

Document:-  
**A/CN.4/SR.2225**

**Summary record of the 2225th 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:-  
**1991, vol. I**

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35. Mr. TOMUSCHAT said that, according to the definition in the introductory articles, which limited risk to certain activities, the construction of major works did not fall into the category of activities involving risk. That type of construction activity did not cause immediate harm. Rather, it contained potential risks, which could materialize at a later stage. For example, it was clearly open to question whether noise should be considered as harm in the traditional sense, as understood by international law and as reflected in awards by international arbitration tribunals. A distinction had to be drawn between two types of activities which involved harm: activities which gave rise to clearly identifiable specific harm, such as in the *Trail Smelter* case,<sup>13</sup> and activities in which harm was the result of an accumulation of various factors, which was true of the normal activities engaged in by industrialized societies. The latter type should be governed by specific rules and should receive specific treatment.

*The meeting rose at 11.30 a.m.*

<sup>13</sup> See 2222nd meeting, footnote 7.

## 2225th MEETING

*Tuesday, 18 June 1991, at 10 a.m.*

*Chairman:* Mr. Abdul G. KOROMA

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/437,<sup>1</sup> A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR<sup>2</sup>  
(continued)

1. Mr. ROUCOUNAS recalled that, in 1973, when the question of liability for risk had briefly attracted the Commission's attention, the United Nations Conference on the Human Environment had completed its work and

<sup>1</sup> Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

<sup>2</sup> For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

UNEP had just been established. Nearly 20 years later, the international community, which had gradually entered what was probably sarcastically being called "the ecological age", had made some slight progress in the regulation of certain specific questions. A number of international instruments, which were, moreover, not all the same in scope, thus showed how much headway had been made, but they showed mainly how much more still had to be made in order to achieve universal results. The Commission, which had begun to study the question as an offshoot of the question of State responsibility, gave the impression to outsiders that, despite its lengthy debates, which reflected the fascination created by the idea of common areas beyond the jurisdiction of any State, it was not yet sure what major options it had with regard to the draft articles on international liability for injurious consequences arising out of activities not prohibited by international law.

2. Nevertheless, he did not believe that the Sixth Committee had wanted to put the Commission to a pointless test comparable to the physical contests to which the gods of antiquity had subjected mortals. On the contrary, the discussions in the General Assembly and the Commission itself showed that the Commission was being called upon to follow the direction the law was actually taking.

3. A recent United Nations study revealed that 80,000 compounds of organic or inorganic chemical substances were now being commercially produced and that 1,000 to 2,000 new chemical products came on the market each year. The effects of such industrial activity, both on human health and on matters relating to transport, marketing, utilization and elimination, were being discussed by international bodies and some conventions and other texts were trying to establish either State control, primarily of a preventive nature, or international cooperation. In that connection, he referred to the 1972 Convention on International Liability for Damage Caused by Space Objects, 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 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. Apart from those specific fields, however—and that was where the importance of the work undertaken by the Commission lay—there were no specific provisions on the consequences of the violation of a rule or on conditions for the compensation owed to the victims of harm caused by an activity involving risk. To take a few recent examples, there were no provisions on liability in the 1986 Convention on Early Notification of a Nuclear Accident, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal or even in the draft convention prepared in 1991 by the Economic Commission for Europe on the transboundary impacts of industrial accidents,<sup>3</sup> article 18 of which read:

<sup>3</sup> See 2224th meeting, footnote 11.

## LIABILITY

The Parties shall cooperate with a view to considering appropriate ways and means of elaborating, within an appropriate framework, international rules, criteria and procedures in the field of liability and compensation to deal with damage resulting from the transboundary effects of industrial accidents.

4. There had thus been some developments with regard to prevention and international cooperation for exchanges of information and assistance, but no rules had been worked out in the field the Commission was considering, and that was why its task was of crucial importance, provided that it led to concrete results. To that end, the Commission had to formulate basic rules to which the States could refer when they wished, first, to leave aside the question of the lawfulness or wrongfulness of an activity which caused transboundary harm and, secondly, to provide compensation for transboundary harm caused by risk in the broad sense of the term.

5. Lengthy doctrinal discussions could be held on the basis for that approach. The main problem was, however, to find the necessary tools to allow for reparation and to encourage operators to take preventive measures. Obviously, there was a theoretical problem: that of the link between prevention and reparation by means of harm. A substantial body of opinion did not see why the breach of an obligation of prevention did not fall within the general regime of responsibility or how there could be an obligation to make reparation even if there had been prevention. That theoretical problem was a very real one, but the Commission could very well leave it aside and formulate specific rules allowing for reparation. He recalled that he had already had occasion to point out that the Commission was being called on to draft two instruments at the same time, one on prevention and the other on reparation.

