

Document:-  
**A/CN.4/SR.2227**

**Summary record of the 2227th 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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responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required.<sup>8</sup>

Furthermore, he stated in his seventh report that:

Those undoubtedly were the meanings of the terms "responsibility" and "liability", at least in international practice and without venturing into the dangerous territory of the meanings of those terms in Anglo-Saxon law.

As now proposed by the Special Rapporteur, it became extremely difficult to decide on the nature and extent of the responsibility of States. What the Special Rapporteur appeared to be proposing was State responsibility for breach of the obligations of due diligence. In his own view, that would be to trespass on the topic of State responsibility, which had been entrusted to another Special Rapporteur.

40. Considering liability to be the result of State responsibility, the Special Rapporteur was actually introducing a concept of absolute State liability, which he regarded as the "middle way". He himself could, however, not help wondering whether States would really agree to assume financial responsibility *vis-à-vis* all non-nationals for all acts by private entities or individuals—not merely by large operators or factory owners, but also by owners of houses and cars. It was one thing to establish conditions under which harm was to be compensated by operators and quite another to pay for damage caused by operators who were themselves unable to pay or could not be traced. Nor could absolute liability be attributed by reference to the Convention on International Liability for Damage Caused by Space Objects. That instrument had been drafted and adopted on the assumption that all future space activities would be carried out by States, which must bear absolute liability for transboundary harm. The Special Rapporteur himself recognized that responsibility for damage caused by space objects was different, in principle, in legal terms, from the situations envisaged in the draft articles, which aimed to establish general principles of objective and strict liability. It was evident that absolute State liability could not be extended to all activities, in particular to private activities. The draft should be oriented towards the civil liability of operators, in accordance with the practice of States.

41. Turning to the concept of harm, he stressed that he in no way denied the role of harm in triggering liability. Liability derived not from risk itself, but only in case of actual harm resulting from activities involving risk. Harm could result both from innocent and from wrongful actions or activities. It might lead to different forms of responsibility, such as objective responsibility, namely, liability for harm resulting from lawful acts, responsibility for wrongful acts, namely, a result of the breach of an obligation, a violation of rules of conduct, including want of diligence, and so forth. The whole question was in the source and nature of the liability in question.

42. If harm was caused by an activity which was inherently risky, but which was in full compliance with the obligations of a State, it could be only the result of *force majeure*, such as an earthquake. In such cases, the State of origin of the transboundary harm and the State which suffered the transboundary harm were both victims and they must cooperate. Adequate principles must therefore be devised to compensate for transboundary damage taking into consideration the specifics of liability. Responsibility for transboundary harm caused by the breach of an obligation was a different matter and one which the Commission had not yet tackled properly. It must now remedy the omission, without confusing the different forms of responsibility. He hoped that, in the next quinquennium, both themes of liability and responsibility would be at the centre of the Commission's work. Its success in framing draft articles on those two subjects would depend on different conceptual approaches to the topics. The results of the work done so far could well be assessed in a working group, which would take account of all the views expressed. That would help to define what ground remained to be covered and would enable the Commission to complete its task. However, he could not go along with the proposal that the Commission should prepare a document for UNCED, since it had neither a clear concept on the matter nor a mandate from the General Assembly for that purpose.

43. Finally, with reference to the "global commons", he personally was wholly in favour of the international legal regulation of questions relating to the "global commons". However, the Commission must proceed with realism and caution. The subject of the "global commons" could not be included in the present topic and was more suitable for independent study, if the General Assembly so decided.

*The meeting rose at 11.35 a.m.*

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## 2227th MEETING

*Thursday, 20 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. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

<sup>8</sup> *Yearbook... 1986*, vol. II (Part One), p. 146, document A/CN.4/402, para. 4.

**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. McCAFFREY said that, although some members regretted that more headway had not been made in the consideration of the topic, that might well be the fault of the Commission, which seemed, rightly or wrongly, to have sacrificed the topic in order to be able to make progress on others.

2. In his view, the assessment made by the Special Rapporteur in his seventh report was quite useful because it gave a general idea not only of the positions of States and of the members of the Commission, but also, thanks to the 33 draft articles proposed in the sixth report,<sup>3</sup> of the shape of the draft and its scope. Consequently, the consideration of the draft articles on first reading would probably make substantial progress during the next term of office of the Commission.

3. Turning to the list of important issues contained in the informal paper the Special Rapporteur had circulated to the members of the Commission,<sup>4</sup> he said that it would be wiser to wait until further progress had been made in the work on the topic, both in plenary and in the Drafting Committee, before taking a decision on the nature of the instrument. As to the title, he reiterated that he was in favour of the replacement of the word "acts" by the word "activities", since the topic must deal with activities not prohibited by international law and the "act" of causing harm to another State was indisputably governed by international law. In addition, that change made it possible to solve a number of theoretical problems: the topic would, for example, cover activities such as those of chemical plants and nuclear power stations, which were not prohibited by international law, but whose operation involved a risk of appreciable harm for other States.

4. With regard to scope, he noted that, according to the Special Rapporteur, a majority seemed to be in favour of including both activities involving risk and activities with harmful effects and he urged the Commission to study the meaning of the obligation of due diligence in the case of activities involving the risk of transboundary harm. Could that obligation become stricter as the scope and gravity of potential harm increased? In other words, if a State set up a chemical plant or a nuclear power station in a border area, for example, and if, despite the vigilance it exercised, a breakdown occurred in the operation of those installations, causing serious harm to a neighbouring State, would the State of origin nevertheless incur liability under international law? By answering

that question, the Commission would be making an outstanding contribution to the development of international law, particularly at the present time, when technology was undoubtedly of benefit to mankind, but also involved some risks.

5. As to prevention and procedural obligations, the Commission should consider the establishment of a regime—which was, moreover, the underlying idea of the schematic outline submitted by the first Special Rapporteur<sup>5</sup>—in order to compensate for the lack of internationally agreed safety standards for the operation of chemical plants, nuclear power stations, and the like. It could happen that an activity which one State regarded as safe was not so regarded by another. Those two States should therefore hold consultations and negotiations in order to agree on a regime to be applied to the activities in question.

6. He agreed with the Special Rapporteur that the procedural obligations seemed to be established in general international law in conditions similar to those contemplated in the draft articles. As to whether they should stay in the realm of "soft" law, his opinion was that a procedural obligation was still an obligation under international law and that its breach gave rise to the consequences arising out of the breach of any international obligation, even, of course, in the absence of harm. As pointed out by the Special Rapporteur in his informal paper, it was obvious that the procedural obligations were complied with by merely putting the procedure in motion and that there was no obligation to reach an agreement before the activity had actually been started in the State of origin. However, should the draft articles go even further and specify that States must reach an agreement? He did not have any definite view on that point. He nevertheless noted that the Special Rapporteur was asking whether, in the event of actual transboundary harm and in the absence of agreement on a regime to make it acceptable to the affected State, there should be a system for the compulsory settlement of disputes. In such a case, there should be compulsory fact-finding into the seriousness of the harm and an obligation for the States concerned to hold consultations and negotiations, but not an obligation to use a particular type of settlement or to accept its outcome. The emphasis should, however, be on prevention. In his view, obligations of due diligence therefore had to be "hard".

7. Referring to responsibility and liability and the relationship between them, he supported the idea of stating the principle of civil liability and residual State liability for the reparation of harm. He nevertheless thought that the rules to be included in the draft articles should facilitate the setting in motion of private law remedies, including the exhaustion of local remedies, on a transnational basis in the case under consideration, and that only where a private individual could not obtain redress, for example, because there were so many sources of pollution that had caused the harm and they were difficult to determine, should the residual liability of the State come into play. That idea followed from the law of diplomatic protection.

<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.

<sup>3</sup> See 2221st meeting, footnote 7.

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

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

8. With regard to the other aspects of the question, he endorsed the proposals formulated, at least implicitly, by the Special Rapporteur and, in particular, the idea that the draft articles should contain some provisions to ensure the application of the principle of non-discrimination (equal access to courts), with internal legislation providing for means of obtaining compensation in the event of transboundary harm.

9. The Special Rapporteur had suggested that the question of the "global commons" should be left open, but, in his own view, it raised different complex issues. There had to be organized action by the international community to deal with the damage being done to the "global commons", which had to be preserved for future generations. To whom should their protection be entrusted, however? To every State, to an organization or to an individual, such as the Secretary-General of the United Nations or the Executive Director of UNEP?

10. Actually, very interesting proposals in that regard had been formulated outside the Commission and, in his view, the Commission should consider them in depth, perhaps, for the sake of efficiency, as part of a separate topic. The Commission could very well formulate a set of articles on the protection of the "global commons" and even make proposals on the agencies that would be responsible for implementing them. Very interesting ideas had been put forward in that regard, including that of changing the Trusteeship Council's mandate and extending it to cover the protection of the resources of the "global commons". At the very least, the Commission should work out a more detailed definition of the meaning of an obligation *erga omnes* with regard, for example, to pollution of the high seas and determine current conditions for the exercise of an *actio popularis* with regard to the resources of the "global commons".

11. As to the Commission's contribution to UNCED, its work on the topic under consideration would probably be taken into account, whether or not it made any special submission to the Conference. The Preparatory Committee for the Conference had set up Working Group III on legal, institutional and all related matters and its mandate was to prepare an annotated list of existing international agreements and international legal instruments in the environmental field, describing their purpose and scope, evaluating their effectiveness and examining possible areas for the further development of international environmental law, and to examine the feasibility of elaborating principles on general rights and obligations of States in the field of environment and development, with a view to incorporating them in an appropriate instrument/charter/statement/declaration.<sup>6</sup> It would, however, be helpful if the Commission were to make its own contribution to the Conference, if only in the form of a progress report on its work on the topic, along the lines of the relevant chapter of its report to the General Assembly. He noted that the Preparatory Committee for the Conference would have before it, at its request, a report from its secretariat on the progress of the work of the Commission on the non-navigational uses of international watercourses.

<sup>6</sup> Official Records of the General Assembly, Forty-sixth Session, Supplement No. 48 (A/46/48), vol. I, annex I, decision 2/3.

12. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur on the tenacity and ingenuity he had displayed in his seventh report, as in the previous ones, on a topic which was so difficult not only from the legal, but also from the political, point of view. It was precisely that difficulty which, in 1969, had led the then Special Rapporteur on State responsibility, Mr. Ago, to recommend and the Commission itself to decide that it should be a separate topic.<sup>7</sup> One of the chief merits of the seventh report was that the Special Rapporteur did not hesitate to encourage the Commission to reconsider the wisdom of that decision. He was, of course, not calling into question the idea of separating the topic under consideration from that of State responsibility for the purpose of dividing the work to be done into parts or that of appointing an ad hoc special rapporteur to examine it. That decision had, however, not been a very wise one because it had been based on over-emphasis on the differences between the two topics, which were very largely only differences of degree.

13. Indeed, in his opinion, within the framework of a national legal system, the various types of injurious facts could be placed along a *continuum* ranging between two extremes. At one end—say, the extreme left—were the facts sanctioned by law as criminal offences characterized by wilful intent (*dolus*). At the opposite end—say, the extreme right—were the injurious facts for which it was difficult if not impossible to trace precisely the author(s) or cause(s). Between the two extremes were to be found the great diversity of injurious facts characterized as "civil torts". Those ranged, as everybody knew, from the unlawful acts characterized by some degree of *culpa* (*lata, levis, levissima*) to wrongful acts, liability for which was predicated by the law on an objective, causal basis, regardless of any degree of fault. That latter type of wrongful act or fact occupied a place next to the injurious facts situated at the extreme right end of the *continuum*.

14. By way of illustration, he drew a distinction between three categories of harmful consequences: first, those provided for by the civil law of a number of countries and also, although perhaps less clearly, by other modern legislation relating to dangerous activities other than nuclear activities; secondly, those covered by the conventions and legislation relating to the civil liability of operators of nuclear plants and nuclear ships; and thirdly, injurious consequences or damage which were much more difficult, if not impossible, to trace within the context of modern societies—probably the most controversial category.

15. With regard first to national legislation, he cited as an example article 2050 of the Italian Civil Code entitled "Liability arising from the exercise of dangerous activities", which read:

Any person who causes damage to another in the exercise of an activity which is dangerous inherently or on account of the means used to carry it out shall be bound to make reparation unless he proves that he has taken all necessary measures to avoid it.

It was clear in that case that there was a reversal of the burden of proof, and also that the Italian legislator had

<sup>7</sup> See 2223rd meeting, footnote 7.

not intended to provide for injurious consequences arising out of activities not prohibited by Italian law, but had attached liability, or the obligation to make compensation, to the fact—or act—of having caused damage. While one could philosophize about the question whether causing damage while carrying out a non-prohibited activity was wrongful, it was difficult to deny, in the case of the hypothesis in question, that wrongfulness was present in the negative fact or act which consisted of not having taken all necessary measures to avoid the damage. There was no doubt, therefore, that the provision in question dealt with responsibility for wrongful acts.

16. As to the second category he had mentioned, namely, harmful consequences arising out of nuclear activities, it was an acknowledged fact that the “legislator”, in other words, the conventions on the civil liability of operators of nuclear plants or nuclear ships and the national legislation deriving from them, went even further in that he provided for strict liability. In such cases, the operator had no escape: whatever measures he might have taken, he had to compensate for the damage. Everyone knew the other principles embodied in the relevant conventions: channelling of liability, limitation of the amount of compensation and additional compensation by the State. One might well wonder, of course, in what respect the situation of the operator of a nuclear plant or ship could be equated with that of a person carrying out a “conventional” dangerous activity of the kind he had referred to in his first example. The fact remained that such a situation also involved responsibility and the responsibility derived from the fact of having caused damage.

17. The third category of harmful consequences was represented *grosso modo* by the various kinds of injuries or damage caused to the environment for which it was difficult to find a causal link with given sources, installations, objects or persons. It was with a view to the compensation of such damage that an endeavour was being made by contemporary writers on civil law to work out theoretical and practical solutions based essentially on the notion that, failing prevention or mitigation, damage should be compensated—in whole or in part by the State or by a public institution—although, for the time being, his remarks applied solely to the national level.

18. As to the Commission’s historic decision to separate the topic under consideration from the topic of State responsibility, he believed that the motivation for that decision,<sup>8</sup> as cited by Mr. Calero Rodrigues (2223rd meeting), rested on two highly questionable propositions.

19. The first drew a distinction between “responsibility for internationally illicit acts” and the “so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities”.

20. That jumped too abruptly, in his view, to space and nuclear activities, when consideration should first have been given to the “conventional” dangerous activities

which he had mentioned in connection with contemporary legislation and in particular with article 2050 of the Italian Civil Code. Clearly, as the Special Rapporteur had often rightly explained, responsibility did not derive from the activity, but from the fact of having caused damage. In the case of “conventional” dangerous activities, it also derived from fault, which qualified even more clearly the wrongful nature of the act.

21. The second ground for the Commission’s decision had been “to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject”. First of all, State responsibility was not the main subject: both of the subjects in question were extremely important. It was surely unacceptable, however, to make such a drastic separation as that implicit in the words “two such sharply different hypotheses”. In fact, it was precisely because of such a drastic distinction that the Special Rapporteur and the Commission were confronted with what now seemed to be an impasse. It was not, of course, a question of attaching the topic under consideration to the topic of State responsibility, but of simply recognizing, on the one hand, that the separation was justified only for reasons of degree and of the special nature of the problems and, on the other, that, given the scope of the topic of State responsibility as a whole, the appointment of a separate Special Rapporteur was justified.

22. Turning to the important issues on which the Special Rapporteur invited the views of the members of the Commission, he said that, so far as the title of the topic was concerned, while it was true that the differences between the various language versions should be eliminated, he wondered whether the French title itself was satisfactory. In a sense, the word “acts”, which appeared in the English version, described the phenomenon more closely. At any rate, it would be difficult for him to accept the notion that acts which caused the injurious consequences covered by the draft articles were not prohibited. Under article 2050 of the Italian Civil Code, for instance, while the dangerous activity was not regarded as unlawful, the fact of causing damage because all the necessary measures had not been taken to avoid it could not reasonably be regarded as not unlawful, in other words, as being lawful. The topic under consideration dealt in large measure—at least so far as dangerous activities other than nuclear activities were concerned—with the regulation of the injurious consequences of acts that could not reasonably be qualified as lawful or “not prohibited”. It was only in the case of extremely hazardous activities that no wrongful act could be found, except for the damage, and that the limit of the general framework of State responsibility was reached—the third category of injurious consequences to which he had referred was an example—but not, however, exceeded. The title should therefore be changed, but neither of the proposed solutions—“acts” or “activities”—was satisfactory.

23. As to the substance of the topic, it was apparent from the Special Rapporteur’s seventh report that three problems of responsibility had to be considered.

<sup>8</sup> Ibid.

24. The first problem concerned the responsibility States might incur in the event of "conventional" dangerous activities. In the case of such activities, States had an obligation of result similar to the obligation of result implicit in article 2050 of the Italian Civil Code. They were bound to ensure that activities which could be dangerous from the international standpoint, in other words, which could cause transboundary harm, should not be conducted without all the necessary precautions being taken to avoid such harm. In such a case, the burden of proof should be reversed, as it was under article 2050 of the Italian Civil Code and under the relevant provisions of other legal systems. The obligation of result, however, surely implied a certain conduct, which consisted in the exercise by the State of all the diligence necessary to avoid the damage. In that connection, one might ask whether, from the standpoint of theoretical analysis, the obligation in question, so far as "conventional" dangerous activities were concerned, remained a pure obligation of result or whether it became, by virtue of the "due diligence" element, a hybrid obligation falling halfway between an obligation of result and an obligation of conduct.

25. The second problem concerned particularly dangerous, or so-called ultra-hazardous activities, including space and nuclear activities. With regard specifically to nuclear activities, his current position differed from that he had taken earlier in various articles, according to which States could be held liable for nuclear damage only if there was fault. He now took the view that a rule similar to that adopted with respect to the operators of nuclear plants and nuclear ships should be adopted for States, but that, in that connection, the Commission should consider two possibilities, given the political difficulty of persuading States to accept causal liability of that kind. The first possibility would consist simply of reversing the burden of proof, in other words, of placing nuclear activities in the same category as "conventional" dangerous activities. The second possibility, and the one he would prefer, would be to extend to States the rule of strict liability adopted under the international conventions on the liability of nuclear operators. There would, of course, have to be some adjustments: first of all, the State should have unlimited liability, whereas, at the internal level, the liability of operators was limited, and some form of international solidarity should be instituted in order to meet the economic burden that compensation for damage caused by large-scale nuclear incidents might represent. Such solidarity would be essential to avoid the disastrous consequences a needy developing country would have to face in such cases in order to meet its liability in full.

26. A far more complicated problem arose in the case of the third category of injurious consequences which were more difficult to attribute, namely, essentially environmental damage in the broad sense of the term. That third category led him to the question of the nature of the instrument.

27. In that connection, the Commission should, bearing in mind the status of its work, adopt two different methods. So far as the first two categories of injurious consequences were concerned—those arising out of "conventional" dangerous activities, on the one hand,

and nuclear activities, on the other—a treaty should be the answer, as Mr. Shi and Mr. Al-Khasawneh had recommended (2225th and 2226th meetings respectively). As to the third category—damage that was not easily attributable—the object for the time being should merely be to indicate the aim to be pursued within the framework of an articulate and progressive development of international environmental law. In the short term, the instrument could take the form of a declaration of the General Assembly. Such a declaration should, however, be followed fairly swiftly by further steps and a mandate could, for instance, be given to the Commission to study the general problem of the environment, including the "global commons", with the care it deserved.

28. In all three cases, he agreed with the observations made by numerous speakers, in particular, Mr. Pellet (2223rd meeting), who had stressed the importance of rules on prevention and cooperation. He was, however, less attracted by the idea of mandatory negotiations in so far as reparation was concerned. Negotiation was nevertheless vital when preventive measures had to be agreed in the context of cooperation among States and the role of international organizations in devising and implementing preventive measures had to be determined.

29. Those measures should include the conclusion of an adequate agreement on nuclear security standards, which, as Mr. McCaffrey had pointed out, were lacking at the current stage.

30. With regard to the question of the relationship between civil liability and State liability, it was clear that, in practice, those two forms of responsibility combined to achieve adequate compensation. They were, however, quite distinct: one fell within the sphere of national law and came into operation under that law, while the other fell within the sphere of international law on State liability. Their relationship consisted in the fact that, once a portion of the damage had been compensated under national law, the State's liability would be reduced proportionally. Proposals to that effect had in fact already been made, in particular by Mr. Mahiou (2222nd meeting), Mr. Calero Rodrigues (2223rd meeting), and Mr. Al-Khasawneh (2226th meeting).

31. Finally, he supported the Special Rapporteur's proposal that a working group should be set up.

32. Mr. EIRIKSSON said that his position on the topic had not changed since he had first spoken on it at the Commission's fortieth session.<sup>9</sup> He had then been of the view that the scope of the draft articles proposed by the Special Rapporteur in his fourth report, which centred on the concept of risk, should be expanded to cover all activities, whether risky or not, that caused harm to other States. The draft articles submitted by the Special Rapporteur in his fifth report<sup>10</sup> had reflected the wider scope of the topic and he himself had considered at that time that activities involving risk were an important sub-topic, involving greater duties of notification and prevention and that the guidelines for the negotiation of

<sup>9</sup> See *Yearbook . . . 1988*, vol. I, pp. 32-33, 2048th meeting, paras. 3-16.

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

reparation for harm would differ according to which of the two categories of activity was involved. In his sixth report,<sup>11</sup> the Special Rapporteur had then amplified the earlier articles on scope and general principles and had introduced all the articles he envisaged on the topic, dealing with prevention and liability and introducing a system of civil liability. He had been somewhat concerned at the time about the addition of a list of substances which were inherently dangerous, since he had felt that its inclusion would tend to narrow the scope of the articles once again by stressing the risk factor.

33. He regretted that the report before the Commission, which admittedly provided a very useful overview of the topic, did not propose articles that would enable the Drafting Committee to make progress in its work. In his view, there was a clear trend in the Commission in favour of preparing a concise set of articles, setting forth the basic principles, with some thresholds to provide, for instance, that the topic would not cover all harm and specifying the situations in which the rules of State responsibility would not apply.

34. He saw some merit in the proposal for the establishment of a working group, which would facilitate the Drafting Committee's work and also provide the basis for the Commission's contribution to UNCED.

35. Turning to the important issues raised by the Special Rapporteur, he said that, as far as the nature of the instrument was concerned, the Commission should work towards the drafting of a convention, but should be ready to change course if the progress of its work so warranted.

36. With regard to the title, he recalled that, at an earlier session, he had proposed a radical change. At present, he had no clear opinion on whether the word "acts" should be replaced by the word "activities" in the English version and considered that the Commission did not really have to deal with that question for the moment.

37. Concerning general principles, he shared the Special Rapporteur's view that there seemed to be basic agreement that the principles referred to in the articles did apply to the subject-matter. He recalled, however, that the proposal made by Mr. Hayes at the 2225th meeting regarding the draft article on reparation had been based on a principle which he found fundamental, namely, that the innocent victim of transboundary harm should not be left to bear the loss.

38. He would prefer the draft articles not to contain detailed rules on prevention or a civil liability regime, at least for the first reading. Otherwise, there might be dozens of articles of a very general nature and that would be quite inappropriate at the present stage.

39. He agreed with other members of the Commission that the submission of articles on the "global commons" should not be delayed.

40. In conclusion, he thought there were fewer problems than others believed. The Commission should con-

tinue its work on the subject and concentrate on the preparation of draft articles.

41. Mr. BEESLEY, recalling his statement at the 2222nd meeting, said that he now proposed to deal with the main points raised by the Special Rapporteur in his report, but perhaps more briefly than he had originally intended in view of the comments just made by Mr. Eiriksson, with which he fully agreed.

42. First, he thought that the Commission should be careful not to assume that it had reached an impasse. For instance, he saw no reason why the Drafting Committee should not be asked to concentrate at least on articles 6 to 10, which had been before it at the forty-first session and on which there seemed to be a broad measure of agreement. In that connection, it might be possible to follow the suggestion made by Mr. Hayes for article 10 and replace the word "reparation" by the word "compensation" in order to avoid encroaching on the topic of State responsibility. He did not underestimate the divergence of views, but did not believe that the disagreement was such as to prevent the Commission from achieving some concrete results at the current session. There was ample evidence of that in the concerns which many members had expressed about the environmental aspects of the subject. There was no reason not to set up an informal group of "friends" both to assist the Special Rapporteur and to advise the Drafting Committee.

43. In that light, he took a favourable view of the seventh report. He fully endorsed the methodology used by the Special Rapporteur, which had the great advantage of forcing the members of the Commission to rethink their basic approach.

44. Turning to the important issues raised by the Special Rapporteur in his informal paper and to that of the nature of the instrument, he said that he did not see why the Commission could not formulate draft articles in the field under consideration as it had done in others. If some specific principles, whether substantive or procedural, did not seem to warrant inclusion in the draft articles, they could instead be incorporated in a code, although he did not think that was necessary. He remembered being particularly interested by Mr. Ogiso's comments (2225th meeting) on the ideas which should be included in a set of articles or in a code, depending on whether the intention was the codification or progressive development of the law or the use of precedents found in "soft" law or in "hard" law. On the latter point, he was of the opinion that, in many cases, the distinction between the two was unjustified. For example, a declaration on outer space had been followed by a treaty on the same subject and the Universal Declaration of Human Rights had been followed by the adoption of the Conventions. Of course, the status of the two types of instrument was not the same, but they overlapped to such an extent that it might well be asked whether it could always be said that a declaration was by definition part of "soft" law, a treaty part of "hard" law.

45. To take another example, should Principle 21 of the Stockholm Declaration on the Human Environment<sup>12</sup>

<sup>11</sup> See 2221st meeting, footnote 7.

<sup>12</sup> Ibid., footnote 6.

or the provisions of articles 192 and 193 of the United Nations Convention on the Law of the Sea be regarded as "soft" law or as "hard" law? The distinction was not relevant. Those were two different ways of expressing the same basic principles. The idea of embodying certain principles in a code if they could not be included in draft articles should nevertheless not be ruled out.

46. He was surprised that some members of the Commission seemed to believe that there were no precedents in that regard and he quoted an example which was probably less well known than the *Trail Smelter* case,<sup>13</sup> namely the statements made by the Canadian and United States Governments in explanation of their positions on the Stockholm Declaration on the Human Environment. The representative of Canada had stated on behalf of his Government that:

The Canadian Government considers that Principle 21 (formerly 18) reflects customary international law, ... that the secondary consequential Principle 22 (formerly 19) reflects an existing duty of States ...

and that:

... the duty of States to inform one another considering the environmental impact of their actions upon areas beyond their jurisdiction also reflected a duty under existing customary international law.<sup>14</sup>

47. The Government of the United States had later stated in a diplomatic note on the Cherry Point oil spill that it:

... continues to give full support to Principle 21 of the Declaration on the Human Environment as well as to the principle enunciated in the *Trail Smelter* arbitration ... in so far as Principle 21 is consistent with customary international law and widely accepted treaty obligations, the U.S.A regards it as declaratory of international law.

and that it:

... believes that the action called for in Principle 22 is necessary to render Principle 21 an effective and usable deterrent to transnational environmental damage.<sup>15</sup>

Those statements should be regarded at least as minor precedents in the progressive development of the law. There were other points of reference, for instance, in the United Nations Convention on the Law of the Sea, where the ideas of "responsibility" and "liability" were both used in several places. He referred the members of the Commission to articles 31, 42, paragraph 5, and 235 of the Convention. In that light, the subject could hardly be regarded as new. There was no doubt that, if they so wished, the members of the Drafting Committee could develop the law in that area, even in the time available to them, and draw some concrete elements from the general debate to submit to the Commission.

48. As to the scope of the topic, he agreed with Mr. Eiriksson that it would be unduly restrictive to decide that liability must be based on risk. The basis of liability should, in his view, be appreciable harm, but he still thought that liability for appreciable harm and the concept of risk should be covered in the same articles, especially from the viewpoint of prevention.

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

<sup>14</sup> Quotation from the speaker's own statement in his capacity as legal adviser and chief negotiator to the Canadian delegation to the Stockholm Conference. Cited in W. Rowland, *The Plot to Save the World* (Vancouver, Clarke, Irwin & Company Limited, 1973), p. 99.

<sup>15</sup> Quotation from diplomatic note. *Ibid.*, p. 112.

49. With regard to the issue of responsibility and liability, the members of the Commission might find it useful to refer to an article by N. L. J. T. Horbach, which was a good summary of the question.<sup>16</sup> The author drew a distinction between "objective" or "no-fault" liability and "subjective" responsibility, in which fault on the part of a State was considered to be the essential element of an internationally wrongful act. She explained why she thought that the Commission had decided to make a separate study of State responsibility and international liability:

First, according to the Commission, State responsibility derives from prohibited acts, whereas, in contrast, international liability can stem from permissible (i.e. not prohibited) acts. Besides responsibility of a State for its wrongful acts, that is, for breaches of an obligation attributable to the State, the Commission also recognizes the responsibility for lawful activities which, due to their nature, give rise to damage. This "source of responsibility" does not presuppose wrongful conduct or a breach of any obligation.

50. The article went on to discuss the duty of reparation arising from objective liability.

51. He did not, however, agree with the author's conclusion that the separation of the two concepts, which had seemed logical at the beginning, no longer applied. On the contrary, he believed the distinction must be maintained.

52. On the other hand, he was not convinced of the need to draw a distinction between primary and secondary rules. He would have preferred the Commission not to venture into that area. It was absurd to describe responsibility for a wrongful act as a secondary rule. In the light of the Commission's discussions, he thought that it was a basic and primary rule and he saw no point in describing the principle that the innocent victim must be compensated as either primary or secondary.

53. With regard to the issue of the "global commons", he was of the opinion that the Commission should at least have established principles which could have been referred to the Drafting Committee. In that connection, he had taken note with interest of Mr. McCaffrey's comments earlier in the meeting on the Preparatory Committee for UNCED and hoped that the Preparatory Committee's work was linked in some way to the Commission's work. Mr. McCaffrey was certainly aware that an intergovernmental meeting on the negotiation of a framework convention on climate change was taking place in the Palais des Nations at the present time. In that case as well, he did not know whether any connection was being made with the Commission's work, but such a link would certainly be highly desirable. Whatever legal regime was to be developed on liability, he hoped that it would take the form of an "umbrella" treaty, modelled on those which had been established in the areas of outer space, human rights and the law of the sea. Part XII of the United Nations Convention on the Law of the Sea was generally considered to be an "umbrella" treaty, since those articles had not only taken note of existing conventions but had subsequently provided the basis for many other subsidiary instruments.

<sup>16</sup> N. L. J. T. Horbach, "The confusion about State responsibility and international liability", *Leiden Journal of International Law*, vol. 4, No. 1, April 1991, p. 48.

54. That did not imply that the framework convention to be prepared by the Commission should not be focused, but the provisions did not have to be too detailed.

55. He did not have a strong view on whether purely "procedural" rules should be established. In fact, however, no aspect of the topic under consideration was strictly procedural. He was referring in particular to the obligations of States to notify, consult or cooperate and even to negotiate.

56. Lastly, he urged the members of the Commission to take a more constructive attitude towards the topic: they should not give up, but should give priority in the Drafting Committee to articles 6 to 9 of the Special Rapporteur's draft.

57. Mr. SOLARI TUDELA said that, like the Special Rapporteur, he believed that the draft articles relating to principles should be sent back to the Drafting Committee because it could help give shape to the progress achieved thus far, especially since the principles in question were certain to be well received.

58. With regard to the nature of the instrument, he believed that, as they stood, the draft articles could serve as a framework agreement, although the nature of the instrument might change as the work proceeded. There was thus no need for the Commission to take a definite decision on the matter at the present time.

59. He would have no objection if the word *actos* was replaced by *actividades* in the Spanish version and "acts" by "activities" in the English version of the title of the topic and he agreed with Mr. Thiam (2225th meeting) that the words "injurious consequences" created some confusion. Their inclusion in the title implied that liability would exist even in the absence of injurious consequences. By keeping the title as it stood, the Commission would be agreeing with a particular school of thought, according to which liability could exist without harm. According to another school of thought, to which he belonged, liability could not exist without harm. If the Commission were to endorse that point of view, the words "injurious consequences" would no longer be necessary.

60. In his view, activities involving risk and activities with harmful effects should both be included within the scope of the articles. He recalled that a list of dangerous substances had been adopted at the European level and failed to see why the same could not be done at the international level. All countries should have access through a framework convention to a list of substances which involved a risk; that type of information was of particular interest to the developing countries, which were more vulnerable because they, more than the other countries, were hosts to the industries which used such substances.

61. Referring to the issue of prevention, he said that it was difficult for someone from a country whose legal system did not distinguish between "soft" law and "hard" law fully to understand what those two ideas covered. If the Commission did not want a particular rule to be an obligation, it could simply make it a recommendation. That would not be at all unusual from the legal point of view, since there were many instruments,

such as the resolutions of the General Assembly, which were only recommendations. Other rules that should be obligations would then be dealt with under the topic of State responsibility rather than under the current topic.

62. Lastly, reparation should be compulsory. Any harm caused by an activity involving risk or an activity with harmful effects must bring reparation into play.

63. Mr. FRANCIS said that, in discussing the topic, the Commission should not forget that situations might occur that were not a direct result of a particular activity. Recalling that Mr. Sreenivasa Rao (2225th meeting) had urged that special treatment should be accorded to third world countries in the draft convention, he again stressed that developing countries had to establish a regime of prevention which provided for penalties both for the government agencies and for the private enterprises that were responsible for harm.

64. In invoking obligations of conduct and of result, Mr. Arangio-Ruiz had referred, by interpretation, to part 1 of the draft articles on State responsibility. In his own statement at the 2223rd meeting, he had said that, in his view, State responsibility would be engaged if a State, in carrying out a lawful act, wilfully caused harm to another State. He therefore saw no problem with invoking the obligation of result if part One of the draft so allowed, but he did not think that it did, since, in the first case, what were involved were wrongful acts and, in the second, acts not prohibited by international law. It was thus important to keep an open, critical mind on obligation of result.

65. Referring to the issue of prevention, he noted that Mr. Al-Khasawneh had said (2226th meeting) that the Special Rapporteur was dealing with the issue in such a way as to bring it under the topic of State responsibility. In fact, with regard to procedural obligations, the Special Rapporteur had raised the question whether they should stay in the realm of "soft" law, i.e. if they were breached, no sanction would follow. If the Special Rapporteur meant sanctions to be imposed at the international level, the Commission would be crossing over into State responsibility. He did not object to the fact that, in the draft articles, the Commission was putting pressure on States to take preventive measures because, in that case, the injured State could invoke the relevant rule of the internal law of the State of origin. He would, however, be concerned about the idea of sanctions at the international level, in other words, in the area of State responsibility. Another question was whether, in invoking the responsibility of the State of origin in respect of procedural matters, the Commission was not contaminating the atmosphere within which negotiations on compensation would take place.

66. Mr. PELLET said that he wished to add two points to the statement that he had made at the 2223rd meeting. The first, which seemed to have been overlooked during the entire debate, was the basic distinction that had to be made according to the type of operator responsible for activities involving risk. International liability could not be approached in the same way in the case of State and non-State operators. The Commission was currently trying to codify the rules of the international liability and responsibility of States. Where the State was the direct

operator, he believed there was less difficulty in accepting the principle of the responsibility of the State and its consequence, which was the obligation to provide compensation, than in the other case. He seriously doubted whether, in contemporary positive international law, the State had an obligation to provide compensation for the harmful consequences of activities not prohibited by international law, when those activities were carried out by private operators or other entities whose activities were not attributable to the State; that obligation would be in addition to the obligation of due diligence rightly expected of all States and he was referring in that connection to the classic *Trail Smelter* case.<sup>17</sup> That basic distinction was practically absent from the Special Rapporteur's approach and, in fact, had hardly been referred to by the members of the Commission. Yet, if it failed to make that distinction, the Commission would encounter difficulties in arriving at an agreement.

67. His second point involved the issue of the foundation of the topic. Mr. Solari Tudela's arguments in favour of the deletion of the words "injurious consequences" from the title were highly debatable. Recalling the basic philosophy underlying the draft articles on State responsibility, at least according to the approach which the former Special Rapporteur, Mr. Ago, had taken to it and which the Commission seemed to endorse, he pointed out that, in that draft, the Commission made a careful distinction between responsibility and reparation, which was only a consequence of responsibility. It was the internationally wrongful act which gave rise to responsibility. If, in addition, the internationally wrongful act resulted in individualisable harm, reparation was called for. While the internationally wrongful act formed the basis for the international responsibility of States in its general form, the factor which gave rise to reparation was harm. Unlike Mr. Solari Tudela, he believed that Mr. Ago's approach could be transposed, *mutatis mutandis*, to the topic under consideration: it could be considered that risk gave rise to certain mechanisms, particularly the obligation of prevention, which was essential, and that harm gave or could give rise to reparation.

68. Mr. ARANGIO-RUIZ, referring to Mr. Pellet's first comment on the conditions under which a State might be held liable for harm when it was not carrying out the activity which had injurious consequences, said he believed that the State was still acting as a governing institution in respect of the operator. To the extent that a State could be held liable, it would be liable not only because of the operator, but also by virtue of not having fulfilled the obligation of due diligence. However, a question remained in the case where a State was liable at the international level for transboundary harm resulting from a nuclear accident that had occurred in a territory under its jurisdiction or on board a ship flying its flag. There would then be two possibilities. The first was to apply the rule which he had drafted for dangerous activities, by analogy with the Civil Code of his country: the State was liable for a nuclear accident only if it was at fault and that would be the case only if the State was unable to prove that it was not at fault and that it had used

all due diligence. He had also suggested another solution: in the case of nuclear activities, it would be no more necessary for the State than for the operator to be at fault in order to be held liable; in that situation, the strict liability of the State would be the criterion. When the time came to adopt the rules on the causal liability of the State, the Commission should use a modified form of the rules provided in conventions relating to operators. While a regime of unlimited liability should be established, there should also be provisions relating to international solidarity in the event of a nuclear disaster, particularly for developing countries.

*The meeting rose at 1 p.m.*

## 2228th MEETING

*Friday, 21 June 1991, at 10 a.m.*

*Chairman: Mr. Abdul G. KOROMA*

*Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, 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. 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. BARBOZA (Special Rapporteur), summing up the discussion, said some members had described his seventh report as proposing a repetition of the general debate and had said that the Commission had already dealt with such general concepts as were now brought to its attention. However, one member had recalled that the Commission's report on its forty-second session had stated:

The sixth report raised some complex policy and technical issues and contained 33 articles. Many members of the Commission felt that they needed more time to reflect on the issues raised in the report 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.

<sup>17</sup> See 2222nd meeting, footnote 7.