee at the previous session.⁸ Even before the Committee had begun its work on those texts, the Special Rapporteur, influenced by some members of the Commission and some delegations in the Sixth Committee of the General Assembly, had proposed a new approach and had reworked the draft. The proposed new articles (arts. 10-17), as well as the revised versions of the previous draft articles, were based precisely on that new approach. Members of the Commission who did not agree with the new approach now had to state their views not only on the draft articles, but also on the concept upon which they were based.

15. The change of conceptual approach was evident from the start, in draft article 1. In appearance, the new concept was a dual one. As the basis for strict liability, the Special

Rapporteur was proposing not only transboundary harm resulting from an activity involving risk, but also any appreciable harm as such. The first question that arose was whether a lawful activity not involving risk could cause transboundary harm. When some members had stressed the need to draw up a list of activities involving risk, it had been stated that there were too many such activities, which were constantly increasing in number. When it came to harm as an autonomous basis for liability, however, the Commission was prepared to juggle with concepts which were difficult to define, such as "continuous", "possible", "hypothetical" or "future" harm. Members who were in favour of the new approach should therefore list the types of harm they knew of that derived from a lawful activity not involving risk. It would be seen that hardly any such activities existed, apart, according to the fifth report (A/CN.4/423), from the use of motor vehicles and domestic heating materials, and no one was sure any more exactly what was being discussed.

16. The draft had thus been modified and the basis of liability had become harm, out of any context. What was more, the so-called dualism was being presented as a compromise which took account of the different points of view. In fact, what was being imposed was a new conceptual basis which destroyed the earlier, already somewhat fragile one. A compromise could have been possible only between two reconcilable legal concepts. By trying to mix wine with oil, both were spoiled. The original concept, that of strict liability, did of course comprise the concept of harm, but as the final link in the causal chain. The new approach made harm the sole basis of such liability, thus giving it a completely different role. The two concepts were mutually exclusive. If it were agreed that, in the absence of any fault, effective harm was a source of liability without any element of risk being involved, liability based on appreciable harm would always exist, independently of risk. The only reason why the new concept did not consign the element of risk to oblivion was that to take the fact of harm as the sole basis would deprive measures for prevention of the harm of all legal foundation. How could a State be obliged to limit its lawful activities in co-operation with other States if the possibility of harm was not even postulated?

17. If harm was artificially removed from its context and taken as the sole basis for international liability, there would be no way of establishing the lawful origins of liability. To say that harm might take the form of a violation of territorial sovereignty (each State having freedom of action in its own territory as long as it did not encroach on the territorial inviolability of other States) would be to re-enter the area of responsibility for wrongful acts. He had very serious doubts about the validity of such a legal approach. The Special Rapporteur himself seemed to be aware of the problem, for he had retained the concept of risk, even though it was considerably watered down. From the legal point of view, however, it was not possible to juggle two types of liability back and forth, substituting one for the other as necessary. One or the other had to be chosen.

18. Having dealt with the legal aspects of the question, he wished to go into the "social" ones, namely those relating to the purpose of the draft articles. Speaking in the Sixth Committee on behalf of a number of advocates of the new approach which had now been adopted by the

⁶ See 2108th meeting, footnote 10.

⁷ See 2110th meeting, footnote 13.

⁸ See 2108th meeting, footnote 5.

Special Rapporteur, one representative had stated that the crux of the matter was not liability in the narrow sense, but the principles of good faith, equity and *sic utere tuo ut alienum non laedas*. He personally did not see why a definition of strict liability which would include the element of risk necessarily had to exclude good faith, equity and the obligation not to harm others. He also did not believe that it was equitable to adopt a definition of liability under which a State that was pursuing a lawful activity without breaking the rules of international law would be treated as an enemy—for was it not true that the terms “innocent victim” and “reparation” were used as though the State of origin were guilty of a violation of international law? To refuse to regard the State of origin as an innocent victim on the same basis as the affected State was to overlook the essential difference between harm which occurred during a lawful activity and harm which resulted from an infringement of the law. In the second case, the harm was caused deliberately or as a result of criminal negligence and the State which had committed the offence or the violation, far from suffering from it, derived political, military or other advantages from it. In the first case, however, the harm was not intentional and its effects were not selective, for it was the State of origin which suffered from it first, and more than other States.

