

Document:-
A/CN.4/SR.2270

Summary record of the 2270th 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:-
1992, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

46. One of the issues dealt with in the report, and repeatedly considered by the Commission, was whether the basis of liability should be risk or harm. Most members thought it should be harm, and for good reason. If liability were to be based on risk, it would tend to restrict the topic, since liability would arise only if it were established that the activity was risky at the time it was embarked upon. Paradoxically, it would also tend to enlarge the scope of the topic, inasmuch as every human endeavour involved a measure of risk. To give the topic a firm footing, therefore, liability should be based on harm, although that did not mean that risk had no place in the determination of compensation. The view that liability was based on harm was also borne out by a long line of case law, which showed that the State's duty to use its territory so as not to cause harm to others was now a universal rule. It was also recognized in a number of treaties, such as the Treaty Banning Nuclear Weapons Tests in the Atmosphere in Outer Space and Under Water and in the Helsinki Rules on the Uses of the Waters of International Rivers.⁸ Harm caused to others, therefore, lay at the very heart of the topic of liability.

47. Other factors to be taken into consideration in determining liability included the concept of reasonableness, balance of interest, and due diligence. The Commission would also have to decide whether the standards of strict and absolute liability should apply to the topic of liability as well as to the topic of State responsibility. That was necessary as a matter of policy and on account of the principle that he who suffers harm must not be left to bear the harm alone and that the victim of harm must be paid compensation.

48. It was essential for the main debate to take place in plenary, since the Commission was engaged in the progressive development of the law in an important area. The Drafting Committee should, of course, be left to formulate the various articles, but it should not be seen to replace the plenary, all the more so as there were no summary records of the Drafting Committee's discussions.

49. Mr. ROSENSTOCK said that, as another newcomer to the Commission, he experienced the same problems as did Mr. Vereshchetin. His perplexity was exacerbated by the fact that the solution to at least part of the problems raised by Mr. Bowett seemed to be a legal fiction, which worried him even more. He believed the problem was in part due to a perception of a practical reality and an attempt to deal with it, which could not safely be discussed in plenary without distancing the hopes of progressive development even further. A happy compromise might perhaps be to have an informal meeting of the Commission, off the record, to see whether some measure of agreement as to the foundation of the topic could be reached. It would be utter madness to set about constructing the floors of the building before agreeing on its foundation.

The meeting rose at 1.10 p.m.

⁸ ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*

2270th MEETING

Tuesday, 9 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/443,¹ A/CN.4/L.469, sect. D, A/CN.4/L.470, A/CN.4/L.476, ILC(XLIV)/Conf. Room Doc.2)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPporteur (continued)

1. Mr. KOROMA, continuing his statement from the preceding meeting, recalled that he had compared the topic to a building with a foundation and a roof already in place while construction was going on. He had attempted at that meeting to define the scope of the topic and had proposed that the English title should be brought into line with that of the other languages. He had also stressed that the topic constantly had to be distinguished from that of State responsibility.

2. In formulating the regime for the topic, the Commission had to bear in mind the basic principles; the most important was that harm as opposed to risk was the basis of the obligation to make reparation and it had been embodied in the draft declaration considered by UNCED.² The fact that harm was essential in order to establish the obligation to make reparation was, in his view, basically what distinguished liability for lawful activities having injurious consequences from responsibility for wrongful acts.

3. The Commission's goal was not to establish a regime of strict liability or liability for risk. It had to take account of factors such as reasonableness, due diligence, the balance of interests, equity and the need not to hinder scientific progress or economic development in defining the regime of liability for lawful activities.

4. He was, however, convinced that any harm had to be compensated, that the victim should not be left to bear the loss and that States had to see to it that activities carried out in their territory did not cause harm to other

¹ Reproduced in *Yearbook . . . 1992*, vol. II (Part One).

² See 2268th meeting, footnote 2.

States. Those were legal principles that had been embodied in arbitral and judicial decisions.

5. With regard to draft articles I to IX proposed for the annex,³ he said that the provisions on prevention should be drafted in the form of obligations not to cause harm and should deal with two important aspects: harm caused to a neighbouring State and harm caused to the "global commons". On the first point, it was necessary to avoid giving States a right of veto over the activities of neighbouring States, since that was not the purpose of the draft articles. On the second point, the international community as a whole had collective responsibility for the "global commons", the marine environment and the ozone layer; that did not mean that activities were prohibited, but that States were under an obligation not to cause harm to the environment. In that connection as well, harm was the core of the distinction between the topic under consideration and that of State responsibility. It must therefore be borne in mind that, when a prohibition was laid down, any violation might move the question into the realm of State responsibility.

6. He had some doubts about the need for certain articles which stated obvious facts, such as draft article I relating to prior authorization by the State of origin for activities to be conducted in its territory. He did not know of any example of an activity such as the ones which were dealt with in the context of the topic and which could be undertaken without the prior authorization of the State of origin.

7. He also thought that States did not like being told how to manage their own affairs, as draft article I did by providing for the adoption of legislative, administrative and enforcement measures. In that connection, reference might, of course, be made to human rights conventions which established that kind of obligation, but that was an entirely different matter. In the context of the topic under consideration, some latitude should be left to States to decide how to implement the obligations they had undertaken. He referred in that connection to principle 11 of the draft Declaration of UNCED, which had vague enough wording on the obligations of States.

8. He did not see the purpose of draft article II, which established the obligation of the State of origin, if there was a certainty or probability of significant transboundary harm, to notify States presumed to be affected, and would welcome clarifications by the Special Rapporteur. In such a case, the State of origin should simply refrain from undertaking the activity in question. The draft article also did not say what the States presumed to be affected should do after having received the notification or technical information.

