

Document:-
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Summary record of the 2184th 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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beginning of chapter III: they were not just intermediate obligations. He favoured the retention of the examples given in article 16 because they demonstrated what should be understood by the liability of States before questions of compensation for damage arose. There again, however, it was doubtful whether a reference to article 1 was sufficient. The Special Rapporteur had not drawn any legal consequences from the list of dangerous activities, but that should be an essential element of the draft.

68. Mr. BEESLEY said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) had been the subject of three differing interpretations. According to one, he had shifted the basis for liability from harm to risk; according to another, he had not done so; and according to yet another, he had followed a middle course. What was the Special Rapporteur's view on the matter?

Organization of work of the session (concluded)*

[Agenda item 1]

69. The CHAIRMAN, introducing the recommendations of the Enlarged Bureau, said that, as was apparent from document A/CN.4/L.444, the Drafting Committee had at the present session dealt with 16 of the 28 draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading in 1986. Since the Commission would not be in a position to conclude the second reading of the draft articles before the end of the session, the question had arisen of the way in which the partial, though substantial, results achieved by the Drafting Committee should be reported to the plenary Commission and to the General Assembly.

70. Accordingly, the Enlarged Bureau proposed that the Chairman of the Drafting Committee should, as was customary, make an oral presentation of the articles prepared under his chairmanship and indicate that, as the second reading of the draft articles had not been concluded and important provisions were still pending, a detailed discussion of the articles adopted so far by the Drafting Committee on second reading would not serve any useful purpose. It was, however, understood that those members of the Commission who considered that it would be useful for statements of a general nature to be made on the orientation of the work would be able to do so. At the present session the Commission would not adopt any of the articles proposed by the Drafting Committee, and would simply take note of the oral report of the Chairman of the Committee.

71. If those arrangements met with the Commission's approval, he understood that it was the intention of the Rapporteur to include in the relevant section of the Commission's report on the present session a passage informing the General Assembly of the stage reached by the Drafting Committee and explaining that the Commission had considered it preferable to postpone a decision on individual articles until the entire set of articles proposed on second reading was before it. The

report would add that, for that reason, the Commission was not submitting any articles to the General Assembly at the current stage, but that it expected to present a complete set of draft articles to the General Assembly at its forty-sixth session.

72. Mr. KOROMA said that he had no objections to the proposed arrangements. However, since the composition of the Commission was to be renewed at the forty-sixth session of the General Assembly, he wondered how the Commission could accommodate the suggestions and comments that would certainly be made by representatives in the Sixth Committee of the General Assembly when the draft articles as a whole were referred to it.

73. The CHAIRMAN said that the Enlarged Bureau had considered that question but had none the less decided that it would be preferable to refer the draft articles as a whole to the General Assembly. If there were no objections, he would take it that the Commission agreed to adopt the arrangements proposed by the Enlarged Bureau.

It was so agreed.

74. The CHAIRMAN said that, as a result of those arrangements, a number of meetings originally reserved for consideration of the draft articles on jurisdictional immunities were available for other purposes. The Enlarged Bureau therefore recommended that the Commission should adopt the timetable for the next two weeks that had been circulated to members. If there were no objections, he would take it that the Commission agreed to adopt the proposed timetable.

It was so agreed.

The meeting rose at 1.05 p.m.

2184th MEETING

Monday, 2 July 1990, at 3.05 p.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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

* Resumed from the 2151st meeting.

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. McCaffrey said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) was an extremely helpful document on a topic that was a rapidly developing field of international law for which a different approach was needed. The question was whether some special régime might be elaborated to deal with the kinds of transboundary harm that might be caused by new technologies and substances, a problem that had not existed when State responsibility had been developed. Thus the topic was unlike others on which the Commission had worked, with the possible exception of the conventions on the law of the sea. The Commission had availed itself of expert advice in preparing the draft articles on which those conventions had been based, and it could profitably do so for the present topic. He had been rather puzzled to hear some members of the Commission say that the Special Rapporteur had changed his approach. On the contrary, the Special Rapporteur had further elaborated one aspect of the draft articles, namely activities involving risk, but had not eliminated the other aspect, as could be seen from paragraphs 11 to 14 of the report, the wording of draft article 1 and the alternative text suggested in the footnote to that article in the annex to the report.

2. The alternative formulation suggested for article 1 was better and he welcomed the elimination of the words "throughout the process". The Special Rapporteur had found a better way to say the same thing in draft article 2, subparagraph (f): "in the course of their normal operation".

3. A number of questions had been raised as to whether the definition of "activities involving risk" in article 2 was sufficiently broad to cover such matters as dams, since the definition relied on three different categories of activities, none of which seemed to be connected with water or dams. The Special Rapporteur had pointed out that anything containing a sufficient quantity of an otherwise harmless substance to make it pose a threat would be covered by the expression "dangerous substance", as indicated in the phrase "A substance may be considered dangerous only if it

occurs in certain quantities or concentrations" in subparagraph (b) of article 2. That solution was rather artificial, and perhaps the best course would be to set out the idea in subparagraph (a) as an activity involving risk, rather than overwork the concept of a "dangerous substance" so as to include water.

4. He welcomed the list of dangerous substances in article 2, which informed States of their obligations. That was crucial to the acceptability of the draft and gave the article more precision. He agreed with Mr. Graefrath (2183rd meeting) that the list must be exhaustive. As other members had already suggested, flexibility could be achieved by adding a procedure for easy and rapid updating or amendment of the draft articles.