19. The new approach which now formed the basis of the draft articles was primarily the result of the fear that the concept of risk would have the effect of limiting liability: those in favour of the new approach wanted liability to extend to all harm independently of risk and thereby to solve all the problems at one fell swoop. They feared, they said, that taking risk into consideration would lead to situations where there was no longer a relationship between minimum risk and maximum harm. But was anyone suggesting that, in the evaluation of risk, only the reliability of facilities should be taken into account, to the exclusion of the extent of potential harm? He was also not convinced by the argument that only harm could be determined precisely, since risk was impossible to measure. On the contrary, it seemed to him that, if the activities covered by the draft were not listed, potential harm could not be determined without an evaluation of risk. When one spoke of an activity involving risk, one did not mean that the activity itself was the cause of the harm, but only that it introduced a heightened element of danger that might get out of control. In order for harm resulting from an accident to constitute transboundary harm, certain conditions had to be met. The probability of transboundary harm was defined both by constant geographical factors, such as the proximity of a border, and by natural factors that varied according to daily, seasonal or annual cycles, such as wind direction, the amount of precipitation, etc. A single activity could, moreover, involve differing risks depending on economic and technological conditions. Joint research carried out by interested States and organizations had led to advances in evaluation methods and, on the basis of those methods, which were now fairly sophisticated, risk and harm could be evaluated: it was possible, for example, to determine, for various locations, the amounts of pollution that were still within the limits of harm permissible for ecosystems shared by more than one State. For those reasons, he believed that the evaluation of harm and the evaluation of risk were closely linked and interdependent and that one could in no circumstances be placed in

opposition to the other, as appeared to be done in draft article 1. All of the internal contradictions inherent in the new approach had to be removed and a unified and integrated approach had to be adopted, for, otherwise, no progress could be made.

20. The new approach adopted by the Special Rapporteur was naturally reflected in the texts of the other articles he proposed. He had thus lowered the threshold beyond which appreciable harm generated liability. In draft article 2 (c), transboundary harm was defined as follows: “Under the régime of the present articles, ‘transboundary harm’ always refers to ‘appreciable harm’”; it would therefore be enough if harm could be recorded by detection devices for appreciable harm to have occurred. He himself believed that caution was called for in that regard and he agreed with those who thought that a specific, higher threshold must be established for liability.

21. According to the Special Rapporteur (*ibid.*, para. 56), the purpose of draft article 6 was to establish a correlation between two aspects of the concept of sovereignty (limited freedom of action with regard to lawful activities taking place in a State’s territory; and limited inviolability with regard to the adverse transboundary effects of activities carried on outside a State’s territory). He himself did not think that the question could be seen in terms of lawful acts, for if it were, all those relationships would be beyond the scope of the topic.

22. The entire system of international co-operation in respect of prevention of and compensation for harm both in the territory of the State of origin and in that of the affected State was based on an approach in which risk was an essential element. The Special Rapporteur retained that foundation for the special régime provided for in the draft, even though the existence of risk was no longer acknowledged as an essential element of liability. It was, however, impossible to perform a balancing act between two different approaches and, unfortunately, the balancing act collapsed on a very important matter, that of co-operation. The revised text of draft article 7 was based on the philosophy of “alienation” or opposition between the “victim” and the party that was considered, implicitly if not explicitly, to be guilty. He did not understand the reasons for deleting the well-balanced provision contained in paragraph 2 of the previous draft article 7, according to which the duty to co-operate with the affected State fell upon the State of origin and vice versa. The article now provided that that obligation existed only “in the event of harm caused by an accident”, whereas, according to the concept of no-fault liability, harm was always attributable to unforeseeable circumstances in the nature of *force majeure*. The article also stipulated that the affected State would co-operate with the State of origin “if possible”. No one was required to do the impossible, of course, but why should that be indicated explicitly only with regard to the affected State? It was strange that co-operation should be limited in that way in articles which, according to some members of the Commission, were intended to enunciate general principles. He was, however, glad to see that article 7 now provided for the possibility of recourse to international organizations, in view of the growing role of those organizations.