9. He also had doubts about draft article IV because, if the State of origin was aware that an activity was going to have harmful effects, it should refrain from undertaking or authorizing it.

10. Draft article V seemed to place an unfair burden on the affected State by requiring it to ask for alternative solutions which would make the activity acceptable; that

was hardly realistic. It would be unfair to place the same burdens on the State of origin and on States which would probably not derive any benefit from the activities in question, but which were most likely to be affected by them.

11. The Special Rapporteur's proposal that States should assume residual liability in the event of the insolvency of the operators would go against the trend, particularly in Europe, towards making the operators assume liability for preserving the environment. Besides, a provision of that kind would not serve the interests of the developing countries in the case of activities carried out in their territory by multinational companies.

12. In conclusion, he believed that the Commission should first state the applicable principles and then try to apply them by identifying the obligations to which they corresponded, taking into account the factors already referred to in building the desired legal structure. The elements were all contained in the report, but they now had to be structured.

13. Mr. BARBOZA (Special Rapporteur) said that, in the light of the discussions at the last two meetings, some explanations were called for.

14. The topic under consideration did give rise to technical problems, but the Commission would be able to solve them. The substance of the topic was not difficult, but it raised the question whether the instrument should contain a chapter on compensation for victims of transboundary damage or whether matters should be left as they were under the existing provisions of general international law. In that connection, some members had maintained and continued to maintain that no rule of general international law made it an obligation for a State to provide compensation for the consequences of an activity not prohibited by international law. However, if general international law did contain a rule on compensation, the Commission should codify it; if not, it should propose one to fill the gap, as part of its task of progressively developing the law.

15. The starting point was transboundary damage, which was the only basis for compensation. "Risk" came afterwards in defining the scope of the draft articles. As to the kind of accountability that should be proposed for that type of damage, he recalled that, when the topic had been created, as one separate from that of State responsibility, what had obviously been meant was some kind of strict liability and the term "responsibility for risk" had been used in the early documents. There were only two types of responsibility in law: one arising out of the breach of an obligation and the other resulting not from a breach, but arising out of an act causing damage.

16. The reason why the question of strict or causal liability, or responsibility for risk, had come to the Commission's attention was that such liability for lawful activities had been imposed in treaties regulating certain dangerous activities, as in outer space, in the nuclear industry or in the transport of oil by sea.

17. Strict liability in international law, as in internal law, was closely associated with activities involving risk and, in that category of activities, there was a nucleus

³ For texts, see 2268th meeting, para. 5.

which warranted the description “ultra-hazardous activities”. It was therefore logical that the Commission, whose mandate was to deal with that type of accountability, which was different from responsibility for wrongful acts, should focus on the only cases in international law in which a legal mechanism was used for liability without a breach of an obligation or, in other words, international conventions governing activities involving risk. The draft articles which he had submitted in the fourth report⁴ therefore dealt only with activities of that kind. The Commission should quite simply have tried to state the principles and rules governing international liability for lawful activities, taking them, in so far as possible, from the following sources: (a) a few well-established principles, such as the *sic utere tuo* rule based on international decisions including the *Trail Smelter*,⁵ *Corfu Channel*,⁶ *Gut Dam*,⁷ *Island of Palmas*⁸ and *Lake Lanoux*⁹ cases and on international declarations which were widely accepted, such as Principle 21 of the Stockholm Declaration,¹⁰ which set limits to the use by a State of its own territory; (b) the conventions on specific activities which he had already mentioned; and (c) general international practice.

18. The Commission and the Sixth Committee had nevertheless wanted the study to include two further aspects, namely, prevention and activities with harmful effects, and that had considerably complicated the technical problems. First of all, the purpose of the eighth report was to deal with the difficulty of making rules on prevention coexist with rules of liability and that explained why he had suggested that the rules on prevention should be placed in an annex, in order to keep them as guidelines at least. However, if the Commission wanted to keep prevention in the main text, in accordance with the wishes of some of its members, States would have obligations of due diligence whose breach would give rise to State responsibility for wrongfulness. That was feasible, provided that measures were taken to distinguish State responsibility from the civil liability of private operators.

19. As he had already pointed out in his report, it was unusual for a regime of prevention to go together with a regime of strict liability. Preventive measures were specific requirements of a technical nature which States had to follow, but such international standards were, of course, rules of conduct and States were responsible for any breach of those rules, even if no damage had occurred. Such a severe regime was conceivable in a specific convention relating to a very dangerous activity, but not in a general convention on dangerous activities. In his view, such measures could form a regime that was independent of liability. Nothing prevented States from adopting separate conventions drafted in general or specific terms and containing international standards of pre-

vention which would involve legal consequences even if no incident had occurred. However, he was not in favour of borrowing from the regime of prevention and liability adopted to cover activities in outer space, as suggested by some members. That regime was wholly atypical and the only one which imposed absolute State liability. In that connection, he recommended a careful reading of the footnote in which he had discussed the work of Doeker and Gehring.