5. The definition of "transboundary harm" in subparagraph (g) of article 2 was acceptable, but the concept of harm to the environment should also be included. It would be something challenging to define, but was a matter of increasing importance. It was perfectly possible to conceive of examples of harm being sustained by the environment, but not by States. Despite an interesting discussion of the importance of restoration, the Special Rapporteur had not incorporated that concept in subparagraph (g), and a reference to "the cost of restorative measures" might well be included in the last sentence.

6. He had no preference for either the word "appreciable" or the word "significant" in subparagraph (h) and welcomed the attempt to set a threshold for harm. It might be possible to refine that concept further and he agreed with Mr. Graefrath that the concept of damage should be defined; many precedents already existed in that regard. The phrase "or may arise" could be added at the end of subparagraph (j) in order to cover situations involving risk. So far as subparagraph (k) was concerned, he had reservations about defining an "incident" as a continuous process, for the term usually referred to an isolated event. The definition of "restorative measures" in subparagraph (l) was welcome, but he wondered where the expression came into play. Perhaps it should be included in the provisions on the obligations of the State of origin in the affected State. In fact, the alternative text suggested in the footnote to subparagraph (g) might also include the concept of restorative measures. The two aspects of the definition of "preventive measures" in subparagraph (m) posed no difficulty, but it might be more appropriate to say "mitigate" instead of "contain or minimize".

7. With regard to chapter II of the draft, he did not oppose the concept of prevention set out in article 8 for the purpose both of preventing harmful effects and of containing or minimizing the risk of harm, for example by implementing appropriate safety measures or using standard design and construction and ensuring maintenance. If some members objected to the word "prevention" applying in both contexts, another word could be found for the second case; but the Commission should go further in providing for the obligation of prevention, especially for activities involving risk. It should at least require, as did the 1982 United Nations

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.

Convention on the Law of the Sea, that the State of origin must comply with generally accepted rules and standards concerning activities involving risk. The point was that no internationally agreed set of safety standards prohibited the construction of a nuclear power plant or a chemical plant simply because the plant did not comply with certain standards. Article 8 must be more stringent. To that end, the phrase "in so far as they are able" must be deleted, because otherwise it would allow States to undertake extremely dangerous activities that entailed the risk of enormous harm.

8. For draft article 9, he preferred the title of the alternative text suggested by the Special Rapporteur in the footnote to the provision, i.e. "Compensation by the State of origin", which would avoid confusion with the field of State responsibility. Once again, he was in favour of incorporating the concept of "restorative measures", at least where the affected State so permitted: obviously, if a State did not wish to be helped with restorative measures, that was its prerogative. The words "in principle" in the second sentence of the alternative text only weakened the provision and should be deleted, for it was important to hold the parties more closely to the criteria set forth in the draft articles.

9. With regard to chapter III of the draft, he agreed with Mr. Graefrath that the approach should be modified so that the articles dealt separately with new or planned measures, activities involving risk and the problem of chronic pollution or continual harm.

10. Whereas draft article 11, paragraph 2, was a positive provision, he was not sure that the wording "Any international organization which intervenes", in draft article 12, was well chosen. The provisions in question might be more understandable if they were placed in a separate article or in a longer paragraph 2 of article 11.

11. Draft article 16 was a specific application of the general obligation of due diligence and of article 8. Once again, the real problem was that no internationally agreed safety standards existed, and it was therefore necessary to fall back on due diligence or to establish a régime on an *ad hoc* basis to take their place. But the Special Rapporteur recognized in the report (A/CN.4/428 and Add.1, para. 9) that it would be unrealistic to ask the States concerned to formulate a régime for every activity. The purpose of article 16 was to obligate States, in the absence of an agreed régime, to exercise due diligence by taking the appropriate preventive measures. However, those measures, as listed in article 16, were not worded strongly enough. In particular, the word "encouraging" could be taken to refer not only to "the adoption of compulsory insurance..." but also to "the application of the best available technology"—two different kinds of requirements that should be treated separately. More attention should be devoted to the formulation of those measures in the articles so as to stress their importance.

12. Draft article 17 was a commendable effort to produce a list of interests to be taken into account. There was solid support in State practice for the use of the balance-of-interests approach. In the report (*ibid.*, para. 39), the Special Rapporteur explained that the

point of article 17 was to provide criteria for the States concerned in negotiating a régime. But it was important to make more explicit how those factors were to be utilized and how the balance of interests fitted into the other obligations in the preceding and subsequent articles.

13. Draft article 18 was extremely important. The Commission should not hesitate to provide for the consequences of failure to comply with procedural obligations. At issue were activities involving nuclear power plants, chemical plants or ongoing pollution from factories. The point was not to prohibit such activities but to prevent harm from being caused. The Commission must create a régime containing obligations that gave rise to international liability in the event of a breach. The obligation of notification, consultation and the like must be just as strict in the present case as it was under the terms of the United Nations Convention on the Law of the Sea and in agreements on international watercourses. The Commission was perhaps hesitating because of the lack of clarity with regard to consequences. But as Mr. Arangio-Ruiz had clearly shown in his second report on State responsibility,⁶ not every breach of an international obligation entailed pecuniary compensation; perhaps only nominal compensation or a form of satisfaction might apply if the obligation to provide notification were breached. Yet there must be some consequences, because otherwise the State of origin would not feel compelled to comply. It was essential to give teeth to the obligations, because the environment was at stake. If a State failed to provide notification, damage might occur—for example through hazardous or toxic substances—that could not be wiped out, and it might be impossible to restore the *status quo ante*. The Commission might make it clear in the commentary that, if the obligation to provide notification were breached, the State was responsible. It was also important to clarify the concept of "causation", and Mr. Graefrath's definition might be of help in that connection.