6. There were nevertheless two things to bear in mind. The first was that, so far, the Commission had never drafted a text providing for an institutional mechanism, whereas the adoption of most instruments on industrial risks had been accompanied by the establishment of bodies to monitor their implementation. The second was that the reparation of harm caused by certain activities was covered by the insurance policies taken out by the operators. In that connection, regulations encouraging States to legislate to require a comprehensive insurance system might help to introduce the regime which the Commission was being called upon to set up. No useful purpose would be served by imposing liability on the State when it was well known that there were some States which could not pay, whereas enterprises could.

7. In his informal note on the important issues,<sup>4</sup> the Special Rapporteur had recommended that no time should be spent on the question of the nature of the instrument. In that connection, he (Mr. Roucouas) observed that that problem was linked to another one, on which the Special Rapporteur had requested the Commission's opinion namely, procedural obligations; that the ultimate form of the draft depended not on the Commission, but on the General Assembly; and that the Commission was not being asked to define to what ex-

tent its articles would be binding. He also noted that "soft" law, despite its usefulness, was still not fully understood and that, whether with regard to form or to substance, there was some "soft" law in all "hard" law and vice versa. The main point was to establish basic rules that were flexible, sufficiently modest, and useful. The rest would come with time.

8. Another problem which the Commission had to solve at the current session in order not to give the impression that it had wasted its time was that of the fate of the draft articles which had been awaiting consideration by the Drafting Committee for some time. That consideration would make it possible, as Mr. Mahiou had said (2222nd meeting), to assess the extent of the consensus in the Commission, at least on the general principles or, in other words, on the scope of the draft articles, international cooperation, preventive measures, the threshold of harm, the range and modalities of reparation and non-discrimination in the compensation of victims.

9. Some of those articles were, moreover, not altogether satisfactory. Draft article 4, for example, was supposed to be based on article 30 of the Vienna Convention on the Law of Treaties, but it dealt with a situation that was not exactly the same as the one referred to in article 30: it stated the obvious, namely, that a specific regulation prevailed over a general regulation, whereas article 30 of the Vienna Convention referred to texts relating to the same subject-matter. What that provision should bring out was the residual nature and complementarity of the draft articles.

10. In conclusion, he believed that a working group might be better able than the Drafting Committee to formulate such general principles at the current session, as well as to identify the broad outlines of the draft in order to show that the Commission was involved in initiatives being taken at the international level.

11. Mr. OGISO, said that, while focusing on the important issues stressed in the Special Rapporteur's informal note, he also wished to reaffirm his personal approach to the topic and, in particular, to the issue of the nature of the instrument.

12. With regard to the question of the title of the topic, he agreed that the word "acts" should be replaced by the word "activities".

13. Turning to what he regarded as one of the most important issues, he could agree with the Special Rapporteur on the need to draft coherent, reasonable, practical and politically acceptable articles, but he did not believe that the question of the nature of the instrument should be left aside for the moment. All future work on the formulation of the draft articles would depend closely on the nature or character of the proposed instrument. If it was to be legally binding, its core would have to be drafted to reflect at least *lex lata*, under present international law. If, on the contrary, it was to be only recommendatory or a code of conduct, rules and principles could be created that were new under present international law. The nature of the instrument therefore had to be decided before going any further. Moreover, the delegation which had proposed that the Commission should carry out an overall review of its work on the topic

<sup>4</sup> See 2222nd meeting, footnote 5.

seemed to have had the same concern: that the Commission should first agree on a clear working hypothesis relating to the legal nature of the instrument or instruments to be worked out.

14. His own view was that the Commission should be prepared to draft two separate instruments: one dealing with the issue of liability, including reparation for damage, and another with the issue of prevention. The first of those instruments would be binding and the second would take the form of recommendations. That approach would have two advantages. The first was that it would avoid the use of the controversial concept of activities involving risk, which was in fact unnecessary if the sole concern was liability arising out of the harmful physical consequences of the activities in question, since only actual harm was taken into account. Because it had no direct link with the reparation of that harm, the concept of risk would then come into play only in connection with the duty of prevention. The second advantage was that there were already certain conventions, such as the Vienna Convention for the Protection of the Ozone Layer and the Convention on Early Notification of a Nuclear Accident, which laid down rules and procedures for prevention and focused on the types of activities that called for preventive measures and on the rules and procedures necessary to prevent possible harm.

15. It was on the basis of that assumption that he wished to comment on some of the important issues raised by the Special Rapporteur. The first instrument, the legally binding one which would deal with liability, including reparation, should, in his view, set forth only certain fundamental rules and principles concerning the legal consequences of transboundary physical harm, such as reparation, non-discrimination before the courts of the forum State and exhaustion of local remedies. With regard more particularly to reparation, certain points merited attention. First, it should be recognized as a legal principle that the innocent victims of transboundary harm should be compensated, primarily through civil liability regimes. That, of course, raised the question whether the principle of causal liability should apply to compensation for damage caused by activities not prohibited by international law. In his view, under the civil law of the majority of States, the principle of causal liability in that field was still not generally recognized; nor was the principle of residual State liability, in the event that reparation was not obtained under the civil law procedure. Moreover, existing conventions on the subject also did not provide for the residual or strict liability of the State, apart from the Convention on International Liability for Damage Caused by Space Objects. The famous *Trail Smelter*<sup>5</sup> principle might not be applicable to all cases, regardless of the actual situations in which transboundary harm occurred. Article 139, paragraph 2, of the United Nations Convention on the Law of the Sea and article 4, paragraph 4, of annex III thereto provided a typical illustration of the reluctance of States when it came to bearing liability for activities conducted by contractors, even when such activities were sponsored by States. He was therefore somewhat hesitant to recognize, under the existing rules of international law,