20. As to the other source of difficulty, activities with harmful effects, what distinguished them from activities involving risk was that they created a certainty of damage through their normal operation. The classic example was the *Trail Smelter* case, in which the State of origin had been aware that the activity in question produced fumes which were being carried to a neighbouring country and causing damage and that, if the industrial process went on unchanged, the affected State would continue to suffer damage. In that case, the two parties involved had had a different perception of the law, but not of the facts. The court had decided that the damage had to be compensated and that the industrial process had to be modified so as not to continue causing harm. In their report, however, the jurists in the Experts Group on Environmental Law of the World Commission (also known as the Brundtland Commission) on Environment and Development had taken the view that such activities might be permitted if the overall socio-economic cost of prevention would, in the long run, far exceed the actual cost of prevention.¹¹ Of course, the affected State would have to give its consent and it might well insist that its territorial integrity should be respected, whatever benefits the State of origin might derive from the activity, or it might give its consent to the activity in return for certain advantages. Until such consent had been given through consultations, the activity in question was in a legal limbo, since it was not prohibited by international law and was therefore part of the topic under consideration. That was why a consultation procedure was provided for in the report.

21. Another case of activities which were not prohibited, but which had harmful effects, was that of activities which produced creeping pollution, especially long-distance pollution or, in other words, pollution caused by daily activities such as domestic heating and automobile traffic leading imperceptibly to a level of transboundary damage that exceeded the tolerable threshold. Such activities were, however, part of modern life and could not be prohibited with one stroke of the pen. The only possible solution in that case was consultation, as proposed in the report. That solution might seem innocuous, but to bring large and small States to the negotiating table was already a major accomplishment.

22. At any rate, the Commission would have to consider the question of activities with harmful effects and there would be time to decide at a later stage whether they warranted separate treatment. For the moment, that did not seem to be the case.

⁴ *Yearbook . . . 1983*, vol. II (Part One), document A/CN.4/366 and Add.1.

⁵ See 2268th meeting, footnote 14.

⁶ *Ibid.*, footnote 15.

⁷ *Ibid.*, footnote 16.

⁸ *Ibid.*, footnote 13.

⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*

¹⁰ See 2269th meeting, footnote 2.

¹¹ See 2268th meeting, footnote 11.

23. Some 33 articles had been submitted to the Commission. They were all tentative and, in some cases, they might not be fully consistent, but they did contain all the elements the Commission needed in order to draft an instrument.

24. Replying to comments made at the preceding meeting, he pointed out that his seventh report,¹² which had been redistributed at the present session, contained a summary of the work on the topic. The view that, before going any further, the Commission should define certain legal concepts such as liability, seek a clear mandate from the General Assembly and change the name of the topic, if necessary, was, in his opinion, not reasonable.

25. Article II of the Convention on International Liability for Damage Caused by Space Objects, cited in support of that view, stipulated that:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight . . .

but it did not contain a definition of the term "absolute liability" which was, in any case, a common law term, not one used in Roman law. Most conventions on liability simply stated the consequences of certain acts and those consequences were precisely the liability that was imposed. Only the type and number of exceptions that were permitted made it possible to decide whether such liability was absolute or strict.

26. The Council of Europe's draft Convention on civil liability for damage resulting from activities dangerous to the environment¹³ also contained no mention whatever of "strict liability". The Commission had debated the issue more than once and had decided to postpone a decision until its draft articles were complete. There was no real difficulty as far as its mandate was concerned. When it had considered the topic as a whole, it would know exactly what title it should recommend for the topic. Once it had considered activities with harmful effects, it would be in a better position to decide whether they should be treated separately or within the scope of the topic. All the necessary definitions could then be incorporated in the draft articles.

27. He was inclined to believe that the Commission could continue its work according to its usual procedures. The Drafting Committee was now considering the first draft articles and it might propose texts which would meet with the approval of the plenary, which was free to decide on them. That had been done in the case of the apparently intractable subject of the law of the non-navigational uses of international watercourses and a solution was thus possible in the present case.

28. Mr. PELLET said that, apart from a few general considerations which did not call for any comments, the report dealt with two quite separate problems: prevention, on which he would now speak, and the development of certain concepts, which he would discuss at a later stage.

29. The Special Rapporteur had sometimes been accused of not closing the general debate on the scope of the topic and of proposing a new reading each year which was then revised the following year. That was, however, not the case now. The singular merit of the eighth report was that it attempted to submit a consistent set of draft articles on a particular aspect of the topic, namely, prevention. He was therefore surprised that the report, which dealt with relatively technical problems, should give rise to such a general debate, whereas the Commission should be supporting the Special Rapporteur's efforts to make progress in the drafting.

30. He welcomed the Special Rapporteur's decision to treat prevention as a matter of priority because it was the only "hard" element of an unsettled topic in which it was not easy to identify the "hard" obligations of States, at least with regard to reparation, which was the heart of the matter. States were, however, clearly bound to be vigilant in limiting or, if possible, preventing significant transboundary harm caused by supposedly lawful activities. That was a well-established principle of general international law and it should be the hard core of the draft articles and the focus for the codification of the topic.

31. The Special Rapporteur was nevertheless reluctant to adopt that approach. He gave the impression in the report that it would lead to methodological problems by shifting the ground from lawful activities, the only subject-matter under consideration, to non-compliance with international law, which came under the topic of State responsibility. Like the Special Rapporteur, he did not believe that that was an insuperable objection. Even if the Commission confined itself to lawful activities, it would do well to decide at what point they ceased to be lawful. To be precise, they ceased to be lawful when the State under whose jurisdiction or control they were taking place was not sufficiently vigilant. Hence the need to deal with prevention and with the obligation of vigilance. Up to that point, he thus agreed with the Special Rapporteur that prevention could properly be covered by the draft and that that should be the starting-point of the entire codification exercise, since it was the only principle on which the progressive development of international law in that field could be based.