14. With regard to draft article 19, on absence of reply to notification, he was concerned about the explanation in the report that "if harm then occurs, [the affected State] will not be able to allege that the State of origin had not taken sufficient precautions" (*ibid.*, para. 41). He was against preventing the affected State from making such an allegation, which should simply be a rebuttable assumption. Clearly, it was important to encourage States to reply to notification, but not to go so far as to prevent a State from alleging that the measures taken had been unsatisfactory. Some States did not have the resources to reply or even the time to request an extension.

15. Lastly, he agreed with the general principle embodied in draft article 20 and with the logic of the Special Rapporteur's comments (*ibid.*, para. 42). If an activity was going to cause harm, the State of origin must not allow the operator to proceed.

16. Mr. BENNOUNA congratulated the Special Rapporteur on a rich report (A/CN.4/428 and Add.1)

⁶ *Yearbook* ... 1989, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

which reflected the progress he had made in his analysis of a difficult topic. Regrettably the topic was still characterized by vague concepts and it also seemed that the Commission was entering still further into the area of environmental law. Indeed, he even wondered whether it was not in fact codifying the basic principles of that law. Uncertainty in the matter was dangerous and could lead the Commission beyond the task assigned to it by the General Assembly. It was therefore essential to spell out the precise objective of the draft articles.

17. There had, of course, been some progress in conceptual terms, but much remained to be done. In the first place, with regard to the distinction between activities involving risk and activities with harmful effects, the main difference, as the Special Rapporteur stated in the report (*ibid.*, para. 12), was in the sphere of prevention. As the Special Rapporteur further pointed out, the two types of activity were very similar, which meant that there could be no major difference between them in terms of legal régime. Such a distinction would therefore be of interest from the point of view of the definition of the activities concerned and of the scope of the topic.

18. A related question concerned the list of activities, in which connection the Commission was faced with two options: first, to establish a list of activities with a view to delimiting the topic more precisely, and, secondly, to establish a procedure whereby the parties themselves could specify the range of activities to be covered in the light of their needs and of technological developments. The first option had the advantage of security and precision—precision that would *a priori* enable States to accede to the future convention in full knowledge of all the facts—but it also had the drawback of being rigid, which meant that it would be difficult to adapt it in line with developments in technology. Mr. Graefrath (2183rd meeting) had advocated a procedure for the amendment and revision of the articles, but that again would be going beyond the framework agreement the Commission was preparing. Another drawback was that some countries might be afraid to commit themselves to a framework agreement containing a precise list of activities, since that could limit their room for manoeuvre and *a priori* expose them to disputes without providing them with guarantees in terms of the régime applicable to each particular activity.

19. The second option had the advantage of allowing States to negotiate on a case-by-case basis the content of their future obligations as well as any limitations on their jurisdiction, in which respect they could have recourse to expert opinion and, if necessary, could also adapt any measures of prevention to the means available. At a recent conference held in London, a number of countries had reached agreement to eliminate substances dangerous to the ozone layer by the year 2000. Under the terms of that agreement, a fund was to be set up to enable certain developing countries to apply the agreement. That example showed that, when measures were taken to curtail certain hazardous activities, the means of fulfilling the relevant obligations also had to be provided. The drawback of

the second option was that it would leave the object of the future convention in the air, and would not enable States wishing to accede to the convention to make an accurate assessment of the content of their future obligations.

20. Since the future convention would be in the nature of a framework agreement, he tended to favour the second option. The Special Rapporteur, for his part, favoured the first, something which might take the Commission far beyond a framework agreement. It should not be forgotten that, in principle, the Commission was dealing with secondary norms of international law, as attested to by the fact that the topic was new, it having been decided at the outset to distinguish between two kinds of international responsibility and to deal with them separately—a decision he personally regretted, for more elements linked the two types of responsibility than separated them. Even though the Commission was at first sight concerned with secondary norms, however, it none the less had a tendency to enter into the sphere of primary norms. That was particularly true since the Special Rapporteur had invited the Commission to draft an annex to deal in even greater detail with the activities concerned. Furthermore, it was apparent from paragraph 17 of the report under consideration that what was involved were half measures, so that in effect the Commission would be dealing neither with a framework agreement nor with specific primary norms.

21. According to the Special Rapporteur, the annex would be drafted with the assistance of experts at a codification conference. It was not just a matter of expertise, however. Delicate compromises between highly conflicting interests, as represented by the major producers and consumers of dangerous substances, would have to be reached. The complex issues involved were best avoided, in his opinion. Thus, rather than laying down a specific definition of hazardous and harmful activities, the Commission should confine itself to a definition couched in general terms, leaving it to States to give more specific content to the definition in the light of their requirements and of any consultations they might hold on the scope of application of the future convention.

22. Draft article 10, which laid down the principle of non-discrimination, was a new article, and a similar provision appeared in the draft articles on the law of the non-navigational uses of international water-courses. He wondered, however, whether States were ready to accept such an obligation in a framework convention of a universal character. It would perhaps be preferable to leave it to the negotiators to decide whether to provide for internal remedies in the light of the development of the legal régime itself. If that régime was too vague and general, it would simply be left to the courts and to case-law to specify the content of the régime. In his view, the Commission should not base itself *a priori* on the European system, as did the Special Rapporteur, who referred in the report to the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters (A/CN.4/428 and Add.1, para. 66) and to the case-law of the European Community. The European Com-

munity had a highly integrated system under which such a provision was authorized. The Commission was not in the same situation. States could perhaps be authorized to incorporate a model clause into agreements concluded between them, but such clauses could not be imposed upon them in a global convention.