23. He would comment only generally on the new draft articles 10 to 17. Like many other members of the

Commission, he found them to be too rigid because they had been artificially transplanted from the topic of the law of the non-navigational uses of international watercourses to a very different subject-matter which corresponded on only a few points.

24. In conclusion, he said that he had not had the impression from the discussion in the Sixth Committee that a radical change in the conceptual basis for liability was required. Some delegations had not dealt with the question at all, others had suggested a new approach, and still others, including France, Guatemala, Jamaica, the Soviet Union and the United States of America, had opposed such an approach. It could not be said that one opinion had clearly dominated the others, just as such a conclusion could not be drawn from the Commission's discussion at its current session. In any event, in trying to find a solution that would reconcile all points of view, it must not be forgotten that the solution had to be based on legal theory and practice.

25. Mr. RAZAFINDRALAMBO, referring the Commission to what he had said on the concept of risk at the previous session,⁹ noted that the Special Rapporteur had indicated that he was not including isolated acts, namely acts which did not form part of an activity, in the concept of an "activity" in order to avoid the problem of absolute liability. Account would, however, have to be taken of acts, such as some nuclear tests, which, although isolated, were none the less repeated at certain intervals. Mr. Calero Rodrigues (2112th meeting) had made some very pertinent comments on that subject.

26. The concept of "territory" did not seem necessary in the draft, as the concepts of "jurisdiction" and "control" would cover all eventualities: those were, in fact, the terms used in article 194, paragraph 2, and article 206 of the 1982 United Nations Convention on the Law of the Sea. He also continued to believe that it would be better to refer to "effective" control, especially when it applied to activities; the amended text of draft article 1 proposed by Mr. McCaffrey (2109th meeting, para. 13) was much clearer in that regard.

27. Since the modern-day trend was towards the economic integration of States and the abolition of customs and tax barriers, the concepts of territorial jurisdiction and control might rapidly become outdated, at least in economic terms. It would therefore be better to refer to "control over activities", which better reflected the true situation in today's world, where it was transnational corporations, not States, that controlled the major industrial and commercial enterprises. There was no justification either for the use of the expression "throughout the process", for it seemed to exclude harm which occurred after an activity had ceased. The problems referred to by the Special Rapporteur in his fifth report (A/CN.4/423, para. 32) in connection with the case where a State exercised control over a territory in violation of international law would not arise if the concepts of jurisdiction and control were applied to activities rather than to places. The population of the affected State could be protected, as the Special Rapporteur noted, by assigning jurisdiction to an international body such as the United Nations Council for Namibia. Moreover, as Mr. Beesley had suggested, the Commission should consider the poss-

ibility of regarding international agencies as "affected agencies"—for example, the International Sea-Bed Authority in respect of damage to the common heritage of mankind.

28. With regard to draft article 3, he noted that Mr. Njenga (2112th meeting) had already described the consequences it would have for developing countries. He himself would refer only to the problems raised by the presumption contained in paragraph 2. The Special Rapporteur himself acknowledged (A/CN.4/423, para. 37) that evidence to counter the presumption that the State of origin had the knowledge or means or knowing that an activity was being carried on was very difficult to establish, but then went on to use arguments that were by no means convincing to show that, in the present instance, that would not be so difficult to do. For the State of origin, evidence consisted not only in showing that it did not know or did not have the means of knowing that an activity was being carried on, but also in demonstrating that it did not know or did not have the means of knowing that such an activity was capable of causing transboundary harm: that required technological know-how that few developing countries possessed. Evidence to counter the presumption was all the more difficult in the present case because the activities in question were carried on by foreign companies and, in particular, by transnational corporations, whose interests were not necessarily the same as those of the State of origin.