32. He could therefore not understand what had prompted the Special Rapporteur to suggest that what appeared to be the hard core of his topic should be included in an annex and even less why the provisions of the annex should be purely recommendatory, since prevention was always better than cure, and the obligation in question was a hard obligation that was well established in positive law, for States had an obligation to exercise vigilance over activities conducted in their territory in order to prevent and minimize any damage that might be caused. The basic question was how to expand on and refine the wording of draft article 8, as referred to the Drafting Committee,¹⁴ and he was rather puzzled why the convention itself should contain an apparently firm, clear article, which, even though it might require some drafting amendments, established the principle that

¹² Ibid., footnote 17.

¹³ Ibid., footnote 8.

¹⁴ Ibid., footnote 5.

there was an obligation of prevention, and why the consequences arising out of the principle embodied in that article would be included in a non-binding annex. His own objection to that approach stemmed from his belief that the provisions in question were binding provisions of hard law, not mere recommendations without any clear-cut legal status.

33. As he had said before, he disagreed with Mr. Calero Rodrigues and Mr. Yankov (2269th meeting) that a decision on the legal nature of the end product of the Commission's discussions could be postponed until a later stage. A draft treaty was not prepared in the same way as a draft recommendation or a draft guideline and he was afraid that, if the Commission kept changing its mind about the form of the instrument it was drafting, there would be even more doubts on its substance.

34. Referring to draft articles I to IX, in what was presented as an annex containing recommendations on prevention, he said that he was not happy with the Special Rapporteur's convoluted definition of the concept of prevention as "measures taken after the incident to contain or minimize the harm". The Special Rapporteur was moreover not entirely consistent with that definition and the draft articles departed from it to some extent. He did not disagree with the idea that, once the damage had occurred, the State must continue taking measures to prevent it from getting worse, but he found it rather strange that measures taken after the occurrence of the incident giving rise to liability should be described as preventive.

35. As to the substance, he was not at all convinced by the Special Rapporteur's explanations of why he had not included preventive measures proper in the draft articles or, in other words, why he had not provided that the State must take measures prior to the incident giving rise to reparation. If he had understood the report properly, the partial silence of the draft in that regard was the result of the fact that the conventions establishing strict liability were silent as well. Accordingly, the Special Rapporteur concluded in his commentary to draft article VI that the State had no obligation of due diligence. That was wholly incompatible with draft article 8, on prevention, which had been referred to the Drafting Committee, and it contradicted the decision in the *Trail Smelter* case. Conventions were silent on that point not because there was no obligation of due diligence, but because the obligation was sufficiently well established and was based on a firm enough customary obligation that it did not have to be reaffirmed in conventions on specific subjects. That was not true in the case of the general text for the codification and progressive development of international law which the Commission had been requested to prepare. The Special Rapporteur's draft was therefore somewhat unbalanced. It dealt only with one particular type of what might, oddly enough, be called "curative prevention" and wrongly remained silent on genuine prevention, which was at least as crucial.

36. Leaving aside the preamble to the annex, the principle of which he did not accept, as he had just explained, he said that draft article I, which was closely modelled on former draft article 16, dealt with a variety of issues. It provided for a number of different operations: an assessment of the risk and the potential harm

which might be caused by the activity in question; the adoption of legislative, administrative and enforcement measures to prevent or minimize the risk of harm; and the prior authorization of those activities by the State under whose jurisdiction or control they were to be carried out, subject to compliance by the operator with the measures adopted during the second phase. The draft article called for at least four comments. First, although the Special Rapporteur had announced that he would not be dealing with "preventive prevention", that was in fact the subject of the article. Secondly, for the sake of clarity, the three phases should have been more clearly distinguished and each one should have a separate article or paragraph in the order in which they were to take place. Thirdly, he was not at all persuaded by the reasons given in the seventh report to explain why the provision contained no reference to an insurance system. Of course insurance was linked to reparation and that was the reason given for no longer including the idea of insurance in draft article I. However, the responsibility of the State to encourage or oblige operators to take out insurance was not part of reparation, but of prevention and of what had to be done before the activity could be carried out or the authorization for the activity could be given. Fourthly, the State of origin or under whose control the activity was to be carried out should not encourage operators to take the measures referred to in the commentary to draft article 16, but require them to take out proper insurance, failing which the authorization in question should be withheld.

37. Draft article II, which was based on former draft article 11, did not give rise to any particular problems, except that it would be logical for the other States which were potentially affected by the activity also to be informed before the prior authorization was given. The same was true of cooperation which should take place among the States concerned. He was, moreover, sceptical about compulsory assistance of international organizations in helping the State of origin identify the affected States.

38. Draft article III also did not seem to give rise to any particular problems, although there might be some discussion about its implementation and the situation in that regard should be clarified. He was not happy with the proposed wording of the next three draft articles. His reservations were the result of the fact that he was still not convinced of the need to distinguish between activities with harmful effects and activities involving risk. As he understood it, an activity with harmful effects was an activity which caused damage regardless of the precautions taken. According to the Special Rapporteur,

There is already a considerable body of international theory and practice to support the view that transboundary harm caused by these activities, when significant, is, in principle, prohibited under general international law.

If that was true—and he was not sure it was—such activities were themselves prohibited by general international law, since by definition they caused such harm in the course of their normal operation; in other words, their consequences were necessarily prohibited by international law. In those circumstances, liability for lawful activities gave way to responsibility for wrongfulness and such activities no longer had any connection with the draft articles. Draft article IV should therefore be de-

leted altogether and draft article V should be extensively revised and placed elsewhere.