23. In the report (*ibid.*, paras. 29-30), the Special Rapporteur spoke of two aspects of the principle of non-discrimination, which were incorporated in draft article 10. The first aspect, which involved placing foreigners and nationals on the same footing for the purposes of the application of the law, concerned only primary norms: that would therefore be going beyond the scope of the draft articles. In short, it seemed that what was needed was a somewhat less bold, yet more realistic, approach.

24. Another vague concept which had caused him considerable difficulty was that of a balance of interests, which was found not only in draft article 17 but also in draft article 9. It was thus central to the draft in that it would apply with respect both to prevention and to reparation. The Special Rapporteur had noted that the technique of listing factors or activities had already been used for the régimes of international watercourses in connection with the determination of the equitable use of a watercourse. Once again, however, the sphere of primary rules was involved, because what was at issue in that case was the elaboration of a régime to govern a specific activity that was known in advance, whereas in the case of the present topic the point was to draft a framework agreement. A list of activities which was vague enough in the case of international watercourses would be even vaguer in the case of the present topic. He therefore did not favour such a list. Although the concept of a balance of interests might conceivably be acceptable in the case of prevention, provided that the relevant factors were spelt out in a little more detail, it would create real difficulties in the case of reparation because the relationship between the author of the damage and the victim was different.

25. With regard to draft article 20, on prohibition of the activity, he assumed that the prohibition would occur prior to the damage, for otherwise the rules of cessation would apply. The question was whether an activity should be prohibited unilaterally by each State or whether it should be prohibited on a reciprocal basis in the context of an agreement between the States concerned. For his own part, he would prefer the latter approach, whereby a treaty-type relationship would arise under international law. In the case of article 20, however, he had the impression that the prohibition would be of a unilateral character.

26. Chapter IV of the draft, on liability, lay at the very heart of the topic, and he agreed with Mr. Graefrath about the definition of the operator and the relationship between the State and the operator. There was a fairly serious lacuna in that reference was made solely to the State, when it was operators which caused harm. Such elements as due diligence, the relationship between the operator and the State, diplomatic protec-

tion and exhaustion of local remedies, therefore, all required further development.

27. He noted that, whereas draft article 9 spoke of the "balance of interests" affected by the harm, draft article 21 provided that "the State or States of origin shall be bound to negotiate . . . to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for". That prompted the question: what was the basic concept that determined the consequences of harm, and hence responsibility and compensation? Was it full compensation or the balance of interests? If it was full compensation, there was no difference between the consequences of responsibility for a wrongful act and the consequences of responsibility for activities not prohibited by international law. If, however, there was some other special concept, it should be spelt out. In his view, it was difficult to uphold the principle of full compensation in the case of no-fault liability, for there was no State practice to that effect. As Alexandre Kiss had noted, apart from the 1972 Convention on International Liability for Damage Caused by Space Objects, there was no precedent for the application of the rule of no-fault liability among States.⁷ Thus, when the *Cosmos 954* Soviet nuclear satellite had disintegrated over Canadian territory in 1978, there had been no question of full compensation. Canada had simply asked for a sum in respect of the costs it had incurred in recovering the hazardous radioactive debris of the satellite. Indeed, in environmental matters, practice actually went against full compensation, first, because the damage was very difficult to assess in monetary terms, and, secondly, because in most cases affecting the environment it was also very difficult to restore matters to the original situation. That had also been the effect of the decision of 11 January 1988 by a court in the United States of America in the "*Amoco Cadiz*" case, in which compensation had not been awarded for environmental damage.

28. He had no objection to draft article 23. For draft article 25, he preferred alternative B. As for draft article 26, he wondered what purpose it served, since it merely laid down the same principles as in the case of State responsibility.

29. With regard to chapter V of the draft, on civil liability, all the conventions cited in the report—including the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the 1969 International Convention on Civil Liability for Oil Pollution Damage (see A/CN.4/384, annex I)—set a ceiling for liability and provided for a compensation fund. Indeed, that was the very purpose of those conventions. Thus, where there was liability without fault, there could not be full compensation. What troubled him in the present case, however, was that a general system was being proposed which would permit liability outside a specific legal régime. Such a system would not be acceptable to States. Of course, a State which ran the risk of serious environmental damage

⁷ A. Kiss, *Droit international de l'environnement* (Études internationales, No. 3) (Paris, Pedone, 1989), p. 111.

from a major oil spill and which looked to the 1969 Convention for compensation would not be fully covered, but that was the state of existing international law. The only solution was through international co-operation as provided for under various conventions on regional seas, such as the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (*ibid.*). It was necessary to be realistic and he agreed entirely with the Special Rapporteur when he recognized (A/CN.4/428 and Add.1, para.46) that there were certain objections to such a system. However, the Special Rapporteur sought to reassure the Commission by saying that the draft articles were basically of a residual nature, adding that the idea was “rather to provide a kind of safety net” (*ibid.*, para. 48). For his own part, he wondered whether States might not see the system not as a safety net but as a trap. In any event, his doubts were not dispelled.

30. With regard to draft article 29, on jurisdiction of national courts, he noted that, in Europe, a party which suffered damage could take its case before its own courts rather than before the courts of the State of origin. It would, however, be difficult to transpose that procedure, no matter how attractive it might seem, into a framework convention of a universal character—a fact recognized by the Special Rapporteur himself in the report (*ibid.*, para. 66 *in fine*). Consequently, he was opposed to such a provision, which would not make for progress.

31. Lastly, he trusted that, in his summing-up, the Special Rapporteur would be able to remove some of his doubts about the draft articles. In particular, he felt that the time had come to lay down firmly the main concepts on which the topic should be founded.