29. With regard to reparation (art. 9), he again referred to the comments he had made at the previous session.¹⁰ He would, however, suggest, in order to meet the concerns expressed by some members, and in particular by Mr. Reuter (2110th meeting), that the word "reparation", which belonged to the realm of responsibility for wrongful acts, should be replaced by "compensation", which was more neutral. Reference was made, for example, to prompt, adequate and equitable compensation in cases of nationalization, and article 235 of the United Nations Convention on the Law of the Sea also provided for "prompt and adequate compensation" in respect of damage caused by pollution of the marine environment.

30. He would make only a few preliminary comments on the new draft articles 10 to 17, which were essentially procedural provisions.

31. With regard to draft article 16, it could be asked whether the principle of the obligation to negotiate should not be included in chapter II of the draft, leaving the modalities of application in chapter III.

32. It would be difficult to impose upon the State of origin a systematic obligation to notify. In the case of existing activities, an obligation of that kind would be rather unrealistic. A transitional régime might be established or a list could be drawn up of activities for which notification would be compulsory.

33. It would be a particularly delicate task for developing countries to apply the "reason to believe" test set out in draft article 10 and to review the technical data concerning the activities being, or about to be, carried on in their territory before informing the affected State or States.

34. It was, however, primarily draft article 12, which provided for a warning by the presumed affected State,

⁹ Yearbook . . . 1988, vol. I, p. 37, 2048th meeting, para. 43.

¹⁰ Ibid., para. 45 in fine.

that seemed to be theoretical in nature, at least as far as North-South and South-South relations were concerned. Moreover, when the affected States were very far away from the State of origin, as was sometimes the case, such a warning could be interpreted as an attempt to interfere in the internal affairs of the State of origin.

35. On the whole, the proposed procedural measures would be practicable only in a regional context and between countries having roughly the same technical and financial resources. If it was intended for developing countries to be able to make use of those measures, pride of place would have to be given to international technical assistance and co-operation, and provision would have to be made for a genuine compulsory mechanism of consultation with the competent international organizations, as had been done in articles 197 *et seq.* of the United Nations Convention on the Law of the Sea.

36. Mr. HAYES said that, in chapter III of the draft, the Special Rapporteur was, in accordance with the intention he had expressed at the previous session, proposing a set of provisions on the procedures to be followed to prevent the risk of harm and to remedy the harm caused, since risk and harm were, according to the revised draft article 1, the two bases for liability. He had two comments to make on those provisions.

37. First, he believed that measures for prevention and measures for reparation should be dealt with in separate articles. That might well be the Special Rapporteur's intention, since draft articles 10 to 17 did not seem to contain any provisions dealing directly with reparation. However, the introductory clause of article 10 covered all activities referred to in article 1, namely those causing harm and those involving risk of harm. It might therefore be concluded that the provisions which followed related both to measures to prevent harm and to measures to be taken in mitigation of harm. Mitigation of harm would, however, more properly find its place in draft articles relating to reparation. Even at the cost of some repetition and for the sake of clarity and logic, a careful distinction had to be drawn between the two categories of measures.

38. Secondly, if the draft articles were to serve not only as guidelines for States seeking to establish their own régime, but also as a residual régime which would apply in the absence of a specific régime, they had to strike a balance between the first two of the three principles set out in the Commission's report on its thirty-ninth session and to which he had referred earlier (2109th meeting, para. 40). Those two principles were embodied in draft article 6, which specified that: "The sovereign freedom of States to carry on or permit human activities in their territory . . . must be compatible with the protection of the rights emanating from the sovereignty of other States." He did not refer to the third principle, relating to the rights of the innocent victim, because in his view it applied more to reparation than to prevention.