the automatic application of the principle of the strict liability of the State, even if it was only residual liability. That led him to the conclusion that the principle of compensation should be set forth in general terms only and should not go so far as to cover causal liability under the civil law and the residual liability of the State. Those issues would be better dealt with in instruments covering well-defined areas, such as nuclear damage and environmental pollution caused by oil spillage.

16. He agreed with the Special Rapporteur that the primary liability should be civil liability, but he doubted whether the rules of civil law were sufficient, in most countries, to cover transboundary physical harm arising out of activities not prohibited by international law. Without excluding the possibility of setting forth certain international rules and standards concerning civil liability in specific instruments, including the question of the channelling of liability—he was thinking, for instance, of the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources—he considered that in principle those matters still fell within the rules of internal law. The principle of causal liability was in fact recognized only in the context of certain ultra-hazardous activities. It was true that a recent German Act, the 1990 Environmental Liability Act, was said to have considerably broadened the scope of that principle, but such a comprehensive approach was not yet common. Consequently, even the fundamental principle of reparation, to which he had referred earlier, needed to be crystallized under specific conventions, by the development of national legislation or through the jurisprudence of national courts. That was all the more so in the case of principles which, at the international level, were of only a recommendatory nature, such as those affecting the details of civil liability.

17. With regard to the Special Rapporteur's question concerning the scope of the future instrument, the concept of activities involving risk should not, in his view, be used in an instrument dealing with reparation. Since almost all human activities involved an element of risk, some threshold would have to be set. That, however, would be very difficult in practice. Furthermore, the concept of risk could lead to confusion in the context of reparation because it could be wrongly regarded as the foundation of the obligation to make reparation or to compensate.

18. Prevention would be the subject of the second instrument, in which most of the provisions on the obligations of the State of origin set forth in draft articles 11 to 20 submitted by the Special Rapporteur would be reproduced in the form of guidelines or a code of conduct. That did not mean that the substantive and procedural rules relating to prevention were not as important as those relating to reparation: on the contrary, the rules on prevention set forth in articles 11 to 20 could be very useful if they were conceived in more precise terms and specifically in relation to ultra-hazardous activities. There was, however, considerable controversy on whether such obligations of the State of origin as those concerning, for instance, assessment, notification, information, consultation and negotiation with affected States

<sup>5</sup> *Ibid.*, footnote 7.

or States presumed to be affected, and unilateral measures of prevention, were already well-established principles of international law applicable to all situations or activities not prohibited by international law, regardless of the nature of such activities or the area where they were carried out. In particular, the substantive and procedural rules concerning prevention, as well as the mechanism for their implementation, might be fairly different according to the type of activity concerned or even according to the phase reached in the course of the same activity. For instance, some conventions, such as the International Convention for the Prevention of Pollution from Ships, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the Vienna Convention for the Protection of the Ozone Layer, approached the question mainly from the angle of the activities that should be prohibited or of the conditions under which a particular activity should be allowed, whereas other conventions, such as the Convention on Early Notification of a Nuclear Accident, dealt only with the accidental phase of the activity and laid down rather detailed rules of notification. In the circumstances, it would be better, at the current stage, to formulate recommendations or a code of conduct on the topic of prevention rather than to formulate generally applicable rules of a legally binding character.

19. The list of dangerous substances should be mainly for preventive purposes and should therefore be in the nature of a recommendation. It might be useful to annex such a list to the instrument on prevention to provide an illustration of the kind of activity that should in future come under closer surveillance and be the subject of special and effective rules on prevention.

20. Lastly, he agreed with previous speakers that it was too soon to lay down general principles of international law relating to the "global commons".

21. Mr. SHI said he agreed with the Special Rapporteur that the discussion should concentrate on the main issues of the topic rather than on the texts of the articles. That was entirely in keeping with the decision taken by the Commission at its forty-second session.<sup>6</sup>

22. In his view, a decision on the nature of the instrument would be premature at the current stage. Since the early 1960s, the Commission's aim had always been for its articles on various topics ultimately to take the form of international conventions. Initially, its codification efforts had met with success, as exemplified by the first conventions on the law of the sea, the conventions on diplomatic and consular relations and the convention on the law of treaties, but, since the 1970s, the conventions concluded on the basis of articles drafted by the Commission had not always proved so successful, either because there had not been many ratifications or because the instruments in question had not come into force because of the scant number of States parties. Also, some of the draft articles recommended by the Commission had been shelved by the General Assembly: he was thinking, for instance, of the most-favoured-nation clause and of the status of the diplomatic courier. In his

view, the Commission should be more careful in future before making recommendations on the final form the draft articles should take, particularly when those articles were more concerned with the progressive development of international law than with its codification, as in the case of the topic under consideration. He therefore agreed with the Special Rapporteur that the question of the nature of the instrument should be left aside for the time being and that the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. The Commission should expedite its work in that direction in order to meet the expectations of the General Assembly and should bear in mind that not even one draft article had been provisionally adopted since the topic had been placed on its agenda over 10 years earlier.