32. Mr. ILLUECA, after congratulating the Special Rapporteur on his excellent sixth report (A/CN.4/428 and Add.1), recalled that, in introducing the Commission's report on its thirty-fourth session in the Sixth Committee of the General Assembly in 1982, Mr. Reuter, the then Chairman of the Commission, had said that some members of the Commission had taken the view that the present topic should not be discussed further for want of any basis in general international law or because of existing difficulties. He had said that most members, however, had taken the opposite view, i.e. that the draft articles could be limited to transboundary problems pertaining to the physical environment and that questions involving the most delicate problems that might arise in the economic sector could be set aside.

33. The then Special Rapporteur, Mr. Quentin-Baxter, had noted in his fourth report that there was in the Sixth Committee

strong and broadly based support for the central aim of the topic, namely to analyse the growing volume and variety of State practice relating to uses made of land, sea, air and outer space, and to identify rules and procedures which can safeguard national interests against losses or injuries arising from activities and situations that are in principle legitimate, but that may entail adverse transboundary effects. . . .⁸

⁸ *Yearbook* . . . 1983, vol. II (Part One), pp. 204-205, document A/CN.4/373, para. 12.

34. The high priority now enjoyed by the topic could be judged from the fact that the General Assembly, in the Environmental Perspective to the Year 2000 and Beyond,⁹ had urged that:

. . . The present momentum should be maintained of concluding conventions on questions such as hazards relating to chemicals, treatment and international transport of hazardous wastes, industrial accidents, climate change, protection of the ozone layer, protection of the marine environment from pollution from land-based sources and protection of biological diversity, in which the United Nations Environment Programme has been playing an active part. (Para. 101.)

35. The draft articles submitted by the present Special Rapporteur had been framed in a realistic and constructive spirit and set forth machinery or procedures for the effective exercise of a “compound primary obligation” which included the duties relating to prevention, information, negotiation and reparation.

36. The articles on prevention—and particularly draft article 16 as it related to the situation after the occurrence of transboundary harm—had given rise to concern on the part of some members. As the previous Special Rapporteur, Mr. Quentin-Baxter, had pointed out in his fourth report, however, the purpose of reparation was always to restore as fully as possible the pre-existing situation and, in the context of the present topic, it could often amount to prevention after the event. He had pointed out that, in the *Trail Smelter* case, the assessment of compensation for proven losses had been a minor phase of the arbitral tribunal's work, adding that “The lion's share of the tribunal's attention was devoted to discussing the means by which future loss or injury could be avoided, consistently with the continued economic viability of the smelting enterprise”.¹⁰ He had also cited the *Colorado River* case, in which the United States of America had been obliged to incur heavy costs to eliminate the problem of high salt levels in the river, which were causing transboundary harm to Mexico. In that case, the two States concerned had stressed the duties of prevention rather than of compensation.¹¹

37. No significance should be attached to the fact that prevention and reparation were dealt with in separate draft articles: they were two successive stages of a continuing process in which the States concerned first saw the need for a régime of prevention and reparation and, when transboundary harm occurred, took the necessary steps if the duties of the State of origin had not been previously determined.

38. The criterion of prevention with regard to the operation of the Panama Canal and the Suez Canal was embodied in the joint declaration which, as Minister for Foreign Affairs of Panama, he had had the occasion to sign together with Mr. Boutros-Ghali, Minister of State for Foreign Affairs of Egypt, at Panama city on 29 July 1981. That declaration had stressed the significance of the effective application of the 1967 Treaty for the Prohibition of Nuclear Weapons in

⁹ General Assembly resolution 42/186 of 11 December 1987, annex.

¹⁰ *Yearbook* . . . 1983, vol. II (Part One), pp. 214-215, document A/CN.4/373, para. 47.

¹¹ *Ibid.*, p. 215, para. 48.

Latin America (Treaty of Tlatelolco), and the declaration's two signatories had stressed the direct and indirect relationship of that instrument with the régimes of neutrality of the Panama and Suez Canals and the desirability of establishing measures of protection against the potential danger of accidents and pollution from nuclear-powered vessels, as well as providing for insurance and for adequate measures to guarantee appropriate compensation.

39. With regard to chapter VI of the sixth report, on liability for harm to the environment in areas beyond national jurisdictions, which included the high seas, the moon and celestial bodies and outer space, a better expression could be found than "global commons" to highlight the common character of such areas rather than their public nature. He would therefore suggest an expression such as "common areas of mankind" (*áreas comunes de la humanidad*).

40. He fully agreed with the Special Rapporteur on the need to regulate in some way activities that were bound to have harmful effects for humanity. The undoubted importance of that question had been stressed with remarkable vision by the Brazilian jurist G. E. do Nascimento e Sylva in his Gilberto Amado Memorial Lecture on "The influence of science and technology on international law" at Geneva in 1983. Mr. Quentin-Baxter had taken up that point in his fourth report, stating:

This report has not addressed directly the urgent question, evoked in this year's Gilberto Amado Memorial Lecture, of mobilizing the means of protecting from degradation the areas of the world beyond the territorial jurisdiction of any State. That question is larger than the present topic; and one of the leads into it [is] that of obligations *erga omnes* . . .¹²

The Special Rapporteur recalled that "According to part 1 of the draft articles on State responsibility for internationally wrongful acts, responsibility derives from the breach of an international obligation and not from harm done" (A/CN.4/428 and Add.1, para. 78) and quoted the view expressed by Mr. Ago in his third report on State responsibility that:

Most of the members of the Commission agreed with the Special Rapporteur . . . in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. . . . (*Ibid.*, footnote 104.)

