

Document:-
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Summary record of the 2182nd 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:-
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affected by transboundary harm, an international organization with competence in that area was also to be notified; but he doubted that that was an obligation. Article 12 stated that any international organization that intervened was to participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter was regulated therein, and, if it was not, the organization was to use its good offices to foster co-operation between the parties. There again, he was not sure about the possible role being attributed to international organizations.

16. He had considerable doubts about the need for draft article 17 and also about the justification for the very concept of a "balance of interests", which, although it might prove useful from the theoretical point of view, did not deserve a place in the draft articles from the practical point of view. Furthermore, in the sixth report, the Special Rapporteur himself confessed to "a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework" (A/CN.4/428 and Add.1, para. 39).

17. Lastly, the Special Rapporteur had been too cautious with the wording of draft article 20. Prohibiting an activity was a serious matter, but, when it was obvious that an activity was about to cause or was causing considerable harm, the activity became wrongful by that very fact and its prohibition should unquestionably be stated in the form of a rule. It might even be possible to define harmful effects by choosing a ceiling that was not too low. However, the only prohibition provided for in article 20 was the refusal to authorize the activity in question, leaving the operator complete discretion for proposing less harmful alternatives.

18. Mr. BEESLEY said that, although he was not yet prepared to take the floor, he fully endorsed the comments made by Mr. Calero Rodrigues.

19. It seemed to him that the new articles proposed by the Special Rapporteur, despite being based on a variety of opinions, reflected a retreat on a number of points and a departure on others at a time when the Commission was making definite progress in its pioneering work. The approach appeared to be so narrow as to run counter to the objective sought. He was particularly troubled by the emphasis placed on dangerous substances, some of which were already the subject of instruments in force, and above all by the shifting away from harm to *ex post facto* risk as the basis for liability.

The meeting rose at 10.45 a.m. to enable the Planning Group to meet.

2182nd MEETING

Thursday, 28 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/423,² A/CN.4/428 and Add.1,³ A/CN.4/L.443, sect. D)⁴

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he wished to clarify certain points raised in the statements made at the previous meeting. In the first place, he wished to reassure Mr. Beesley that the introduction of the concept of "dangerous substances" did not mean any radical departure from the earlier approach. In fact, the approach was still the same: provision was being made for activities which had harmful effects.

2. The concept of "dangerous substances" helped to make the key notion of "appreciable" or "significant" risk more precise. It was in the nature of an alarm signal for any operator using such substances, and for his Government: both knew that certain obligations were incumbent upon them and that certain precautions were in order. The introduction of that concept thus eliminated the uncertainties involved in one of the two aspects of "appreciable" risk: that of its being "foreseeable" or "appreciable at first sight" after a simple examination.

3. Mr. Calero Rodrigues had said that the concept of "dangerous substances" was unduly narrow, citing the example of a dam: water was in itself not a dangerous substance but could cause transboundary harm. Water could thus be considered dangerous in certain quantities or concentrations or in certain situations, "without prejudice to the provisions of subparagraph

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

² Reproduced in *Yearbook* ... 1989, vol. II (Part One).

³ Reproduced in *Yearbook* ... 1990, 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 2179th meeting, para. 29.

(a)", as stated in draft article 2, subparagraph (b). In his sixth report (A/CN.4/428 and Add.1, footnote 34), a somewhat similar example was mentioned: crude oil was not normally a dangerous substance, but it became so if 200,000 tons of it were carried in a ship. That point should perhaps be made clearer in the text of article 2.

4. The most important issue touched on by Mr. Calero Rodrigues was, however, prevention. The text of subparagraph (m) of article 2 did not exactly reflect the intention of the draft, which was to refer to measures to prevent the occurrence of an incident and measures to contain or minimize the harmful effects of an incident once it had occurred. Both types of measures were preventive: the first to prevent the incident and the second to prevent the harm from occurring, totally or partly. Containing, minimizing or mitigating were equivalent to preventing a certain amount of harm which would have occurred without those measures. The word "prevention" had its etymological origin in the Latin *praevenire*, namely "to come before" the incident, or before the harm. It should be remembered that there might be a lapse of time between the incident and the transboundary harm. The adoption of certain precautions made the effects of the activity less harmful. Another example was that of a national river becoming heavily polluted as a result of activities with harmful effects, i.e. activities which caused harm in the course of their normal operation. That pollution threatened to contaminate ground water shared with a neighbouring country. Measures to prevent the pollution from extending to the ground water thus constituted preventive measures designed to avoid transboundary harm. That aspect of prevention was indispensable and was included in all recent conventions on specific activities.