23. As to the title of the topic, he would refer members to paragraph 216 of the Commission's report on its thirty-eighth session,<sup>7</sup> which seemed to settle the question, and he would therefore not reopen the debate on the matter. In order to facilitate work on the topic in the next quinquennium, however, it would be better for the Commission to request the General Assembly at its forty-sixth session to replace the word "acts", in the English version of the title, by the word "activities", with any consequential changes being made in the other languages.

24. With regard to the scope of the topic, he had consistently held the view that the draft articles should apply to activities involving risk as well as to activities with harmful effects or activities that caused harm. Like other members, he considered that the threshold concept was important in triggering liability for activities not prohibited by international law. States seemed to accept or to tolerate a certain degree of harm and it was only when harm exceeded a certain established limit, either because of an accident or for other reasons, that liability was triggered. The question, however, was whether the two types of activity—activities involving risk and activities with harmful effects—should be treated together. Although it was mainly a question of method, he considered that, since the two types of activities had much in common in terms both of general principles and of legal consequences, the two could indeed be treated together. On the other hand, he doubted whether the word "prevention", even if understood in the broad sense the Special Rapporteur gave to it in his sixth report,<sup>8</sup> could also apply to measures taken after the occurrence of an accident to reduce the extent and degree of harm or to minimize the harmful effects of an activity. At any rate, he agreed with the Special Rapporteur that the Commission should review the possibility of the joint treatment of the two aspects of the matter at the end of the exercise.

25. A general definition could serve as a guide to States in delimiting the scope of the topic. It would be difficult, if not impossible, to draw up an exhaustive list of dangerous activities and an illustrative list would be virtually useless. As to a list of dangerous substances, he shared the view expressed in the Sixth Committee that

<sup>6</sup> *Yearbook* . . . 1990, vol. II (Part Two), para. 472.

<sup>7</sup> *Yearbook* . . . 1986, vol. II (Part Two), p. 58.

<sup>8</sup> See 2221st meeting, footnote 7.

the fact that a substance appeared on the list might not mean that the activity related to the substance would necessarily create a risk of transboundary harm and that the risk might be created by activities unconnected with a dangerous substance.<sup>9</sup>

26. Prevention was no doubt an important element in the regime applicable to activities involving risk. The revised procedural rules proposed by the Special Rapporteur in his sixth report were an improvement over those presented in his fifth report.<sup>10</sup> Despite views to the contrary voiced both in the Commission and in the Sixth Committee, however, the obligation of prevention should remain within the realm of "soft" law. In that connection, he endorsed the commentary to article 18 which appeared in the Special Rapporteur's sixth report: failure to comply with procedural obligations of prevention entailed no liability, for liability arose only when harm had occurred and could be imputed to an activity by a causal link.

27. With regard to the assignment of liability for appreciable or significant transboundary harm, he considered that the operator should bear the primary liability to make reparation, since that was in line with the current practice of States, as reflected in a number of conventions. The operator might be a private corporation, a State enterprise or the State itself, in accordance with the way that term was used in the draft articles on jurisdictional immunities of States and their property. Where the operator was the State itself, there was no doubt that the State should be liable. Since the amount of compensation might be quite large, an intergovernmental fund might be created, with statutes similar to those of the World Bank or the Common Fund for Commodities. The specific terms and conditions governing the use of the resources would be determined by the fund itself. Since primary liability lay with the operator, the draft articles ought to include provisions on civil liability. However, it was best not to make those provisions too detailed, since civil liability was provided for in domestic law and countries might have different legislation in that regard, so that uniformity would probably be hard to achieve in the near future. Provisions embodying general principles on local remedies and particularly on non-discrimination would suffice.

28. Harm to the "global commons", in particular the "greenhouse effect", was currently a matter of particular concern. The Commission could not ignore that problem and should contribute to the development of the law in the field. The question was whether it should do so in the context of the current topic, under which the Commission was considering liability for appreciable or significant transboundary harm to persons, property or the environment. Both the State of origin and the affected State could thus be easily identified and the harm caused could be assessed. That was not the case with harm to the "global commons", which differed from the current topic in a number of ways: the multiplicity of sources causing harm, the difficulty of identifying the State or

States of origin, the problem of assessing the threshold of harm, difficulty in determining the effects of harm to the environment of the "global commons" and the question of the definition of the concept of the "global commons". In those circumstances, he did not think that the issue should be dealt with under the current topic and suggested that the Commission might list it separately as a priority topic in its long-term programme of work.

29. In discussing the current topic, the Commission should take account of the conditions of developing countries and formulate the draft articles accordingly. Articles 3 and 7 proposed by the Special Rapporteur did in fact take account of their lack of technology. However, the situation needed to be considered more systematically because, whether they were upstream or downstream of the harm, developing countries were the main victims of modern industrial production. Activities involving risk or activities causing transboundary harm were very often carried out by transnational corporations, which developing countries were hardly in a position to regulate. Furthermore, many of those countries did not have the technological know-how and financial resources to control such activities. It was thus not only a matter of providing assistance to developing countries, but also of determining who was liable in the case of transboundary harm. Developing countries that were affected by transboundary harm faced the problem of the lack of means for monitoring and assessing the harm and the lack of the technology and financial resources to minimize and contain it.

30. Lastly, he hoped that the Commission could speed up its work on the topic, especially since it was already well advanced on jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. In his opinion, the topic of liability should be given high priority on the agenda of the renewed Commission.

31. Mr. Sreenivasa RAO said that, in attempting to recast the basic ideas of the topic in the light of comments by States, recent conventions and the conceptual problems involved, several of Mr. Barboza's reports, including the seventh, seemed to create some confusion about the focus and direction of the topic, but, on closer examination, they were in fact helping the Commission to grasp the essential elements of the possible legal regime.

32. He, too, was in favour of a flexible framework convention establishing general principles of liability, including the circumstances under which liability arose; the role of prevention and due diligence; exemptions from liability; the criteria for compensation or reparation; the role of equity; the peaceful settlement of disputes; the functions of international forums and organizations; and the establishment of effective standards and monitoring agencies through national legislation.

33. It was reasonable to assume that liability should be based on significant or appreciable harm, whether such harm had or had not occurred, and that the role of the risk factor should be limited to indicating the possibility or probability of harm and, more importantly, to imposing the obligations of prevention and due diligence. The

<sup>9</sup> *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee, 28th meeting, para. 62.*

<sup>10</sup> *Yearbook . . . 1989, vol. II (Part One), document A/CN.4/423.*

debate was also indicating—even though it had yet to be stated clearly—that liability for harm lay with the operator, subject to all the principles linked to the obligation of due diligence and the applicable exceptions. In that connection, the Special Rapporteur had rightly emphasized control of the activity in his seventh report.

34. It should also be recognized that a regime of liability placing the emphasis on the operator might never be applicable to harm to the environment, persons or property as a result of the gradual accumulation of the harmful transboundary effects of a more or less long-term activity, especially if that harm was the result not of the activity of one operator in one particular State, but of the activities of several operators in more than one State, as in the case of the depletion of the ozone layer. The principle of liability could be effectively applied only if it was adapted to the characteristics of each type of activity. A regime of liability could not be designed to be applicable to every situation, as shown, for example, by the current negotiations on liability for nuclear accidents or incidents. By highlighting the features of particular activities, such negotiations could provide guidelines for the Commission on the basic elements of the framework convention on which it was working and, once the convention had taken shape, could help give it final form.

35. International liability as a regime was closely linked to the lifestyle of peoples and it must be borne in mind that much of the world's population was simply trying to satisfy its basic needs or improve its standard of living. For the developing world, space research, communications, technology, atomic energy and so on were means of reducing economic disparities and compensating for having missed out on industrial and technical revolutions as a result of colonialism and the exploitation of their natural resources. Those efforts to modernize did not reflect a desire for power, as they might in other parts of the world, but would enable the developing countries to meet the challenges of population growth and poverty.

36. If, in order to obtain the technical, scientific and financial assistance of the most advanced countries, the developing countries, having little to offer in return, sometimes had to pay the price in terms of national sovereignty or political, economic or cultural freedom, was it moral and equitable to require the same standards of liability of them? To demand equality of treatment in that regard was to take no account of the lifestyles and standards of living which the developed world had achieved at the expense of the environment, planetary resources and, more serious still, a large majority of the world's population. A regime could not be considered equitable and based on a sense of justice if it ignored the disparities in standards of living between nations and was insensitive to the development needs of the majority of the world's population.

37. The responsibility of the over-industrialized world for the enormous amounts of waste generated by excessive consumption and its contribution to global warming, deforestation, and the like, had to be given due consideration. He feared that non-acceptance of State liability and the exclusive dependence on operator liability might create some gaps in the regime to be established. State

liability should be distinguished from the liability of multinational corporations.

38. There was a need to set up international organizations and reorient existing ones in order to provide the technical assistance needed to ensure the safety of operations. It was also necessary to set adequate standards, define thresholds of harm and, above all, establish international funds and contingency plans which would operate in cases of disaster.

39. It was clear that there were activities which gave rise to some limited harm, owing to operator negligence or irresponsibility, in which case a simple liability regime would be applicable, as in the common law. In such cases, claims would be based on the law of causality, the principle of the due diligence expected of a prudent and reasonable individual, the principle of compensation and other types of relief for damage, as well as insurance coverage, which could be made mandatory. However, in the absence of agreement on the threshold of appreciable harm, extending that regime to all forms of transboundary harm would be legally and politically unacceptable.

40. In view of the work that still had to be done, he would welcome the establishment of a small working group to consider the main issues: while an innocent victim should not have to bear the cost of the harm, should he not share the risk to the extent that he benefited from the activity? What approach should be taken on the issue of intergenerational equity? With regard to environmental law, the poor suffered most from the effects of pollution; they must be given a cleaner environment, which would then help guarantee their right to life. In India, the Supreme Court had interpreted the right to life in its widest sense in linking it to the right to development. In mentioning those specific aspects of liability, his aim was merely to stress that the issue for developing countries was less the right to life than the right to survival. Under such circumstances, how could the environment be protected and the basic needs of populations be met at the same time without an excessive drain on financial and other resources? How could liability be shared between those who caused harm and those who could remedy it by means of surplus resources?

41. In conclusion, he said he hoped that, while viewing the topic in a consistent manner, the Commission would bear in mind the situation of much of the world's population, whose development needs were urgent and whose very survival was in jeopardy.

42. Mr. THIAM thanked the Special Rapporteur for his report. He said that a great deal of thought had gone into it, but it created two contradictory impressions.

43. The first was that the report was a kind of introduction to consideration on second reading before the fact. All the issues referred to in the report had been discussed at length and had been incorporated into draft articles which had been sent to the Drafting Committee. Those issues were being brought up again even before the Drafting Committee had considered them and before States had commented on the Commission's work. However, there was also the impression that the consideration of certain issues had just begun. That was the case, for

example, of the scope of the draft articles, a matter which was usually dealt with at the start of the work. Those contradictory impressions might have been created because the subject was a difficult one, but also because the Commission had not given the Special Rapporteur clear enough guidelines. In any event, the item had been on the agenda for more than 10 years and the Commission continued to puzzle over the same issues without being able to come up with a precise and coherent focus; and, once again, the Special Rapporteur was asking the Commission to consider issues on which the members had already made their positions clear. He personally continued to entertain doubts about the topic itself, which, in his opinion, was not separate enough from the overall topic of State responsibility and should have been considered in that context. It was unfortunate that, in undertaking his study of the topic of State responsibility, Mr. Ago, Special Rapporteur on the topic from 1963 to 1978, had refused to consider the overall issue of responsibility and liability and had dealt only with responsibility for wrongful acts.

44. He would nevertheless try to give a few ideas on the questions raised by the Special Rapporteur.

45. With regard to the nature of the instrument, he thought that such a complex topic probably called for a framework convention embodying some very general rules rather than binding ones. States did not seem to be prepared to accept responsibility for the activities they carried out in their own territory, as was their sovereign right, without any wrongdoing on their part. That was the problem and it was the problem that had arisen some 10 or 12 years previously with regard to liability for risk, a principle for which it had been very difficult to gain acceptance. It was probably now generally agreed that liability for risk existed, but that was the result not of codification, but of legal decisions that had gradually given shape to the applicable rules. The Commission therefore had to be cautious and modest, ruling out any ambitious undertakings.

46. The title of the topic was not only very long, but also contained ambiguous terms. It referred to "international liability for injurious consequences", but was there such a thing as liability for non-injurious consequences? All liability involved injury. The Commission could thus improve the title by simplifying it and making it more precise. He also recalled that it had been agreed that the topic should cover *activités* and not *actes*. A term corresponding to the word *activités* therefore had to be found in English.

47. With regard to scope, he did not see any difference, from the viewpoint of liability, between activities involving risk and activities with harmful effects. Any activity which caused harm, whether an activity involving risk or an activity with harmful effects, would give rise to liability. He could also see no point in drawing up a list of substances. Whenever the use of a substance caused harm, the harm must be repaired. A list of prohibited substances would make sense only in connection with responsibility for wrongful acts. In any case, compiling a list of substances would not be easy and would call for technical knowledge that the Commission did not have.

48. Most of the principles proposed—freedom of action and the limits thereto (art. 6), cooperation (art. 7), prevention (art. 8) and reparation (art. 9)—derived from general international law. He saw no objection to including them in the draft articles, provided that responsibility for wrongful acts was not confused with the present topic. For instance, making prevention an obligation would be tantamount to saying that a breach of that obligation would give rise to responsibility for a wrongful act. That was also true of reparation.

49. With regard to procedural obligations, the Special Rapporteur was asking whether they should remain within the realm of "soft" law. He could not take a definite stand on that issue, since that was a common law concept. However, if a procedural obligation was laid down, States must comply with it, for otherwise, there would be a breach. It could not be said both that an obligation existed and that it was part of "soft" law, unless the concept had some meaning of which he was unaware.

50. He could also not take a stand on the choice to be made between the original civil liability of a State and its residual liability. He noted, however, that the Special Rapporteur had expressed his own preference in the draft articles which he had proposed and all of which—for instance, articles 1 and 3—were based on the liability of the State of origin. If the intention was now to base them on the principle of the operator's liability, he had no objection, but all the draft articles would then have to be revised accordingly. The same applied to the duty of diligence. The Special Rapporteur had stuck to his own approach in proposing that the State should be liable for any breach of the duty of diligence. But there must be a choice: either a State was liable for activities which were themselves necessary and which it carried out in a sovereign capacity, but which caused harm to someone else, or it was responsible for a breach of its obligation of diligence.

51. It must be recognized that the Commission was not much further ahead than it had been at the beginning of its discussion of the topic. It had to decide what to do now and it had two options: it could tell the General Assembly that the topic was not ripe for codification and recommend that it should invite States to sign bilateral or multilateral conventions in specific fields; or it could continue its study of the topic, but it then had to try to be consistent, logical, systematic, discerning and clear, naturally with the Special Rapporteur's assistance. Above all, however, it must avoid going over the same ground every year.

52. Mr. HAYES said that, in response to the suggestion made in the Sixth Committee of the General Assembly, which the Special Rapporteur had quoted in the introduction to his report, he would refer mainly to the overall assessment of the current state of the topic, dealing with the key issues rather than with the draft articles, even if that meant reopening the general debate to some extent.

53. Although it was true that the Commission's debates at the last four sessions had revealed some sharp differences of opinion both with regard to fundamental matters and to points of detail, there was a surprisingly

wide area of agreement, in some cases amounting to a consensus.

54. The schematic outline proposed by the former Special Rapporteur<sup>11</sup> had been approved by the Commission at its thirty-fourth session; the present Special Rapporteur had proposed that it should be retained, and that proposal had subsequently been endorsed by the Commission. The outline was based on the principle *sic utere tuo ut alienum non laedas*, the first principle which met with general agreement and which lay at the very heart of the subject: liability for transboundary harm, whether threatened or actual. That principle was supplemented by another, which was based on Principle 21 of the Stockholm Declaration<sup>12</sup> asserting that States had as much freedom of choice in their activities in their own territory as was compatible with the rights and interests of other States. On that point as well, there seemed to be general agreement in the Commission. The outline also contained the elements of risk and harm, even if it did not use those words, providing as it did for prevention and reparation. In addition, it proposed that the innocent victim should not be left to bear his loss or injury and it emphasized the balance of interests between the States concerned.

55. At the thirty-ninth session, the present Special Rapporteur had asked the members of the Commission to discuss the following points: (1) whether the draft articles should ensure for States as much freedom of action within their territory as was compatible with the rights and interests of other States; (2) whether the protection of rights and interests of other States required the adoption of measures of prevention of harm; (3) whether, if injury nevertheless occurred, there should be compensation; and (4) whether the view that an innocent victim should not be left to bear his loss, should have a firm place in the topic.<sup>13</sup> At the end of that debate, the Special Rapporteur had drawn the following conclusions: (a) the Commission must endeavour to fulfil its mandate from the General Assembly on the topic by regulating activities which had or might have transboundary physical consequences adversely affecting persons or objects; (b) the draft articles on the topic should not discourage the development of science and technology, which were essential for the improvement of conditions of life in national communities; (c) as the topic dealt with both prevention and reparation, the regime of prevention must be linked to reparation in order to preserve the unity of the topic and enhance its usefulness; and (d) certain general principles should apply in that area, in particular: (i) every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States; (ii) States must respect the sovereignty and equality of other States; (iii) an innocent victim of transboundary injurious effects should not be left to bear his loss.<sup>14</sup>

56. Those elements which were contained in the schematic outline were therefore valid material and the debates at the thirty-ninth and subsequent sessions of the

Commission had shown that there was broad support for their inclusion in the future instrument, even if views differed on how that should be done.

57. He thus believed that, in the overall assessment it would submit to the General Assembly, the Commission should in the first instance draw attention to those areas of agreement and he hoped that they could be added to following the current debate.

58. Turning to the important issues raised by the Special Rapporteur, he said that with regard to the nature of the instrument, he accepted the Special Rapporteur's recommendation that the Commission should leave a final decision until a later stage and in the meantime work on the preparation of a framework convention. In any case, he personally favoured a framework agreement, which would encourage States to establish regimes applicable to specific activities and situations. It would then act both as a guideline and as a body of residual rules to be applied in the absence of a special regime.

59. With regard to the title of the topic, he thought a decision should be left until later, on the basis of the assumption that the English text of the title would refer to "activities" and thus conform with the other language versions. The Special Rapporteur's explanations on that point were fully convincing.

60. As to scope, he believed that there was agreement on including both activities involving risk and activities with harmful effects and on laying down the corresponding obligations of prevention and reparation. He was, moreover, not convinced that the two kinds of activities were mutually exclusive, since they could easily overlap.

61. He also did not think that there should be a further round of discussions on the choice of adjectives to qualify "risk" or "harm". He was nevertheless still firmly convinced that confining the draft to activities involving risk by describing them as "ultra-hazardous activities" or by referring to a list of activities or of dangerous substances would unnecessarily and unjustifiably restrict its scope. There did not seem to be much support for such an approach either in the Commission or in the Sixth Committee.

62. He agreed that the principles referred to in the draft articles were those applicable in the field. He thought, however, that the absence of any specific provision stating that the innocent victim should not be left to bear his loss was a significant gap which must be filled, perhaps by incorporating it in draft article 9 on reparation or in draft article 6 on freedom of action and the limits thereto.

63. Referring to procedural obligations, he said he agreed with the Special Rapporteur that there was basic agreement on having a procedure to trigger the obligations to make a transboundary impact assessment, to notify the potentially affected States and to consult with those States. Fortunately, the wording of the articles on procedural obligations in the sixth report was less detailed than in the earlier version, but it could be further simplified if the provision of detailed information, including technical data, was obligatory only where a request was made either by the State of origin or by the potentially affected State. There might well be cases

<sup>11</sup> See 2223rd meeting, footnote 5.

<sup>12</sup> See 2221st meeting, footnote 6.

<sup>13</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 41, para. 132.

<sup>14</sup> *Ibid.*, p. 49, para. 194.

when it would be unnecessary to provide such data to accompany the notification because the risk would be quite obvious. Although the Special Rapporteur was emphasizing that the proposed provisions reflected the wording of some specific agreements, he personally thought that less detailed rules were called for in a framework agreement. He also thought that article 17 could be simplified and placed in an annex, as the Special Rapporteur proposed in his report, and he supported the view that no sanctions should attach to the procedural obligations; compliance or non-compliance with them should instead be a factor to be taken into account in negotiations for compensation once harm had occurred. On the other hand, due diligence and the adoption of measures of prevention should be strict obligations.

64. With regard to the obligation of reparation, he would prefer the choice of regime to be left open instead of having a system of civil liability and residual State liability. If such a regime was to be developed, the draft articles would have to require States to make provision to that effect in their internal law. However, domestic legal systems differed as to grounds of action and he wondered how feasible, or even desirable, it would be to insist on that kind of harmonization. It would be better to leave it to States to make what provision they considered appropriate to impose liability on the operator for transboundary harm if it occurred, whether the operator compensated the injured party directly or contributed to the compensation paid by the State of origin.

65. As to the "global commons", he agreed that, if there were no applicable rules, some ought to be framed, but not without first studying the many aspects of the subject. The Commission should make clear that its task was to develop that area of law and should seek a mandate to do so.

66. In connection with the negotiations which the Special Rapporteur had said States would be starting on the topic at some stage, he understood that the Special Rapporteur had meant something other than the inter-State negotiations which always took place in the Sixth Committee when it considered drafts submitted by the Commission or in a diplomatic conference with a view to the adoption of an instrument. The Special Rapporteur had spoken of putting forward several alternative drafts for some articles. His own view was that that would be premature. The Commission should await the General Assembly's reaction to its report on the status of the topic before considering such an unusual procedure, even if the topic itself was an unusual one.

67. Lastly, he thought it would be useful for the Commission to inform UNCED that it was doing work which had a bearing on the environment. For that purpose, it could, as recommended by the Special Rapporteur, ask a working group to prepare a paper to be approved by the Commission and sent to the Conference. The paper should also report on the progress of the Commission's work on the law of the non-navigational uses of international watercourses.

*The meeting rose at 1.10 p.m.*

## 2226th MEETING

*Wednesday, 19 June 1991, at 10.05 a.m.*

*Chairman: Mr. Abdul G. KOROMA*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.*

### **International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/437,<sup>1</sup> A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

#### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR<sup>2</sup> (continued)

1. Mr. PAWLAK thanked the Special Rapporteur for his seventh report and his useful and inspiring introduction. The opinions expressed by the Special Rapporteur and his request for the views of the members on the topic deserved careful consideration. Like many other members, he was deeply concerned that, despite 14 years of determined effort, the draft articles on the topic were not even ready to be sent to the Drafting Committee. One reason was that the Commission had allowed the topic to grow from a relatively limited one covering State liability for non-prohibited activities into a quasi-omnipotent and uncontrollable monster encompassing virtually the whole of international environmental law. Of course, that growth had been fuelled by long-standing concerns about the degradation of the global environment and environmental accidents.

2. In order to achieve what should be its basic objective, namely, fulfilling its obligation to the General Assembly, the Commission should be working not towards the elaboration in the distant future of an overall convention, but towards the drafting in the near future of a relatively narrow and practical legal instrument, which could meet the international community's basic concerns and be accepted by States as a useful tool to combat any abuses arising from the use of new technologies. In other words, the monster topic had to be controlled and contained.

3. The Commission would do best to limit itself to one basic objective: laying a firm and scientifically sound foundation for the topic. There were a number of exist-

<sup>1</sup> Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

<sup>2</sup> For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.