41. The view that harm should not be regarded as one of the constituent elements of State responsibility had been disputed by Eduardo Jiménez de Aréchaga, who had pointed out that it was the result of an approach to State responsibility which considered only cases in which responsibility arose from injury to aliens—an area in which a breach related precisely to the obligation not to cause harm. It had to be remembered, however, that State responsibility arose in contemporary practice not only in respect of the treatment of aliens, but also, and more importantly, with regard to direct inter-State claims arising from the pollution of the environment, the utilization of watercourses and nuclear tests. In that connection, one could cite the

Nuclear Tests cases.¹³ It had been held that Australia and New Zealand had to demonstrate that the French nuclear tests had caused harm to their populations and their territory. France had argued, on the basis of scientific reports, that no such damage had been caused. Conduct that was wrongful because it was capable of causing injury only gave rise to responsibility if injury resulted for another State. The breach of an international obligation was a necessary element of international responsibility but it was not the only one; the additional element of harm or injury to the claimant State was also required.

42. Chapter VI of the sixth report was a commendable effort to seek positive solutions for extremely serious problems which affected the very survival of mankind. The analysis by the Special Rapporteur of the interrelationship between the scope of part 1 of the draft articles on State responsibility¹⁴ and that of the present draft articles, as well as his examination of the questions of the affected State, applicable liability, and other matters such as harm to the environment in the common areas of mankind, challenged the Commission to make a thorough study during the term of office of its current members of the salient points raised by the Special Rapporteur, with a view to extending the scope of the topic to harm to the environment in areas beyond national jurisdictions.

43. Mr. CALERO RODRIGUES said that, following the Special Rapporteur's explanations during the discussion, the difference between their views had narrowed considerably. Difficulties stemmed from the fact that each member of the Commission looked at the topic from his own standpoint and, so far, no generally accepted approach had emerged.

44. Chapter IV of the sixth report (A/CN.4/428 and Add.1), on liability, took up the issue of harm. The basic element of the whole set of draft articles was that of transboundary harm caused by lawful activities carried on under the jurisdiction of the State of origin. All the articles revolved around that concept of harm and set out norms of conduct which prescribed the exercise of due diligence to prevent activities from causing harm or, in the event of harm having occurred, to wipe out as far as possible the harmful consequences resulting from the activities in question. The articles on prevention in chapter III of the draft contained provisions regulating due diligence to avoid harm being caused. The articles on liability in chapter IV, for their part, set forth provisions regulating the conduct required of the State under whose jurisdiction the activity which had caused harm had taken place.

45. In the alternative text for draft article 9 suggested by the Special Rapporteur in the footnote to that article in the annex to the report, the words "the State of origin shall ensure that [compensation] [reparation] is made for harm" had been substituted for "the State of origin shall make reparation for appreciable harm". For his part, he welcomed the fact that the Special

¹² *Ibid.*, p. 222, para. 74.

¹³ *Nuclear Tests (Australia v. France) (New Zealand v. France)*, Judgments of 20 December 1974, *I.C.J. Reports 1974*, pp. 253 and 457.

¹⁴ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Rapporteur had now suggested “compensation” as the alternative to “reparation”. The concept of compensation was more precise and indicated a form of reparation which had a compensatory function; he believed it was precisely that function which it was intended to attribute to the proposed obligation in the draft. Another difference between the two texts was the far-reaching change of replacing the formula “shall make reparation” (i.e. compensation) by “shall ensure that reparation” (i.e. compensation) “is made”. That change of wording allowed for the introduction of the concept of civil liability and of the possibility of harm being compensated for without the direct intervention of the State of origin. During the discussion, Mr. Graefrath (2183rd meeting) had tried to demonstrate the advantages of the technique of channelling said to have been widely accepted in international instruments. Specific reference had been made by Mr. Graefrath to article 139 of the 1982 United Nations Convention on the Law of the Sea, which, with regard to the sea-bed and ocean floor beyond national jurisdictions, excluded State liability for damage if the State had “taken all necessary and appropriate measures to secure effective compliance” with the relevant provisions of the Convention by persons under its jurisdiction. Personally, he was not convinced that the prominent place given to civil liability in other instruments offered the best model for resolving the question of compensation in the present draft. Those other instruments dealt with very well-defined fields and none of them had the broad scope of the present draft articles, in which the “operator” would be a very elusive element.

46. The main point, however, was that Mr. Graefrath had given an incorrect interpretation to the provisions submitted by the Special Rapporteur, who had gone a long way to combine the possibilities of using both State liability and civil liability. The role of civil liability was not a minor one. Under draft article 28, any individual who had suffered harm could press a claim on the basis of civil liability either in the courts of the affected State or in those of the State of origin (art. 29, para. 3). Paragraph 1 of draft article 29 specified that courts would be given the necessary jurisdiction to deal with such claims and that access to the courts was guaranteed. Hence civil liability was far from being ignored; it was recognized and guaranteed as a channel for seeking redress for harm, and the injured individual—and even the injured State—was free to use that channel. Use of that channel did not, and should not, exclude the liability of the State, which could be invoked through what was being termed somewhat awkwardly the “diplomatic channel”.

47. Unfortunately, the obligation to make, or to ensure, reparation (compensation) stated in article 9 was not clearly spelled out in chapter IV of the draft and it would be preferable for the articles to leave no room for doubt. The obligation set out in draft article 21 was only an obligation “to negotiate . . . to determine the legal consequences of the harm”. He took that to mean that the purpose of negotiations was to determine the amount and conditions of compensation, on the understanding that the question of the existence of the harm and that of the establishment of a causal link

between the harm and certain activities had already been settled by agreement between the States concerned. It would be useful to refer to those two preliminary questions in the draft.