39. The question arose whether the proposed measures were not too detailed, either as guidelines or as a residual régime, given the wide variety of situations to which they would have to apply. It was true, as the Special Rapporteur had indicated, that those provisions were inspired by the Commission's work on the law of the non-navigational uses of international watercourses, as well as by various author-

ties and instruments. Other sources could be added, particularly two instruments adopted that year: the first was a legally binding instrument, namely, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,¹¹ adopted on 22 March 1989 under the auspices of UNEP, and the second was a more general instrument, namely the Hague Declaration on the Environment of 11 March 1989,¹² in which the representatives of more than 20 States from all parts of the world had called for the development of new principles of international law in that field.

40. The question of the content of the procedural draft articles therefore called for in-depth consideration. Although he was convinced of the need to encourage States to adopt specific régimes, to give them guidelines for such régimes and to propose a residual régime by providing for procedures of notification, consultation, exchange of information and—contrary to Mr. Graefrath's opinion (2111th meeting)—negotiation, it was not yet clear to him what details should be included in those provisions.

41. Lastly, he had two preliminary comments on draft article 10. First, since the time factor seemed very important with regard to procedure, it might be preferable in subparagraph (b) to replace the word "timely" by "early", along the lines of draft article 14, which specified that the State which had been notified must communicate its findings to the notifying State "as early as possible", thus showing that the reply to the notification had to be made urgently. Secondly, subparagraph (d) should refer to the measures which the notifying State "is taking or proposing to take" rather than to those which it "is attempting to take".

42. He hoped that he would have an opportunity for further discussion of the extremely dense and complex provisions presented in sections IV to IX of the Special Rapporteur's fifth report (A/CN.4/423).

43. Mr. AL-BAHARNA noted with satisfaction that, in his fifth report (A/CN.4/423), the Special Rapporteur had not only revised the 10 draft articles referred to the Drafting Committee at the previous session, but also proposed eight new draft articles. He particularly welcomed the amendments to the articles that had aroused controversy in the Commission and in the Sixth Committee of the General Assembly and urged the Commission to do everything possible to arrive at a consensus on the scope and nature of the present topic so that it could make progress and thus silence the sceptics who did not believe that it served any purpose to codify the rules of international law on the topic.

44. He had always felt that the scope of the topic could not be limited to activities involving risk. In his view, there was no special reason why liability for transboundary harm caused by activities carried on under the jurisdiction of a particular State should have been excluded. He was not, however, suggesting that the "risk" factor should be dispensed with. The Commission should adopt a dual approach, making "harm" or "injury" the criterion for

¹¹ See 2112th meeting, footnote 6.

¹² *International Legal Materials* (Washington, D.C.), vol. XXVIII (1989), p. 1308.

liability and "risk" the criterion for preventive measures. There remained the question whether the "risk" factor should be completely excluded as a basis for liability. He had an open mind on that question, but could in principle go along with the idea that hazardous activities which carried the risk of disastrous consequences in the event of an accident should give rise to liability.

45. The Special Rapporteur, who admitted in his report that he could not "disregard the important body of opinion in the Commission which prefers not to use the concept of 'risk' as a limiting factor" and considered that "such thinking can be incorporated in the draft articles" (*ibid.*, para. 12), had proposed a revised article 1 that would be acceptable apart from certain conceptual and terminological shortcomings. The expressions "in other places under its jurisdiction as recognized by international law" and "in the absence of such jurisdiction, under its control" were rather vague. For one thing, it was difficult to know what was meant by the expression "as recognized by international law". He therefore suggested that the article should be amended to read:

"The present articles shall apply to activities carried on in the territory of a State or in other places under its jurisdiction or control, when the physical consequences of such activities cause, or create the risk of causing, transboundary injury."

That form of wording might help to avoid controversy as to whether or not international law recognized the jurisdiction of a State in a particular case.