5. Consequently, the concept of harm needed to be broadened so as to include the cost of such preventive measures, whether taken by the affected State or by a third party. Some conventions included any further harm caused by such measures, and the present draft had followed suit (art. 2 (g)). Such further damage did arise, for instance when a State was obliged to clear part of a forest in its territory so as to avoid the spread of a fire produced by an activity which created a risk of causing transboundary harm in a neighbouring country. The damage in question should be compensated for, since it had been caused by a preventive measure.

6. Another very important point raised by Mr. Calero Rodrigues was that substantive (i.e. non-procedural) obligations of prevention should give rise to a right of action in favour of the affected State. In reply, he wished to make it clear that there was no intention in the draft articles of attaching a right of action to any obligation of prevention. He might perhaps have misinterpreted the wish of the majority of the Commission, but had done so for a very good reason: he had counted Mr. Calero Rodrigues as one of the members who did not wish any right of action to arise from the obligation to take preventive measures. As Mr. Calero Rodrigues had said at the thirty-ninth session, in 1987, and repeated at the present session (2181st meeting, para. 2), it would be useful to include rules of preven-

tion in the draft and they could be based on the principle of co-operation. Co-operation could hardly be said to give rise to any "hard" obligations. That position regarding the right of action was expressed in section 2, paragraph 8, of the schematic outline submitted by the previous Special Rapporteur, Mr. Quentin-Baxter.

7. In the report he pointed out that "the affected State will be entitled to institute proceedings only if harm arises" and that "the mechanisms of liability are activated only if the harm can be causally attributed to the activity in question" (A/CN.4/428 and Add.1, para. 40). As Special Rapporteur, he was prepared to follow the opinion of the majority of members on that capital issue, but the question whether a right of action arose from the obligation to take preventive measures had to be clearly stated. That question had led to lengthy discussion in the Commission; the main obstacle was the risk of invading the area of responsibility for internationally wrongful acts and thereby going outside the scope of the present topic.

8. Mr. FRANCIS said that he welcomed the Special Rapporteur's sixth report (A/CN.4/428 and Add.1), which contained valuable suggestions. Paragraph 1 provided the key to the contents of the report, which brought up to date the draft articles submitted at the previous session in the light of the discussion and the Special Rapporteur's own reflections. The Special Rapporteur had introduced the concept of "dangerous substances" and dangerous activities in draft article 2, on the use of terms, as well as the principle of non-discrimination in the new draft article 10.

9. The important question had been raised whether the notion of dangerous activities and that of dangerous substances should be made the subject of mandatory provisions. It was a difficult issue and he tended to agree with the explanation given by the Special Rapporteur in terms of scope and the degree of risk. In any event, the question properly fell within the purview of the topic and, taking the matter somewhat further, he would suggest that the Commission would have to produce a more detailed formulation for the subject of prevention, with special reference to dangerous activities.

10. The Special Rapporteur had spoken of water as a harmless liquid but one which could be destructive and lethal in large quantities or concentrations, or when it was polluted. Preventive measures were thus called for in appropriate circumstances. In that connection, he recalled that article 23 (Water-related dangers and emergency situations) of the draft articles on the law of the non-navigational uses of international watercourses had been referred to the Drafting Committee at the Commission's previous session.⁶ The Special Rapporteur had been criticized for leaning too heavily on the draft articles concerning international watercourses. For his part, he felt that, on the issue of dangerous activities and dangerous substances, the Special Rapporteur and the Commission might well have to fall back on the prevention provisions in those very articles.

⁶ For the text, see *Yearbook . . . 1989*, vol. II (Part Two), p. 125, para. 641.

At the same time, there would be a consequential need for a protection régime, both for the affected State and for the State of origin.

11. It had been asked whether the provisions relating to dangerous activities and dangerous substances should be mandatory in character. In order to reply to the question, he thought that a distinction had to be drawn between two types of situations: bilateral situations and broader situations, the latter being the subject of chapter VI of the report, dealing with liability for harm caused to the "global commons". The answer with regard to bilateral situations depended on what was meant by "mandatory". The obligations and régime of prevention established should be no less obligatory than the other duties imposed by the draft articles. The obligation of prevention should entail norms no higher than the other obligations, so that the situations which arose could be settled by such means as conciliation and negotiation. In the broader context of the environment, however, there was no choice other than to make the provisions mandatory, for article 19 of part 1 of the draft articles on State responsibility⁷ was quite specific: serious breaches would be designated as crimes and other breaches as delicts.