48. Again, under article 21 the negotiations had to be conducted “bearing in mind that the harm must, in principle, be fully compensated for”. In draft article 26, however, provision was made for exceptions, and in draft article 23, entitled “Reduction of compensation payable by the State of origin”, provision was made for what the Special Rapporteur called “guidelines for negotiations” (A/CN.4/428 and Add.1, para. 51). Article 23 was unsatisfactory, but he had been unable to devise substantive changes to improve it. Perhaps some new ideas might emerge from the debate, but for the time being the text proposed by the Special Rapporteur would have to be retained.

49. As for draft article 24, he doubted whether there was any need for separate provisions on harm to the environment. It had always been his view that the importance of a given aspect of a question did not, *per se*, justify treating it separately. A separate article should be drafted only when separate legal treatment was necessary. Harm to the environment was not different from harm of any other kind, and he was not convinced by the Special Rapporteur’s arguments for treating it separately from harm to persons or property. The provisions of paragraph 1 regarding restoration would apply equally to both kinds of harm, as would those of paragraph 3. Where, then, was the specificity of harm to the environment which would warrant a separate provision? The Commission should be prompted solely by legal considerations, and if there was no legal justification for including a certain provision, it should not be included merely because the subject-matter was important or popular. Indeed, to draft a meaningless provision for the environment would be to belittle the importance of environmental problems. If it was felt that the environment justified separate treatment, the Commission could decide to devote an entire topic to the question, possibly updating the 1972 Stockholm Declaration,¹⁵ rather than including it within a draft of much more general scope.

50. Further consideration was also needed of the threshold of compensation. It was acknowledged that not all transboundary harm had to be compensated for. Draft article 2, subparagraph (h), referred to “appreciable” or “significant” harm which was “greater than the mere nuisance or insignificant harm which is normally tolerated”. But the Commission was aware, from its work on the law of the non-navigational uses of international watercourses, of the difficulty of qualifying harm, and it was doubtful whether any adjective could do so satisfactorily. Yet the draft articles should contain a clear indication of the circumstances which would justify a claim for compensation, whether through the diplomatic or the domestic channel. He would welcome any suggestion the Special Rapporteur could make in that respect.

51. Another problem concerned the obligations of the State of origin. What would happen if negotiations

¹⁵ See 2179th meeting, footnote 17.

under article 23 were unsuccessful? In the report (*ibid.*, para. 43), the Special Rapporteur explained that, if the State of origin did not fulfil its obligation to negotiate, it would be violating an international obligation and would thus incur responsibility for a wrongful act. He doubted, however, if the State of origin could be compelled to negotiate in good faith, and wondered what the outcome would be if negotiations did take place in good faith but did not result in agreement. In the latter case, the States concerned would presumably recognize that they were in dispute and would look to one of the methods of dispute settlement. But to attempt to resolve the dispute without recourse to a third party might well fail and, according to the draft articles, a refusal by the State of origin to accept third-party settlement, whether judicial or arbitral, would not be considered a wrongful act. He feared that the provisions on compensation were likely to prove ineffectual unless some mechanism was provided for settling disputes.

52. In chapter VI of the sixth report, the Special Rapporteur dealt with the question of liability for harm to the environment in areas beyond national jurisdictions—the “global commons”. The Special Rapporteur examined several options, but did not seem convinced that it was feasible to include the global commons within the scope of the draft. In his own view, some instrument to regulate harm to the global commons was certainly needed, but the present draft was bedevilled by so many problems that to attempt to include the question of the global commons would seriously disrupt progress. The existing draft would have to be reviewed in its entirety. He would therefore prefer to leave aside the question of the global commons for the time being, but was grateful to the Special Rapporteur for his very substantial analysis of the questions involved.

53. Mr. Sreenivasa RAO said that he welcomed the clarity and fluency of the sixth report (A/CN.4/428 and Add.1) and the open-minded manner in which the Special Rapporteur had invited the Commission and the Sixth Committee of the General Assembly to express their views. The present 33 draft articles needed further study before a proper response could be given. They covered a wide range of legal concepts and raised important issues for developing States; they also raised the problem of reconciling the needs of development with protection of the environment.

54. Mr. Graefrath (2183rd meeting) was right to say that the main emphasis should be on prevention and on devising a régime for transboundary harm confined strictly to cases of “substantial” harm, as opposed to “appreciable” harm. Responsibility should be placed with the operator, where it belonged, and the liability of the operator should be dealt with more directly than had been attempted so far. The Special Rapporteur’s approach implied that it was possible to devise a framework convention, consisting of general principles, while at the same time indicating what kinds of activities were covered by it. He would himself prefer a framework convention, which was probably all the Commission could achieve, but also thought that States would be prepared to accept such a convention only when they could see which activities under their

jurisdiction it would govern. It was perhaps not necessary for a framework convention to include a list of dangerous substances, as opposed to an illustrative list of activities involving risk or actual transboundary harm.

55. A list of activities was a primary task for the Commission. The emerging corpus of international environmental law covered a wide range of subjects: climatic change, systematic food-production failure, desertification, deforestation, long-range transboundary air pollution, the destruction of the ozone layer, ocean contamination and the endangerment of species. The Commission’s list might also cover marine pollution from land-based sources, the transport, handling and disposal of toxic and dangerous wastes, international trade in potentially harmful chemicals, hazards posed by large chemical and industrial plants, and the operation of nuclear reactors and nuclear ships.