46. With regard to draft article 3, it seemed to him to be a deviation from the basic principles of law to make liability conditional on the fact that the State of origin knew or had means of knowing that an activity was being, or was about to be, carried on in its territory. While he was sympathetic to the Special Rapporteur's wish to safeguard the interests of developing countries, he was not certain whether that was the best way of doing so. For one thing, the condition was formulated in general terms so as to apply to all States; moreover, it would appear to narrow liability considerably. Although he had no substantive objection to its inclusion in article 3, he would like the Commission to reconsider the knowledge test. As to the change in the title of the article, he considered that the former title ("Attribution") was not appropriate and that the new one ("Assignment of obligations") was misleading. In his view, since the main purpose of the article was to establish the circumstances under which a State was liable, the article could be entitled "Proof of obligations".

47. As to draft article 4, he was not certain at the present stage whether the outcome of the Commission's work would be a multilateral convention or a sort of restatement of the law. If it were the former, the subject-matter of the article would be governed not by paragraph 2 of article 30 of the 1969 Vienna Convention on the Law of Treaties, but by paragraph 3, according to which, in the case of successive treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". That, however, was not what was stated in draft article 4, which provided that "the present articles shall apply subject to that other international agreement". If, on the other hand, the outcome of the work was not to be a multilateral convention, article 4 might not be strictly necessary.

48. He was a little puzzled by the two alternative texts of draft article 5. In his view, the explanation given by the Special Rapporteur (*ibid.*, paras. 40-54) did not put an end to the debate on the question whether the form of liability under consideration was based on fault or not. It would be better to avoid theoretical discussions and to adopt a pragmatic approach, as the arbitrators had done in the *Trail Smelter* case.¹³ Neither of the proposed texts was really necessary: the matter would be best left to the general rules of international law and to the law of treaties.

49. He was in general agreement with the revised draft articles 6, 7 and 8, which were an improvement on the corresponding previous provisions, although the drafting could perhaps be further improved.

50. Draft article 9, on reparation, gave rise to some problems. As reparation was an important aspect of the legal régime being established, the Commission should examine the concept at some length. One question which arose in that connection was what range of remedies was to be included in the concept of reparation. In private law, reparation meant payment for an injury and redress for a wrong. Thus defined, reparation was probably not confined to pecuniary damages. But what forms did non-pecuniary damages take? The Commission would have to examine that issue because the acceptability of the instrument it was formulating would depend in no small measure upon the operational significance of reparation.

51. The drafting of article 9 also required improvement. The opening words "To the extent compatible with the present articles" were unnecessary; nor was there any need to refer to the "balance of interests" theory. Moreover, since the Commission was now simply enunciating the principle of reparation, it might not be necessary to specify that reparation would be "decided by negotiation". The best course would be to state the principle of reparation in as simple and direct terms as possible.

52. He welcomed the new draft articles 10 to 17 concerning, *inter alia*, notification, information, negotiation and consultations and appreciated in particular the Special Rapporteur's efforts to keep up the momentum on what was probably the most difficult topic before the Commission. Given the progress made at the previous session, it should be possible to see light at the end of the tunnel before long. As he had been unable to examine those new articles in detail, due to lack of time, his comments would be of a preliminary nature.

53. With regard to methodology, the Special Rapporteur had apparently followed the model of the corresponding provisions of the draft articles on the law of the non-navigational uses of international watercourses. While those draft articles could probably not be disregarded, they were not the best model for provisions that would apply not only in the case of pollution of international watercourses, but also in many other situations. The best course would have been to draw up a more general régime on the basis of the one provided for international watercourses. The Special Rapporteur had not done that, and was proposing a more rigid notification procedure than that envisaged under the international watercourses régime. The Commission might wish to adopt a more generalized procedure.

¹³ See 2108th meeting, footnote 9.

54. Furthermore, he did not think that the dictum of the ICJ in the *Fisheries Jurisdiction* cases, on which the Special Rapporteur had relied for the title of draft article 16 (Obligation to negotiate), applied "almost word for word" to the situations arising under the present topic, as the Special Rapporteur argued (*ibid.*, paras. 134-135). In those cases, the Court, which had been called upon to decide the relative rights of the United Kingdom and Iceland, and of the Federal Republic of Germany and Iceland, in areas of coastal sea in which the respective parties had claimed certain fishing rights, had considered it expedient to direct them to negotiate: it was by virtue of that decision that an obligation to negotiate arose. It could not, however, be inferred therefrom that there was an obligation to negotiate in cases involving transboundary risk or harm. Admittedly, States did negotiate in such cases, but that was not the same as saying that there was an "obligation" to negotiate. He therefore suggested that the title of article 16 be amended to read simply "Negotiation". Of the two alternatives texts proposed in paragraph 1, he preferred alternative A, which was simpler and would be quicker to implement than alternative B.

55. Lastly, he considered that the draft articles relating to the consequences of failure to comply with certain procedures were unduly complicated. That was particularly true of draft article 12, which provided for a warning by the presumed affected State, and draft article 15 on absence of reply to notification. He urged the Commission to review articles 10 to 17 with a view to making them less procedure-oriented. In cases of transboundary risk or injury, States must be able to act without being hampered by procedure.

56. Mr. YANKOV, expressing appreciation to the Special Rapporteur for his valuable fifth report (A/CN.4/423), said that draft article 1, on the scope of the articles, was a significant departure from the previous version, for, by establishing a link between risk and harm—the two bases of liability—it determined the general rules which were to be formulated and which would apply equally to activities involving risk and activities causing harm. Those rules should, in his view, have a triple purpose, namely to lay down guidelines to be followed by States in concluding bilateral, multilateral, regional and global agreements; to give special emphasis in those guidelines to prevention without losing sight of the question of compensation; and to make the duty of co-operation the basic starting-point, whatever the procedural rules adopted.

57. Like a number of other members of the Commission, he considered that certain expressions used in the draft were not felicitous, such as "places under its jurisdiction or control", which recurred frequently and which could be replaced by "areas under its jurisdiction or control".

58. He did not think that the revised draft article 7, on co-operation, represented any significant advance, since it contained expressions that were open to different interpretations.

59. Draft article 8, which concerned the important principle of prevention, seemed to him to be too vague and should be elaborated somewhat. To say, as the Special Rapporteur did in his report, that "States will also have to enact the necessary laws and administrative regulations to incorporate this obligation into their domestic law, and will have to enforce those domestic norms" (*ibid.*, para. 66)

was to see only the national dimension of "appropriate measures" of prevention. To be effective, particularly in the case of high-risk activities and activities which might have transboundary effects, national measures of prevention should encompass international rules and standards elaborated directly by the States concerned or through the competent international organizations, as provided for in article 197 of the 1982 United Nations Convention on the Law of the Sea.

60. With regard to draft article 9, he wondered what in fact constituted the legal foundation of reparation within the framework of the present topic—reparation which, as the Special Rapporteur pointed out (*ibid.*, paras. 69-70), did not derive from responsibility for wrongfulness. The Special Rapporteur stated that such responsibility appeared to be governed by the nature of the "costs allocation" and that, accordingly, it should seek to restore the "balance of interests" affected by the harm. It would then be more a case of "compensation", however, based on the principle of equity. Moreover, reparation, as understood in that context, seemed to raise several problems. For instance, how could the State of origin be determined when the injurious effect was due to multiple factors and was particularly widespread?

61. Turning to the new articles of chapter III of the draft and specifically to article 10, he said that assessment as such (subpara. (a)) should be the subject of a separate article, since it involved a whole series of technical operations, such as evaluation of the potential risk, surveillance, measurement, analyses and standard-setting, which had nothing to do with formalities like notification and information. It would therefore be preferable to link the provisions in subparagraphs (b), (c) and (d), which laid down procedural rules, with the following procedural articles, on the basis of the example of part XII, section 2, of the United Nations Convention on the Law of the Sea.

62. He agreed with a number of other members that draft articles 11 to 17 should be more concerned with the concept of co-operation and be less rigid and specific, since care should be taken not to reproduce the procedure contemplated for the law of the non-navigational uses of international watercourses. In particular, the obligation to negotiate (art.16) should be based not so much on the principle of the peaceful settlement of disputes—although that should not be ruled out altogether—as on the duty of co-operation.