39. If, however, the starting point was the idea that activities with harmful effects could be lawful, at least under certain conditions, contrary to what was stated in the report, there was no valid reason for distinguishing between activities with harmful effects and activities involving risk. In both cases, consultations must be held between the State of origin and the potentially affected State or States and draft article VI would suffice for both kinds. In either case, he did not see the need for draft article IV.

40. Although the Special Rapporteur explained in his commentary that draft article VI took a new approach, it seemed to be based on former draft article 14, whose simpler and more direct wording he himself preferred. In draft article V, the comparison with draft article 20 in the sixth report¹⁵ seemed to be to the latter's advantage, for at least one basic reason, namely, that the initiative was left to the State of origin, which had to decide what had to be done to limit the risk inherent in the activity and that was the least that could be done in the case of activities which, by definition, were not prohibited by international law. The present wording of draft article V actually amounted to a prohibition of such activities, since the State of origin was no longer able to decide how they were to be conducted or regulated.

41. He could endorse the idea underlying draft article VII, but had some reservations about the wording. It was a good thing that a State potentially affected by an activity could take the initiative for holding consultations, both before and after the authorization, and even when the activity in question had started or damage was becoming apparent. But why have a reference to draft article II of the annex? The reference ought to be to the provisions on consultations. Moreover, the idea that the State of origin would bear the cost of the study was completely utopian: that would be the best way of preventing the parties from achieving an amicable settlement and it overlooked the fact that the activities were assumed to be lawful. Punishing the State of origin in that way was quite unacceptable and was, in any case, entirely unrealistic.

42. It was difficult to form a view of draft article VIII, which referred by mistake to draft articles III and V instead of to draft articles IV and VI, since the annex it mentioned did not yet exist. A provision of that kind should recall the general obligation concerning the peaceful settlement of disputes and, if necessary, refer to an annex providing for a particularly flexible and speedy means of settlement in order to compel States to hold proper consultations.

43. Draft article IX, which had been taken from former draft article 17, was hopelessly puzzling, not because he objected to the ideas which it embodied and which were quite correct, but because he did not think it belonged in a set of draft articles, whether they became a genuine convention on prevention or remained the kind of "soft law" text to which the Special Rapporteur appeared to

be resigned and which would itself be regrettable. Those ideas should be placed in the commentary, where they could be expanded on and added to.

44. In conclusion, he said he hoped that seven of the nine draft articles submitted in the eighth report would be referred to the Drafting Committee and that draft articles IV and IX would be dropped. He also hoped that, instead of labouring over general provisions which were not ready either for codification or even for the progressive development of international law, the Drafting Committee would agree to confine itself initially to the draft articles on prevention in the broad sense, whether or not they had been selected by the Special Rapporteur, and try to prepare a coherent set of draft articles dealing only with prevention and the obligation of vigilance. Such draft articles would be self-contained and might be submitted on first reading to the General Assembly quite soon.

45. Mr. ROBINSON said that the report contained a well-balanced mixture of background material and draft articles which served to advance the Commission's work on a topic that was full of conceptual and doctrinal difficulties.

46. Before commenting on the recommendatory provisions on prevention that were proposed for the annex, he had some points to make about the conceptual problems. He could see no objection to changing the word "acts" in the English title of the topic to the word "activities", which would make it clear that reference was being made to liability for injurious consequences of activities which were not themselves unlawful and which were therefore not prohibited by international law, although certain acts committed during the conduct of such activities might be wrongful. The distinction, although a little artificial, might be workable. The fact that such acts were committed during the conduct of activities which were in themselves lawful would provide a justification for treating them within the scope of the topic and the Commission's mandate. The change in the title of the English version would make it more consistent with the other language versions, especially the French, and also with draft article 1 of the revised version of the draft articles proposed by the Special Rapporteur in his fifth report,¹⁶ which specified that the articles applied to "activities". The annex proposed in the eighth report also referred to "activities". It therefore seemed that the Commission had already decided to deal with "activities" rather than with "acts". Why, then, did it not fully embrace the logic of that approach, which called for the treatment not only of certain lawful activities, but also of acts committed in the course of those activities which were unlawful and prohibited by general international law? Turning to the proposed annex, he said he did not think that the provisions on prevention should take the form of recommendations. He reserved the right to come back to the issue at a later stage, when the Commission considered the nature of the instrument to be prepared.

¹⁵ See 2269th meeting, footnote 4.

¹⁶ See 2268th meeting, footnote 6.

47. With regard to draft article I, he did not agree with those who were saying that the question of the prior authorization of the activities by the State under whose jurisdiction or control they were to be carried out was a wholly internal matter. It was appropriate to provide, in instruments such as the one now in preparation, that such activities must be authorized in advance by the State of origin, with the important result that that State would be in breach if such activities were carried out on its territory without its prior consent.

48. In his view, the phrase “the State should arrange for an assessment of any transboundary harm it [the activity] might cause” was too vague. Did it mean that the State was bound to carry out the assessment itself, whenever it was not the operator, or merely that it had to ensure that the operator made the assessment?

49. He did not know whether the Commission had taken a decision on the question whether the topic included harm caused in areas beyond national jurisdiction. The definition of transboundary harm in article 2 (c) of the revised draft articles did not establish any link between harm and those areas. Yet areas belonging to the common heritage of mankind, such as the seabed beyond the limits of national jurisdiction, required just as much protection as areas lying within national jurisdiction. The lack of agreed institutional machinery to monitor the use of those areas was not an argument against applying the draft articles to them.