12. As for the draft articles themselves, he agreed, by and large, with the formulation of subparagraph (a) of article 2, but a definition of the term "risk" could be inserted to precede that of "activities involving risk". It would be possible to draw on the language used in the sixth report and "risk" could be defined in terms of the inherent danger of the substance or the activity concerned, combined with the foreseeability of harm eventually occurring. An operator, in weighing the costs involved, might find it more economical to pay reparation rather than keep to an elaborate prevention régime. That aspect of the matter underlined the advisability of including the idea of foreseeability in the draft.

13. The term "incident" was defined in subparagraph (k) of article 2, but did that term also cover a "situation"? He was not quite sure. He had on several occasions urged that a definition of the term "situation" should be included in the article on the use of terms, and he would welcome the Special Rapporteur's views on the matter.

14. The Special Rapporteur's explanations regarding the expression "preventive measures", in subparagraph (m), were acceptable, for preventive measures were those intended to avoid harm or to lessen or minimize the probability of an extension of the injury. Therefore it was right to take account of preventive measures both before and after the event, so as to cover the idea of avoiding further harm. There was really no legal objection to that drafting technique.

15. He agreed with those members of the Commission who had suggested that the provisions on prevention in draft article 8 should be strengthened. In addition, the second sentence of the article should be redrafted and made into a separate paragraph.

16. The proviso "To the extent compatible with the present articles", in draft article 9, made for some weakness and offered far too much latitude for the State of origin. Hence it should be deleted and perhaps replaced by a formula such as: "In accordance with the present articles". The words "in principle", in the second sentence, should be deleted. He welcomed the introduction of the new draft article 10, on non-discrimination.

17. Article 17 definitely had a place in the draft, considering that the Commission was legislating for developing as well as developed States. The type of information mentioned in the article would be of use to legal advisers in their respective ministries. However, the words "those States may", in the introductory clause, could be qualified by an expression such as: "subject to the requirements of individual situations".

18. Mr. Calero Rodrigues (2181st meeting) had been right to say that draft article 18 should be amended, for in its present formulation it detracted from the force of article 8. Again, Mr. Calero Rodrigues had properly pointed out that, in the situation covered by draft article 20, a project should not go ahead. That should be reflected in the wording of the article, especially since the draft now included the idea of dangerous substances.

19. Mr. RAZAFINDRALAMBO said that he welcomed the efforts by the Special Rapporteur, in his sixth report (A/CN.4/428 and Add.1), to reflect the views expressed in the Commission and in the Sixth Committee of the General Assembly. Because of the extreme complexity of the topic, the Commission must act speedily to fulfil its mandate from the General Assembly, and complete its work on the subject in advance of other bodies with similar objectives. He had some reservations about the Special Rapporteur's approach, but would confine his remarks to the first three chapters of the report, leaving aside the question of liability.

20. The Special Rapporteur now proposed a reformulation of some of the first 10 draft articles, which had been referred to the Drafting Committee in 1988.⁸ Since the Committee had not yet considered them, there was no objection to the Commission resuming its discussion of those articles within the confines of the substantive changes suggested. The Commission had regularly adopted such a practice and, indeed, special rapporteurs had often revised texts already referred to the Drafting Committee. Although the practice risked reopening the debate in the Commission, it did facilitate the drafting of texts widely acceptable both to the Commission and to the Sixth Committee.

21. The Special Rapporteur had made substantive changes in draft article 2, on the use of terms, and had also introduced a new article 10, on non-discrimination. An attempt was also made in the introduction to the report to elucidate the concepts of "activities involving risk" and "activities with harmful effects". Personally, he supported the proposal to treat the consequences of the two kinds of activities in the same way, and to cover them by the same legal régime. He

⁷ *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

⁸ See *Yearbook* . . . 1988, vol. II (Part Two), p. 9, para. 22.

also agreed with the comment in the report (*ibid.*, para. 12) that the main difference between the two types of activities lay in the sphere of prevention: there were two types of preventive measures, those intended to prevent an incident from occurring, and those intended to contain or minimize the effects of an incident once it had occurred. However, it was difficult to envisage preventive measures *ex post facto*, and it might be better to speak simply of “measures intended to contain or minimize the effects of an incident”. It was when an incident occurred that the two types of activities did not seem to differ markedly.

22. He endorsed the general duty to co-operate imposed on States in both instances, a duty which should be acceptable both to the State of origin and to the affected State. In draft articles 11, 12, 17 (*l*), 19 and 22, international organizations were given a dominant role in fulfilling that obligation. It was a welcome move, for the technical assistance of international organizations was particularly desirable for developing countries so that they could negotiate on an equal footing with States of origin, which were usually industrialized countries. The draft should perhaps include a special article, based on article 202 of the 1982 United Nations Convention on the Law of the Sea, dealing with assistance to developing States in the areas of science and technology. Similarly, the balance of interests would best be served by including a further provision, based on article 203 of that Convention, for preferential treatment for developing countries in the allocation of funds and technical assistance by international organizations, and in the use of their specialized services.

23. In response to the suggestions made, the Special Rapporteur had included a list of activities in article 2. It was not confined, however, to technical operations, for an indicative list of dangerous substances and organisms was also incorporated. If the Special Rapporteur's intention was to supply a more complete list in the form of annexes, it was difficult to understand the purpose of the list in article 2. The best course would be to retain the definition of “activities involving risk”, in subparagraph (*a*), and to add, as a subparagraph (*a*) (*iv*), the legal criterion of appreciable risk of harm to persons found in subparagraph (*b*), along with the definition of the term “dangerous” given at the end of subparagraph (*b*). The remainder of subparagraph (*b*), together with subparagraphs (*c*) and (*d*), should be presented in the form of detailed annexes prepared, with expert advice, either by the Special Rapporteur himself or by an international codification conference.

24. The “cost of preventive measures” should indeed be included in subparagraph (*g*), but it should perhaps be qualified as “reasonable”, as had been done in recent conventions, such as those mentioned in the report (*ibid.*, para. 22). The meaning of the phrase “any further harm to which such measures may give rise” was not clear and he would be grateful for some explanation from the Special Rapporteur.

25. The very broad definition of the term “incident” in subparagraph (*k*) did not square with the language

used in the report (*ibid.*, para. 12), where the word “incident” was used in the context of prevention and the word “accident” to denote the event which had caused the harm. The term “incident” was used in the 1954 *Atomic Energy Act* of the United States of America, in connection with nuclear reactors, and similar usage was found in Council of Europe documents. However, in multilateral treaties such as the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships (*ibid.*, footnote 20), the term *accident* was preferred in French. It would perhaps be best to reserve the term “incident” for the event involving the risk of harm, and the word “accident” for the event which actually caused it. Subparagraph (*m*) could be amended accordingly.

26. He would prefer the emphasis in draft article 7 to be placed on the need for technical assistance to developing countries from the relevant international organizations. The principle of non-discrimination, enunciated in the new draft article 10, was entirely acceptable and was already recognized in practice, for instance in the judgment of the United States Supreme Court in *Kansas v. Colorado* (1907) (see A/CN.4/384, para. 226 *in fine*).

27. Chapter III of the draft, which set out the obligations imposed on States, should be entitled “Preventive measures” rather than “Prevention”, to distinguish it from the principle of prevention covered by draft article 8. The procedures listed in chapter III constituted the minimum régime acceptable to States in the context of a duty to co-operate, and he could not fail to endorse the principle that international organizations should be involved, subject to the inclusion of a separate provision for preferential treatment to developing countries.

28. Draft article 13 should be placed immediately after draft article 11. In addition, it should perhaps allow for the affected State to request postponement of the activity in question until a final decision was taken. The various unilateral preventive measures proposed in draft article 16 were too complex, and it would be better to set them out in separate paragraphs.

29. He had no objection to the principle contained in draft article 17, and indeed State practice now reflected the notion of a balance of interests in matters relating to liability. In the report (A/CN.4/428 and Add.1, para. 39), the Special Rapporteur referred to the usefulness of providing some guidelines for States concerning the factors to be taken into consideration when negotiating a régime. Assistance from international organizations, referred to in subparagraph (*l*), should be afforded not only to the State of origin, but also to the affected State, for under article 13 the latter could take the initiative in requiring the State of origin to take preventive measures against transboundary harm, or to reduce the risk of such harm.

30. The wording of draft article 18 was unclear and only from the report (*ibid.*, para. 40) was it plain that the words “foregoing obligations” referred to the procedural obligations set out in chapter III of the draft. If liability was incurred only when a causal link

was established between the harm and the activity, no special provision was needed to that effect.

31. Draft article 19 should be placed immediately after article 11, and draft article 15, on protection of national security or industrial secrets, should appear at the end of chapter III.

32. Lastly, the problems covered in the report were not new, yet the Special Rapporteur had made significant progress in the preparation of draft articles on the topic.

33. Mr. HAYES said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) was very stimulating, but he ventured to disagree with a number of the proposals contained therein. The respective roles of risk and harm as indicated in the Special Rapporteur's fourth report⁹ had been discussed by the Commission at its fortieth session, in 1988, and by the Sixth Committee of the General Assembly the same year, and the trend of opinion in both had indicated that the role given to harm was too narrow. The understanding during the debate in 1989 on the fifth report (A/CN.4/423), which had responded to that trend, was that the topic should encompass activities involving risk of harm and activities actually causing harm. The former called for measures of prevention and, if such measures were not taken or proved to be inadequate, the activity became an activity causing harm. The same category of activities also included activities which resulted in harm where no risk of harm had been apparent. In all cases, the remedy for activities causing harm would be reparation.

34. The sixth report seemed to take a different approach. Activity causing harm appeared to have a different meaning, i.e. an activity in which harm was seen as an inevitable or virtually inevitable consequence from the beginning and which could be undertaken and continued on the basis that measures would be taken to reduce the harm and compensation would be paid for such harm as did occur. That was the meaning which emerged from paragraphs 12 and 13 of the sixth report (A/CN.4/428 and Add.1), and from the definition of the expression "activities with harmful effects" in subparagraph (f) of draft article 2. In that provision, the words "in the course of their normal operation" had been substituted for the previous unsatisfactory expression "throughout the process",¹⁰ giving the expression an entirely different meaning. If the definition of activities with harmful effects failed to include activities which caused harm even though the risk of harm had not been anticipated, the scope of the topic would be at least as narrow as that rejected by the Commission and the Sixth Committee in 1988.

35. Another narrowing element was the revision of the definition of activities involving risk (art. 2, subpara. (a)). The Commission had previously dismissed the idea of a list of activities involving risk, believing it would be too restrictive for a general convention. Yet the Special Rapporteur now proposed to add to the

definition of activities involving risk categories of hazardous entities, as well as what was, in effect, a non-exhaustive list of dangerous substances.

36. The overall effect was to reduce the scope of the topic drastically, through an excessively restrictive definition of the two kinds of activities it covered. The narrowing of the definition of activities causing harm was so disastrous that he could not believe it was deliberate, and he would welcome the Special Rapporteur's assurances on that point. Such treatment of the topic would be a poor response to the principle *sic utere tuo ut alienum non laedas* from which it sprang, or indeed to the principle, previously approved, that the innocent victim of injurious transboundary effects should not be left to bear his loss.

37. Accordingly, he could not accept the definitions given in subparagraphs (a) to (d) and (f) of the new draft article 2. Subparagraph (h), defining "appreciable" or "significant" harm, omitted the element of perceptibility. In the report (A/CN.4/428 and Add.1, para. 16), the Special Rapporteur explained that that was justified by the list of dangerous substances. If the perceptibility element were restored, "appreciable" would be a more appropriate adjective in subparagraph (h) than "significant". He reserved his position on the definition of an "incident" (subpara. (k)), a word which he could not find in the draft articles.

38. He agreed with the Special Rapporteur (*ibid.*, para. 22) that the cost of measures taken to minimize the harmful effects of an activity should be included in the definition of "transboundary harm" (art. 2, subpara. (g)). Such measures should not be referred to as "preventive measures", an expression that should be reserved for measures intended to prevent an activity involving risk from actually causing harm. For the same reason, he was opposed to the introduction in draft article 8 (Prevention) of measures to minimize harmful effects, and to the corresponding part of the definition of "preventive measures" in subparagraph (m) of article 2. In the report (A/CN.4/428 and Add.1, para. 27), measures to mitigate existing harm were defined as reparation, an approach he could agree with.

39. He also agreed with the Special Rapporteur that provision should be made for harm to the environment and that the most appropriate remedy was restoration of the *status quo ante*. He therefore welcomed the definition of "restorative measures" in subparagraph (l) of article 2. Some adjustment might also be needed in draft article 9, on reparation, or in the definition of "transboundary harm".

40. The simplified formulation of preventive measures in chapter III of the draft was welcome, and the simplification should perhaps be taken further, especially in articles 16 and 17. While he supported the provisions relating to assessment, notification, information and consultation, he did not agree entirely with the terms of draft articles 11, 13, 14 and 16. The obligations defined in those articles were not such that failure to comply with them should give grounds for the institution of proceedings, and he therefore supported draft article 18. Draft article 19, however, tipped the balance too far in the other direction with its implication that, if the

⁹ *Yearbook... 1988*, vol. II (Part One), p. 251, document A/CN.4/413.

¹⁰ See draft article 2, subparagraph (b), as submitted in the Special Rapporteur's fifth report (A/CN.4/423, sect. II).

notified State failed to reply, such failure would ultimately be to its disadvantage. Since failure on either score would inevitably arise in the context of reparation, neither should be over-emphasized. An exception for national security and industrial secrets, as in draft article 15, was appropriate.

41. He could not understand the references in draft article 11, paragraph 2, and draft article 12 to an "international organization", which appeared to assume that international organizations "with competence in that area" existed. Care should be taken, in article 12, not to confer on an organization functions that were not defined in its constituent instrument.

42. Draft article 16 was too detailed: there was no need to spell out examples of appropriate preventive measures, which ought properly to be included in the commentary. The same was true of draft article 17. Lastly, draft article 20 should be couched in stronger terms, since a qualified prohibition would merely undermine the efficacy of prevention.

43. Mr. EIRIKSSON said he shared the widely held view in the Commission that the topic should be divided as between harm caused by hazardous activities, and harm caused otherwise. The Special Rapporteur had now submitted a complete set of draft articles. In general, he would prefer less detailed treatment, because of the considerable amount of time required for the Commission to deal with each article. He had been struck by the large number of safeguard clauses, necessary though they might be to render the articles acceptable.

44. The new articles contained in chapters III and IV of the draft were welcome, although he would question the position of draft article 17, on the balance of interests. Equally welcome were the new chapter V, on civil liability, and the new draft article 10, on non-discrimination; the latter provision was, in his opinion, an essential part of the treatment of civil liability. The present topic differed from that of the law of the non-navigational uses of international watercourses in that it was not necessary for the Commission to restrict its treatment of liability. As to the revised articles in chapters I and II of the draft, he would point out that the Drafting Committee already had before it two sets of articles, and some confusion was bound to arise from the presentation of a new set.

45. He welcomed the Special Rapporteur's discussion, in section B of the introduction to his sixth report (A/CN.4/428 and Add.1), of the main questions of principle, as well as the analysis in chapter VI of the concept of harm to the "global commons". Less satisfying were the Special Rapporteur's definition of activities involving risk and the list of dangerous substances in draft article 2. Subparagraphs (a) to (d) of article 2 gave a misleading impression of the articles, which were supposed to be more general in nature. The terms used were highly technical and would raise the expectation of equally detailed provisions in the chapters on prevention and liability. Details of that kind should be left to agreements covering specific subjects to be governed by specific régimes.

46. He agreed with Mr. Razafindralambo that the Commission must proceed with dispatch in dealing with the topic, so as not to be overtaken by events. The Drafting Committee should be given the opportunity to complete its consideration of the first two chapters of the draft. Once the later chapters had been discussed, the Special Rapporteur might decide to present revised articles, reflecting the discussion in the Sixth Committee of the General Assembly. Alternatively, he might propose further discussion of the present articles. Either approach would be acceptable. His own opinion was that the Special Rapporteur, in giving final form to such a complicated topic, had made a major contribution to the development of international law.

The meeting rose at 11.40 a.m.

2183rd MEETING

Friday, 29 June 1990, at 10.45 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,¹ A/CN.4/423,² A/CN.4/428 and Add.1,³ A/CN.4/L.443, sect. D)⁴

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he wished to reply to the comments made at the previous meeting by Mr. Hayes, who had expressed concern in particular about the new approach which he (the Spe-

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

² Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 1990*, 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 2179th meeting, para. 29.