63. Lastly, he said that, in his view, the draft articles required further consideration by the Commission before they were referred to the Drafting Committee.

64. Mr. KOROMA paid tribute to the Special Rapporteur for his work on a complex topic which was not unrelated to State responsibility and the law of the non-navigational uses of international watercourses and which, despite the fact that it had originally been intended to cover only space activities and nuclear energy, had developed over the years, although the Commission still did not have a very clear idea of what it should cover.

65. Like several other members, he considered that the Commission should be less ambitious. Rather than aspiring to produce a framework agreement, it should be content to formulate legal principles that could serve as guidelines for States in their bilateral and regional relations.

The object, in a nutshell, was to govern activities carried on under the jurisdiction of a State which caused trans-boundary harm. It could even be argued that a single article, imposing an obligation on every State not to cause injury or harm to its neighbours through its activities, would suffice.

66. Consequently, liability should have as its basis not risk—in which event the topic would be impossible to deal with, since any activity, for example the construction of a dam or a nuclear plant, involved a modicum of risk—but harm. In determining liability, it was necessary to take account, apart from risk, of such factors as causation, foreseeability and presumption of negligence (*res ipsa loquitur*) to see whether the victim had contributed to the harm caused, so as to mitigate the harshness of strict liability. He would therefore encourage the Special Rapporteur to set out the criteria which took account of those elements and which could supplement those already mentioned in his fifth report (A/CN.4/423). The Special Rapporteur should also consider how liability was to be determined. Only then could the Commission deal with the procedural rules, assuming that such rules were required.

67. It had been suggested that consideration of the present topic should be extended to certain aspects of environmental law. While he conceded that there were certainly similarities between the two fields, the latter was much broader than the former, since it covered, for instance, maritime spaces, outer space, the Arctic and the Antarctic, the ozone layer, and conservation of water and other natural resources. The Commission might also wish to make environmental law a separate agenda item, which it could study with the assistance of experts. It would not be advisable, however, to make it an adjunct of the topic under consideration.

68. Lastly, it would not be advisable, in his view, to refer the draft articles to the Drafting Committee at the present stage.

The meeting rose at 6.05 p.m.

2114th MEETING

Wednesday, 7 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. 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. DÍAZ GONZÁLEZ said that, like Mr. Beesley (2110th meeting), he saw the present topic as an exercise in the progressive development of international law. The Commission must therefore be willing to study related topical issues of concern to States, precisely because its aim was to develop the law to govern certain activities, to seek to prevent the harm they might cause, and to ensure that such harm did not go unpunished.

2. However, the draft articles raised problems of legal definition and of legal methodology and language. As Mr. Reuter (*ibid.*) had said, the length of time the topic had been on the Commission's agenda did not warrant so hasty a dispatch of the draft articles as to obscure those fundamental problems. The Special Rapporteur, in attempting to define the fundamentals of the topic, had looked for a foothold and had introduced the concept of activities involving risk. Yet such activities themselves were not prohibited by international law. That was a difficulty which had to be resolved; there could be no question of merely producing a set of draft articles and leaving it to the Drafting Committee to solve the fundamental problems. In defining obligations, whether of negotiation or of prevention, the Commission must determine the purpose of those obligations and hence determine the basis of the liability involved.

3. It had been suggested that a link should be forged between the concept of risk and the concept of harm, so that liability would not be based solely on risk, and that meant devising an appropriate legal régime. In positive law, special régimes were elaborated in the context of specific agreements or conventions, perhaps under the auspices of judicial or arbitral machinery, as in the *Trail Smelter* case.⁶ Reference had already been made to the conventions on the peaceful use of nuclear energy, on pollution of the seas by oil or other contaminating substances, and on space objects. In all those cases, the liability was strict liability, arising only when harm was caused, and State responsibility could be incurred only if the State had failed in its duty of diligence. Liability for risk, however, could arise only where there was no internationally wrongful act. The scope for

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. I.

⁶ See 2108th meeting, footnote 9.