50. It had been pointed out that the proposed annex contained no definition of a threshold. However, the idea of a threshold for transboundary harm was defined in draft articles I and II, according to which harm must be “significant”. He nevertheless noted that article 2 (c) of the revised draft articles stated that the expression “transboundary harm” always meant “appreciable harm”. The wording of the texts must therefore be harmonized. “Significant” was apparently a higher threshold than “appreciable” and, according to the report, there was a considerable body of opinion and practice in support of the view that transboundary harm, when significant, was prohibited by general international law. As to the choice of terms, he was content for the moment to acknowledge the existence of a rule of general international law prohibiting transboundary harm when it attained a certain level. However, since the term “significant” was used in article I, it should be used throughout the annex.

51. No threshold for “risk” was defined in draft article I of the annex and, although such a definition was more relevant for draft article VI, it was also applicable to draft article I. Article 1 of the revised text of the draft articles of the main text used the term “appreciable risk”. The same term should therefore be used throughout the annex.

52. In the light of draft article II of the annex and the purpose of the annex in general, he was persuaded that the articles on prevention should be more than mere recommendations. Since the activities in question posed a threat to the environment of States and thus to their economic development, those articles should form part of a binding instrument, with provisions that were appropriately mandatory and appropriately recommendatory. In

particular, as in the draft articles on the law of the non-navigational uses of international watercourses, the articles on notification, information and cooperation should be not only exhortatory, but also mandatory, in keeping with the developing norms of international cooperation.

53. Draft articles IV and VI dealt with activities with harmful effects and with activities involving risk, in an order that should have been reversed, and reflected the main thrust of the draft articles, namely, the distinction between the two categories of activity. That distinction, which held throughout the annex, had been opposed by at least one member of the Commission, who was of the opinion that liability could flow only from harm, not from mere risk. That view seemed to overlook the fact that the exhortation to consult under draft article VI arose not from mere risk, but rather from activities involving a risk of transboundary harm. In that connection and in accordance with his views on draft article I, he suggested that draft article VI should reflect the applicable thresholds and should thus make reference to “activities involving an appreciable risk of transboundary harm”.

54. While activities involving risk were lawful and activities with harmful effects were wrongful, the regimes applicable to each of the two categories of activities were essentially identical, meaning that they were based on consultations with a view to reaching agreement on certain measures to be taken, including preventive measures. It seemed somehow illogical to elaborate the same regime for the two types of activities.

55. In the case of activities involving risk, the States concerned were requested to enter into consultations in order to establish a regime of preventive measures. Since such activities were lawful, there could be no question of requiring the consent of the affected State in order for such activities to be carried out in the State of origin. In the case of activities with harmful effects, the State of origin was also urged to enter into consultations with the affected State with a view to establishing a legal regime for those activities which would be acceptable to all parties. However, since those activities were wrongful, consultations necessarily meant obtaining the consent of the affected State. If that consent was withheld, the activities would then be prohibited and subject to a dispute settlement procedure. Yet, in the absence of precise criteria under which the consent of the affected State should be given, it was highly probable that any difference would be resolved in favour of the affected State, given that the activities in question were prohibited activities.

56. Draft article IV did not specify that, in the case of avoidable harm, the object of the consultations was to obtain the agreement of the affected State regarding the establishment of an acceptable legal regime of prevention. That should be made clear, since the term “consultation” was very often used in cases where there was no obligation to obtain consent. Consequently, draft article IV should specify the characteristics of a legal regime for which the consent of the affected States was requested in the case of avoidable transboundary harm.

57. In the event that the harm was unavoidable and the affected State refused to consent to the activities with harmful effects, the State of origin would seem, then, to

be unable to carry out such activities, as they were wrongful. Did that give the affected State the power of veto, as indicated in the commentary to draft article VIII? He thought that would be the case, but could see no alternative, since a State could hardly be expected to give its consent to an activity which would cause it harm.

58. He wondered what might be the grounds of a dispute under draft article VIII? The State of origin and the affected State would start from different positions, depending on whether the case fell within the scope of draft articles IV or VI. In the case of draft article VI, the State of origin was dealing with lawful activities, while, in draft article IV, it was dealing with wrongful activities. Yet, he did not see exactly what the basis of the dispute would be. A dispute was usually based on the assertion of a right. But what right did the State of origin have in relation to an activity with harmful effects which was wrongful and prohibited? It might be possible to define in an annex the conditions under which the consent of the affected State could be given, a consent which would cleanse the activities with harmful effects of their wrongfulness. It might also be a question of determining, in the case where consent had been refused, whether that refusal was justified in terms of the conditions set forth in the proposed annex.

59. In respect of draft article V, it was his view that, in the case where transboundary harm was unavoidable or where it was established that such harm could not be adequately compensated, the interests of the affected State were not sufficiently protected simply by allowing it to ask the State of origin to request alternative solutions from the operator. That issue was discussed in the report. It should be specified that, if the operator was unable to put forward acceptable alternatives, the State of origin could not authorize the proposed activities.

60. The concept of a balance of interests, referred to in draft article IX, was useful and the corresponding discussion in the report was very interesting. However, in his view, there was a significant difference between the discussion and the application of the concept. The concept was, in fact, discussed as an exception to the obligation of the State of origin or, more correctly, to the request made of that State to take measures of prevention in relation to activities involving risk and activities with harmful effects. In the first case, if the loss of benefits involved in carrying out such preventive measures outweighed the advantages of such measures, the activities could be carried out in the absence of preventive measures, as long as compensation was provided in the event of substantial harm. As to the balance of interests in the case of activities with harmful effects, by establishing that the factors relevant to a balance of interests were simply to be taken into account during the consultations envisaged, draft article IX did not give due consideration to that balance as constituting an exception to the establishment of prevention regimes, as called for under draft articles IV and VI. In addition, the concept of a balance of interests, which should be retained, should be reflected, as it was in the report, in a manner which distinguished between activities involving risk and activities with harmful effects: those activities involved different regimes and the balance of interests might vary well from one to the other.

61. He thanked the Special Rapporteur for his report. He considered unreasonable the view held by certain members of the Commission that the report should have dealt with the conceptual basis of the topic, which had been on the Commission's programme of work for 14 years. At the same time, a return to that conceptual framework would enable the new members of the Commission to grasp more clearly the essence of the topic. In that connection, he welcomed the proposal by Mr. Rosenstock (2269th meeting) for the holding of an informal discussion on the issue.

62. Mr. Sreenivasa RAO said that the principle of liability, which had until recently applied to situations of known causes and effects, had acquired new dimensions as a result of industrial and technological development. Several new activities regarded by States and the international community as important from the socio-economic standpoint and central to their well-being—such as the exploitation of oil resources, the development and use of atomic energy for peaceful purposes, and the construction of chemical plants and large dams—raised issues of liability when accidents or incidents resulted in harm on an unprecedented scale. Most of those activities had been the object of national and international regulation. Liability for any resultant damage had to be assessed in the light of the principles to be observed with regard to operation, prevention and mitigation of damage, and must also respond to the concern of the community to preserve and continue to promote the activity in question. Furthermore, in order to determine the content of the obligation of reparation, it was necessary to take account of the magnitude of the damage that might be caused and also of the fact that, in certain cases, the causal link between the activity and the damage could not be established with certainty. Accordingly, in the case of ultra-hazardous activities, a liability regime had been developed on the basis of the principle of strict liability, which was itself founded on the basic principle of absolute liability. By virtue of those principles, an operator was liable for any damage caused by an ultra-hazardous activity he had undertaken, regardless of any measures he had taken to prevent or mitigate the damage and of the causal link between the activity and the damage. External intervening factors, such as acts of sabotage and war, would, however, shift the liability from the operator to those responsible for the act concerned. Furthermore, a limit had been set to the liability of the operator or the State and supplementary means of funding had been made available to ensure that justice was rendered to the victims of damage. Under the regime of liability thus developed over the years, the role assigned to the State, as opposed to the operator, consisted essentially of providing the administrative, legislative and judicial infrastructure necessary for the examination of complaints and the settlement of disputes. It was rare, however, for those functions to give rise to the liability, or even responsibility, of a State in the event of accidents or incidents, which gave rise only to the liability of the operator. The State was, however, expected to improve its administrative, legislative and judicial response, within the limits of its technological and financial capabilities, wherever there was a failure of its control in a given area.

63. The growth in population, the increase in poverty, the widening gap between the rich and the poor and, above all, the continued conflict between various groups which used weapons and methods of warfare that were dangerous for the environment had contributed to the deterioration of the environment, the pollution of air and rivers, desertification and deforestation. Environment and development were now irrevocably intertwined and there was an ever-increasing awareness that man should cease to conquer the environment and should instead respect it and learn to remain within the limits of environmentally sustainable growth. All States must endeavour to arrive at commonly accepted international regimes for the exploitation of natural resources, the oceans, outer space and rivers. Even if such regimes could be developed, it would be a long time before they became operational; in the meantime, questions of damage and compensation for damage caused by certain human activities both within the State and across frontiers were bound to exacerbate international relations and to test the principle of good neighbourliness, which, in the modern age, was no longer confined to immediate neighbours. Those questions could no longer be viewed from the same standpoint in a world where the rich must help the poor, where self-interest lay in protecting the common interest and where community responsibility took precedence over individual responsibility and liability. It was apparent too that the present generation and future generations would have to pay for the callous behaviour of previous generations towards their fellow men and above all towards nature and the environment. No regime of liability, whatsoever, would be able to save the innocent victims of those activities and to compensate for the damage that was bound to occur as a result of pollution of the environment, deforestation, floods and rising sea levels, for instance.

64. For that reason, the approach adopted by the Commission thus far in responding to its mandate with respect to the development of suitable guidelines and principles in the matter of liability could be only provisional. The Commission had still not fully understood the context in which such principles or guidelines would operate. It relied unduly on the concept of State responsibility, particularly with regard to prevention, which played into the hands of the real or more directly responsible agents of damage, namely, the operators and multinational corporations which remained beyond the jurisdiction of any one State. In the end, any concept of State liability would only be inequitable and impose onerous responsibilities on a large number of developing countries which were struggling, with their modest means, to develop resources, meet international debt obligations and eradicate poverty. Such a concept was also likely to lead to more conflicts between States and to expose the limits to the capacity of States—even the most advanced—to govern in so far as they were required to ensure that any operation conducted within their borders did not cause transboundary harm or to pay for the harm to which it gave rise.

65. The regime of notification and consultation among States, which seemed straightforward on the face of it, could virtually put an end to the freedom and sovereignty a State enjoyed over its territory, resources and people, since everything it undertook would be subject

to the approval or veto of the other State or States and would depend on their development priorities.

66. The logical conclusion was that a liability regime could succeed only within the context of the known parameters of State practice and development. The new concerns about the environment and development went beyond that concept. Any liability regime could play only a limited role within the context of a policy framework that had yet to evolve. Also, the principle of strict liability did not form part of the principles being discussed at UNCED. On the question of prevention, he considered that the points raised in the Special Rapporteur's report and during the discussion were valid only in certain contexts. The principle of consultation, for instance, was applicable only in the case of activities likely to cause harm that could be accurately assessed by technical means, as in the case of the construction of a dam. On the other hand, when the causal link between the planned activity and its effects was difficult to establish, the principle of consultation no longer had any point. Yet the draft articles contemplated several situations of that kind. There was also a risk of the sovereignty of States being infringed, so that the principle did have its limits.

67. He also considered that the terms used should be selected with care to avoid any confusion. Measures of prevention were applied before the harm occurred. It would therefore have been preferable to have spoken of measures to prevent and mitigate the damage, which were also at issue. Furthermore, measures of prevention differed according to whether they were applied by the State or the operator. The former were in fact regulatory measures and were precisely what the operator had to apply.

68. Mr. YAMADA said that, according to the documents on the topic dating back to 1980, there was a wide divergence of views among the members of the Commission on many key elements. It was difficult for him to grasp where the Commission stood and where it was headed. The subject was indeed a complex and difficult one, but he understood the disappointment of some Member States at the slow progress made, particularly against the background of the speed with which treaty norms on various specific environment-related activities were currently being developed. A pronouncement on the subject had to be made without too much delay. At the same time, he was gratified to note that the Drafting Committee had before it draft articles on the question, but he feared that the Drafting Committee had not received much clear guidance from the Commission on the future course of its work and it might be desirable to discuss the matter in plenary.

69. With regard to scope, the Commission should clarify the types of harm to be covered by the draft articles. The prevailing view was that the Commission's work should cover both activities involving risk and activities with harmful effects and the Special Rapporteur had amended draft article 1 as proposed in his sixth report accordingly. His own view was that activities involving risk had to be the core of the Commission's work. In the case of ultra-hazardous activities, such as oil activities and nuclear activities, there were already many specific treaties which governed liability and repa-

ration and which the Commission could use to establish general principles applicable to activities involving risk. It was possible, however, that any recommendations by the Commission for the establishment of a liability regime for activities involving risk might not prove readily acceptable to Governments. The Commission should nevertheless make a pioneering effort in that field.

70. Activities with harmful effects gave rise to a conceptual problem. In the final analysis, they should belong to the realm of State responsibility. It was difficult to conceive of a legal regime where it would be lawful to inflict harm on someone provided that compensation was paid. There were, of course, cases of compensation for harm caused by such lawful acts as expropriation. There were also cases of compensation for activities whose wrongfulness was precluded on grounds such as *force majeure*. However, those cases all belonged to the realm of State responsibility.

71. The fact was that, at present, there were many activities with harmful effects which were not prohibited by international law, for various reasons. Sooner or later, however, they were bound to be regulated and transferred to the State responsibility regime. Like Mr. Calero Rodrigues (2269th meeting), he also believed that the draft articles themselves should contain precise provisions on the relationship between the regime of international liability for injurious consequences of activities that were not prohibited and the regime of State responsibility, not only conceptually, but also from the point of view of their practical application to specific situations.

72. Although the Commission had agreed that, at the present stage in its work on the topic, it would not consider the question of the nature of the instrument to be formulated, he welcomed the Special Rapporteur's proposal for the inclusion in an annex, in the form of recommendations, of all questions relating to obligations of prevention or, in other words, for the separation of those obligations from obligations of reparation. It would be better for the Commission to give priority consideration to the question of reparation and for the draft articles basically to establish the principles governing the matter. The question of obligations of prevention might be dealt with separately.

73. He had serious doubts whether the various instruments referred to in the appendix to the eighth report could serve as a sufficient basis for the changes he proposed to make to draft article 2 of the main text. That article was meant to be of a universal character, whereas the provisions in question were recommendatory in nature or applicable to specific situations or particular regions.

74. Lastly, he had no objection to the principle of non-discrimination, which was dealt with in the new draft article 10, but he would like it to be made clear that the victim of harm should be able to obtain compensation at a level in keeping with internationally recognized standards, for example, through the courts of his State of residence.

The meeting rose at 1 p.m.

2271st MEETING

Wednesday, 10 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/443,¹ A/CN.4/L.469, sect. D, A/CN.4/L.470, A/CN.4/L.476, ILC(XLIV)/Conf. Room Doc.2)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

1. Mr. FOMBA said that, to bring the issues into closer focus, it was essential to have a clear understanding of the three key concepts covered in the title of the topic, namely, international liability, injurious consequences, and acts not prohibited by international law.
2. The last of those three concepts was not exempt from criticism, for though at first it might seem easy to define, there were situations in which it was difficult to judge the lawfulness or unlawfulness of a given activity. That difficulty stemmed not so much from the attitude of States as from developments in the law. So far as the concept of injurious consequences was concerned, the basic assumption was that lawful acts could have harmful consequences, ranging from the negligible to the catastrophic. The question therefore was whether, in order to establish international liability, all categories of harm should be taken into consideration or whether some selection should be made. Treaties which catered for the risk regime had resolved the difficulty by not expressly specifying the threshold of harm that would give rise to the right to compensation. In other words, no distinction was drawn between serious harm and negligible harm and, where there was a question of the "exceptional" or "abnormal" nature of the harm, the reference was to the origin of that harm and not to its intrinsic nature.
3. As to the concept of international liability, two important aspects called for close consideration: the nature of the liability, and its scope. So far as the first aspect was concerned, the question was whether the liability should be exclusive or residual. So far as the second was

¹ Reproduced in *Yearbook* . . . 1992, vol. II (Part One).