56. Some members of the Commission had expressed concern lest the Commission’s efforts to develop a régime of liability for all those environmental concerns be overtaken by developments elsewhere. Their concern was unnecessary, since the Commission’s work could only benefit from the development of specific principles in certain fields, and indeed the Special Rapporteur had drawn inspiration from such sources. Liability régimes had yet to be devised in most areas, especially for nuclear incidents and the transboundary movement of hazardous wastes.

57. Where nuclear incidents were concerned, the preferred approach was to assign liability to the operator, up to a fixed financial limit, according to the principle of strict liability. There would be no exceptions, so that victims could claim compensation; the State would be required to meet any shortfall due to the operator’s inability to obtain complete insurance cover. Arguments had also been advanced in favour of setting up common funds, at the regional or global level, from contributions made either by the operators of nuclear facilities or by States, in order to meet compensation claims which exceeded the combined limits of the operator’s liability and State cover. The aim was to secure full compensation for innocent victims when it was impossible to restore the previous situation, obtaining funds from a variety of sources according to the apportionment of responsibility. That approach best met the common concern for viable régimes of environmental law of benefit to the entire international community. A régime of strict or absolute liability involving the State alone would be neither practical nor justifiable. The Bhopal and Chernobyl disasters had demonstrated the sheer scale of the damage which could be caused by environmental hazards. Such accidents could involve hundreds or thousands of claimants, entail enormous financial expenditure and require substantial scientific and technological resources, both in prevention and in restoration. To afford protection against such consequences over a 30-year period, as proposed by the Special Rapporteur, would be beyond the capacity of any single State, however wealthy; no developing State could possibly play such a role. Moreover, if the principle of strict liability were chosen and the ordinary requirement of causation were

dispensed with, to enable more victims to claim compensation more rapidly, there must, in the interest of fairness to the operator, be a ceiling on financial liability, which might vary according to the activity covered. Looking beyond the limitations of the traditional law of tort, he considered that the kind of approach he had outlined could best resolve the difficulty.

58. In adopting a broad concept of damage, to include damage to the environment, the Commission must not disregard the goals of restoration and of adequate and reasonable compensation, nor must it unduly burden the operator, the State or the international community. Prescriptions for bilateral or multilateral negotiations, or specific rules of procedure for notification, consultation and dispute settlement, could only be effective if there were generally accepted common standards and fairly shared benefits and burdens. All parties concerned must be willing to achieve a balance of interests by accommodating all legitimate competing interests. Otherwise, the procedural obligations would merely lead to disputes and jeopardize friendly relations. Hence he was not convinced that the draft articles should give priority to procedural obligations, which could be considered after an acceptable régime on liability had been developed.

59. Attention should be paid to the concerns of the developing countries, their present stage of economic development, and the need to share with them current knowledge on the conduct of dangerous activities. They stood in need of training, as well as technical and financial assistance, in order to develop the necessary infrastructure to achieve a safe environment and sustainable development. Multinational corporations operating in their territories must conform with international standards of accountability and liability. Developing States had difficulty in obtaining the transfer of appropriate technology under equitable terms and they were anxious to exercise control over the natural resources under their jurisdiction, and to remain competitive in world trade and international markets.

60. Turning to the draft articles, he would prefer to replace the word "places", in article 1, by "areas". He agreed with Mr. Graefrath that the proposed definitions of terms in article 2 could be regarded as guidelines and reviewed later. Article 3, however, required more careful consideration and a detailed commentary. If liability was to be established, the State of origin must be fully aware of the potential risk of an activity, not merely of its existence. The Bhopal disaster was a particularly relevant example in that regard. There must also be an element of control over the activity in question and it should be made clear in the commentary that an important factor in the attribution of responsibility would be the operator's profit from the activity.

61. He objected to the expression "sovereign freedom", in article 6, and would prefer the word "right". The language of article 7 was too complex. The intention was, apparently, to require States to reduce or contain the risks of an activity, without

preventing the activity itself; but the sense should be brought out more clearly.

62. With regard to article 12, he agreed with Mr. Al-Baharna (2183rd meeting) that the word "intervene" should be avoided in relation to international organizations. They were to be invited, on a consensual basis, to bring their skills and expertise to bear in the management of a crisis. As Mr. McCaffrey had pointed out, the various factors listed in article 17 should be weighted, either in the commentary or in additional paragraphs.

63. The obligation, in article 21, to negotiate full compensation was too far-reaching and would not be accepted by States. Because exonerating factors were allowed for in article 23, there would be problems in the negotiating process if the principle of full compensation was upheld. In the same article, the phrase "if the State of origin has taken precautionary measures . . . and the activity is being carried on in both States" was difficult to understand. The fact that an activity was conducted by both States, rather than by the State of origin alone, made no difference to the outcome. If both States were operating nuclear reactors, and one of the nuclear reactors was involved in an incident, the activity by the other State was irrelevant.

64. In article 24, the Special Rapporteur had attempted to bring within the compass of a single article both harm to the environment and harm to persons or property. In his opinion, the two types of harm should be treated separately, even if the requirement of reparation and compensation was the same. Again, the exoneration from liability in article 26, paragraph 1 (b), was not stated clearly. Was it the intention to extend liability to a person who caused harm and affected innocent persons in the process? Provision must also be made for acts by terrorists, for harm to innocent victims and for measures of relief and restoration.

65. Lastly, with regard to article 29, he pointed out that even the affected State might want to pursue a remedy in the courts of the other State, and that possibility should not be foreclosed. In other respects, he agreed with the Special Rapporteur's proposals.

The meeting rose at 6.15 p.m.

2185th MEETING

Tuesday, 3 July 1990, at 3 p.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. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo,