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Summary record of the 2271st meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

Extract from the Yearbook of the International Law Commission:-
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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

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

concerned, the scope of the possible strict liability of the State would differ, depending on whether it involved harm to the environment or harm caused by activities involving exceptional risk. It was difficult to lay down a firm definition of the latter type of activity as the concept was far too vague and it was not possible to identify such activities clearly. A strictly legal definition, in which the emphasis was placed on the fact that the harmful effects of such activities could be effaced only by the exercise of the greatest care by the State would not, on its own, be sufficient. The other possible kind of definition, namely, incorporating a list of activities likely to come within such a category and a reference to the various kinds of harmful consequences that might ensue, was limited by scientific and technological developments and knowledge. Such activities could therefore be defined only in generic terms, in other words, by indicating their main characteristics. Indeed, the word "exceptional" denoted not only the catastrophic nature of the harm likely to be caused but also the type and relative rarity of the harm. Moreover, experience gained from domestic laws dictated the need for the utmost prudence.

4. The concept of harm to the environment was a priori easier to pinpoint, though the actual situation was more complex. If that concept were defined as degradation of the natural elements, its vagueness, and the need to incorporate qualitative factors, immediately became apparent. Accordingly, the interdependence and mobility of the constituent elements of the environment meant that the law had to break free from ideas that were too firm and too territorial. None the less it was possible to arrive at sufficiently clear and agreed definitions, as demonstrated in the case of the term "pollution" where used in reference to the seas. So far as international ecological harm was concerned, its origins—both human and industrial—and also its consequences must be determined.

5. The question of liability for harm to the environment had occupied a central place in the reports by Mr. Quentin-Baxter, the previous Special Rapporteur. At the outset, Mr. Quentin-Baxter had taken the view that protection of the environment was a field particularly suited to the application of strict liability, from which all reference to the unlawfulness of the original act was absent; he had, however, subsequently gone on to stress the primary obligations imposed on States with respect to protection of the environment. For his own part, he agreed with Pierre-Marie Dupuy that positive law on liability for harm to the environment in no way differed from the basis of the ordinary law on the international liability of States for the commission of a wrongful act. That view was borne out by article 235, paragraph 1, of the United Nations Convention on the Law of the Sea, article V of the resolution on the legal rules concerning pollution of rivers and lakes in international law, adopted by the Institute of International Law,[2] and paragraph 13 of the document entitled "Responsibility and liability of States in relation to transfrontier pollution", adopted by the Council of OECD in 1984. The latter document also referred to the minority view favouring a regime of strict liability, whereby the State within whose jurisdiction the polluting activity was carried out would be required to make reparation for the transboundary harm caused, irrespective of any precautions that it might have taken. That would mean the introduction of a system of strict liability, for the element taken into consideration was not the conduct of the State concerned, judged in subjective terms, but the occurrence of harm beyond the area falling within the jurisdiction of that State, judged in objective terms. That position, also upheld by some developing countries, particularly in the course of the negotiations on article 235 of the United Nations Convention on the Law of the Sea, reflected the desire to change the direction of contemporary international law. It did not, however, reflect practice, which was characterized by two main features: a dearth of precedent, and particularly of case law, and the almost total preference of States for pursuing channels of diplomatic negotiation and consultation rather than applying the costly and cumbersome procedures for the determination of international liability.

6. Prevention involved a strictly legal obligation inasmuch as it was based on the fundamental right of human beings to a healthy environment. The customary rule of due diligence, which lay at the heart of that obligation, covered such aspects as the elaboration of legal and administrative measures and regulations, consultation with neighbouring States and the use of impact studies. The question arose whether all the specific implications of diligence should be made compulsory by spelling them out in the body of the text or whether they should be covered by a simple reference to unilateral obligations. In other words, should all the obligations to be imposed on States—whether of conduct, result or means—be dealt with? A priori he favoured a flexible solution, similar to that proposed by the Special Rapporteur, but it was important not to lose sight of the fact that, regardless of the solution chosen, international law was and should remain consensual.

7. Mr. de SARAM, expressing appreciation for the Special Rapporteur's eighth report, said that the topic before the Commission lay within a fast-moving area, and there was as yet no international consensus on what was a major legal issue, namely whether, in the event of damage being caused on the territory of State B as a result of an activity not prohibited by international law carried out on the territory of State A—and in the absence of any prior agreement applicable to the case— it could be said, as a matter of law, that State A, by reason solely of the fact that an activity on its territory caused damage on the territory of State B, was under legal obligation to compensate State B for such damage. The answer would, of course, depend on whether State A was under a primary obligation—or, to use the shorthand term, an "obligation of result"—to ensure that an activity on its territory did not result in damage on the territory of State B, or whether the obligation was only an "obligation of conduct", namely, an obligation to exercise all due diligence in ensuring there was no damage. It was on the question of what constituted the primary obligation between the two States involved in such a case, where there was no prior applicable agreement between them, that the fundamental differences of view arose—differences exacerbated by the magnitude of the harm

[2] *Institute of International Law, Yearbook*, vol. 58, part II (Deliberations during plenary meetings, Athens, 1979), p. 197.

that could ensue from activities not prohibited by international law. In the absence of any prior applicable agreement, the question of the nature of the primary obligation between the two States would have to be determined in the light of customary international law or in the light of general principles of law. It seemed to him and, he believed, to many others in the Commission, that there were difficulties in asserting, one way or another, what in such a case the primary obligation exactly was, or, at least, there had been and, it seemed to him, still were, deep-seated differences of view on the matter in the Commission. It was a question that had kept arising over many years not only in the course of the Commission's discussions on the present topic but also in the course of its preparation of the draft articles on the law of the non-navigational uses of international watercourses. In the latter connection, he drew attention to draft article 7 (Obligation not to cause appreciable harm), previously draft article 8, and to the footnote to the commentary stating that certain members reserved their positions because it was not clear from the article and the commentary whether the article was meant as a rule of State responsibility or liability.[3]

8. It was, he believed, a deep-seated concern as to what ought to be asserted to be the primary obligation between States where—in a case where no prior applicable agreement applied—an activity not prohibited by international law on the territory of one State caused damage on the territory of the other, that had led Mr. Quentin-Baxter, the previous Special Rapporteur, to propose in his schematic outline,[4] in 1982, that there should be a prior balancing of interests in consultations between States—consultations whose moral, if not legal, basis lay in such principles as *sic utere tuo ut alienum non laedas*—with a view to determining in advance, at the planning stage, whether, in the event of an activity in one State causing damage on the territory of another, a duty to compensate would or would not arise. The balance-of-interests concept was also one of the principal features of the recommendatory provisions on prevention now proposed by the Special Rapporteur, as was apparent from draft article IX.

9. It therefore seemed that, in the case he had referred to, the question of the nature of the primary obligation between State A and State B and the related question whether that obligation would differ depending on whether or not the activity was extra-hazardous, hazardous or otherwise, would continue to occupy the Commission and international lawyers for some time to come.

10. In the meantime, it would be unconscionable for the world community to permit damage in such cases to lie where it fell, with innocent victims having to bear the burden of loss and injury without compensation. In national systems of law, risks of extraordinary magnitude, which could not be adequately accommodated within national rules of the law of torts, were usually dealt with through insurance arrangements under which difficult questions of law, and of fact, ceased to have any substantial legal or practical significance. Moreover, he believed it to be true in many countries that the costs and delays involved in having recourse to legal advice or legal proceedings—to determine the legal rightness or wrongness of positions should a risk ever materialize—made insurance and reinsurance and, perhaps, even reinsurance, the only sensible and practicable course. There were several examples of similar arrangements on the international plane, in the field of treaties, where the principal purpose of the treaty was to provide for speedy and adequate compensation for damage rather than to determine, in the admittedly uncertain fields of general customary international law and general principles of law, who was responsible or liable. One of the more successful examples of such arrangements, concluded following the "*Torrey Canyon*" incident off the British coast in 1967, was the 1969 International Convention on Civil Liability for Oil Pollution Damage and the related 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The two Conventions had subsequently been revised, in certain respects, following the *Amoco Cadiz* incident off the coast of Brittany. There were many other examples of similar treaty arrangements or proposed treaty arrangements in other fields as well. Work on insurance and reinsurance against risks of catastrophic damage, and on the "internalization" of the costs of insurance coverage as a unit of production costs, so that questions of the rightness or wrongness of positions under applicable rules of the law of torts seemed only to have a theoretical interest, was still being carried out. The list of conventions and draft conventions referred to by the Special Rapporteur in his introductory statement (2268th meeting) also demonstrated that work was currently in progress in a number of different forums.

11. He therefore trusted that reference to models of schemes for the coverage of damage could be made in the instrument that would record the Commission's final conclusions on its work on the topic. Although a decision on the exact nature of such an instrument could perhaps only be determined at a later stage, it was important to bear in mind that it was a point that still had to be resolved. In the meantime, the suggestions put forward by the Special Rapporteur, in particular in his eighth report, provided the Commission with a helpful basis on which to pursue its work, though perhaps more in the realm of the progressive development than in the codification of the law.

12. The provisions on prevention proposed for inclusion in an annex should remain recommendatory in nature and should be couched in rather moderate terms. In an ideal situation, where relations between the States concerned were relatively stable and harmonious, the provisions of draft articles IV to IX, concerning consultations and dispute settlement, would probably work smoothly, but where relations were less than ideal, possibilities for effective consultation, not to mention dispute settlement, could be remote. For instance, the State on whose territory a particular activity was planned might decide to go ahead in any event, and, if the risk of damage materialized, the State affected might have no alternative but to have recourse to the available dispute-settlement procedure and the general principles of law. In terms of the innocent victim and of orderly proceed-

[3] *Yearbook . . . 1988*, vol. II (Part Two), p. 35, footnote 111.

[4] See 2269th meeting, footnote 3.

ings within the world community, it was an unfortunate scenario. The Commission should therefore examine more closely the possibility of insurance arrangements, or of some other schemes, for the coverage of damage under international conventions.

13. He agreed with Mr. Rosenstock (2269th meeting) that an exchange of views between members in a less formal setting than that of a plenary meeting of the Commission might be worthwhile.

14. The CHAIRMAN, speaking as a member of the Commission, said that, despite the wealth of material furnished by the Special Rapporteur and his predecessor, Mr. Quentin-Baxter, the Commission was still at the initial stages of its work on the topic. Although the Special Rapporteur thought that the general-debate phase was over, there was still widespread disagreement on what could and should be achieved. The feeling that there was a conceptual vacuum was by no means confined to the new members. The Commission had had continuous discussions on the issues of risk and harm, of reparation and prevention, yet it had not been able to establish clearly the aims to be pursued. To his mind, the choice to be made should not depend on subjective likes and dislikes. Rather, the Commission should endeavour to assess the objective needs of the international community, an element that seemed to be lacking in all the reports submitted by the Special Rapporteur. It needed to determine the gaps in the existing framework of rules of international law and whether it could actually make a meaningful contribution to the development of international law by drawing up general rules, which were not specifically tied to a given sector of inter-State relations. While it had been among the first to address the issues subsumed under the topic of international liability, the Commission had been largely overtaken by others. There was currently an almost dizzying abundance of instruments in the field, ranging from treaties to purely political declarations. Those recent developments had to be taken into consideration in pursuing the work on the topic.

15. The Commission should limit itself to drafting a set of principles on the rights and responsibilities of States with respect to the use of territories, areas or objects under their jurisdictional control. States would probably never accept a binding instrument restricting their freedom of action in a general fashion. The Stockholm Declaration[5] and the declaration to be adopted at UNCED[6] should serve as a starting-point. The Commission should first assess the "hard" substance of those declarations and then move on to improving upon and giving appropriate legal form to discussions that had taken place in forums with a predominantly political outlook.

16. One thing was certain: it was not possible to continue to discuss the report on the present topic and then set it aside in order to consider more important items. A decision had to be made on which direction to follow. He was grateful to the Special Rapporteur for his report, which would help guide the Commission in its analysis of the complex questions under consideration.

17. Mr. BENNOUNA said that he appreciated the great flexibility and patience demonstrated by the Special Rapporteur over the years as he had tried to clarify some very difficult issues. He agreed with the Special Rapporteur that the general-debate phase was over. In spite of the uncertainties that remained, it was time for members to agree on certain fundamentals of the topic and to move ahead in elaborating a draft instrument.

18. The Commission had at the outset decided to treat the issue of responsibility and liability separately. The first topic concerned the responsibility of States for internationally wrongful acts. The other concerned liability for activities involving risk that were not, as yet, regulated by international law. Actually, such activities represented a gap or inadequacy in international law and were neither prohibited nor authorized by it—a fact that was appropriately reflected in the title of the present topic, which had avoided using the term "lawful acts" and stressed instead that the acts in question were simply not prohibited by international law.

19. The link between State responsibility and international liability was undeniable; the two domains could not, by definition, be completely separate from one another, particularly since State responsibility covered the field of international law in its entirety. The Commission was simply wasting its time in trying to define strict boundaries between the topics.

20. Some members of the Commission insisted on arriving at absolutes. However, that was not possible, given the nature of the present topic, which represented a grey area between law and non-law, an area that had been characterized as "soft" law. Areas which did not fall under the scope of international law were reserved for the exclusive competence of States, which, in itself, was a relative concept.

21. Admittedly, the title of the topic was not entirely satisfactory. However, the Commission should leave that question aside and concentrate on substance. The title could be modified later, once the issues had been adequately clarified.

22. In dealing with the issue of strict liability, or liability for risk, it was important to go beyond the concept of harm, and the obligation to make reparation, to the related concepts of risk and prevention. It was becoming clear that liability for risk could be dealt with only in conjunction with prevention. To deal with either subject alone was to miss the point. Prevention and reparations for harm had to be seen as a "package"; both elements had necessarily to be included in the topic.

23. As to the precise nature of the articles on prevention, the Commission should bear in mind that it was working towards the establishment of a framework convention, similar to the one successfully elaborated on the law of the non-navigational uses of international watercourses. That type of convention was abstract by definition: it simply provided a general foundation on which to construct concrete and precise rules, to be negotiated between the States themselves. He thus shared the view of

[5] Ibid., footnote 2.

[6] See 2268th meeting, footnote 2.

Mr. Calero Rodrigues (2269th meeting) and others that it would be premature to decide whether to place the provisions on prevention in an annex, in the form of recommendations. He did not concur with those who believed that the Commission would proceed differently depending on the nature of the text, especially since the topic under consideration represented an intermediate zone in international law. The Commission should not, at that stage, make a decision with regard to the character of any particular provision; the juridical nature of the instrument it was elaborating should be left open until work on the contents of the instrument had been completed.

24. In his eighth report, the Special Rapporteur discussed the distinction between activities involving risk and activities with harmful effects. Some members had maintained that activities with harmful effects were wrongful from the start and thus did not even fall within the scope of the topic. Such a conviction had failed to receive affirmation in the eighth report: the Special Rapporteur had simply raised the question. Moreover, there were different degrees of harm and, in some cases, States were willing to tolerate a certain level of harm, depending on the interests involved. In that connection, he endorsed the view of the Special Rapporteur, who had stressed the obligation of States to negotiate, based on the principle of a balance of interests and that of equitable conditions in carrying out a particular activity. Those principles could serve as guidelines, thus enabling States to define through negotiations the thresholds of tolerance for any particular activity with harmful effects. Again, some members wished to make a distinction between prevention before the start of an activity and prevention of the further spread of harm after it had occurred. That distinction was false, for prevention was a continuous operation and should be considered as a constant obligation on States.

25. As they appeared in the report, the recommendatory provisions on prevention contained certain redundancies and might need to be revised by the Drafting Committee. For example, both draft article IV and draft article VI dealt with the obligation of the State of origin to hold consultations with the affected States with regard to certain activities. Draft article VIII, concerning the settlement of disputes, also needed to be reworded. In that connection, it was important to avoid a situation in which a State was prevented from carrying out activities by a veto from another State. A flexible procedure for the settlement of disputes might be the solution.

26. Lastly, he wondered whether the Chairman might not assist members in arriving at some mutually acceptable guidelines on the present topic, which could then serve as a basis for the elaboration of a draft convention.

27. The CHAIRMAN said it was not clear that it was up to him to provide the Commission with a set of guidelines for its work. That task would be better carried out by the members themselves.

28. Mr. RAZAFINDRALAMBO said he had expressed regret previously that the Commission was still discussing the fundamental issues underlying the topic and was even questioning its merit. He thus appreciated the fact that, in his eighth report, the Special Rapporteur had concentrated mainly on the principle of prevention and proposed a set of concrete articles on the subject. His approach had been based on a thorough survey of the international instruments on the environment and of the efforts of various international and regional bodies working on the regulation of dangerous activities.

29. At a time when the entire world was launching an offensive against environmental degradation, the Commission had a major role to play and must not miss its chance to make an enlightened contribution, within the scope of its mandate and within the limits of its legal competence. The Commission's task was not only delicate and complex, but also vital, for the world was dominated by technology and economic power, which was giving rise to an ever-widening gap between the wealthy countries of the North and the poor countries of the South. For that reason, the developing countries could only welcome any progress towards international regulation of the injurious consequences arising out of acts not prohibited by international law. In that connection, the scepticism expressed by Mr. Pellet (2270th meeting) with regard to participation by the international organizations, as envisaged in draft article 12 of the main text[7] was regrettable. Far from being reduced to determining which State or States would be affected by the transboundary effects of a particular activity, the role of international organizations, both universal and regional, should include the supply of technical and financial assistance to developing countries in connection with the adoption of preventive measures. He had in mind such bodies as UNIDO, IAEA and the Indian Ocean Commission. The provision defining their role might well be modelled on articles 202 and 203 of the United Nations Convention on the Law of the Sea. Preferential treatment for developing countries was, of course, a constant concern of the United Nations and was embodied in principle 6 of the principles on general rights and obligations drafted for UNCED,[8] as well as in several provisions of the draft Convention on Biological Diversity.[9]

30. As to the proposals on obligations of prevention contained in the report, he saw no reason for separate treatment of unilateral prevention measures relating to, respectively, activities involving risk and activities with harmful effects. As the Special Rapporteur pointed out, the role of the State was the same no matter what the activity being regulated. He agreed with the Special Rapporteur that differences between the two categories of activities did arise in relation to the need for prior consultation.

31. The proposal that all the articles on prevention should be consigned to an annex consisting of purely recommendatory provisions was attractive in its apparent simplicity, but, as already pointed out by several members, there were a number of objections. It should be remembered that it had always been the Commission's practice not to decide on the nature of a draft under consideration before completing its work on the draft. Mr. Pellet's suggestion that obligations of prevention

[7] Ibid., footnote 7.

[8] Ibid., footnote 2.

[9] Ibid., footnote 4.

should form the main or only subject of the Commission's work on the topic deserved attention but appeared to ignore the existence of articles 1 to 10, already referred to the Drafting Committee. Moreover, it allowed only a minor and subsidiary role for international organizations and, most important of all, was not consistent with the Commission's mandate from the General Assembly.

32. The various proposals advanced in the report concerning the development of some concepts in draft article 2 of the main text, and more particularly the concepts of risk and harm, should be referred to the Drafting Committee. Lastly, the Special Rapporteur was to be congratulated on a lucid, concise and constructive report, one which would undoubtedly help the Commission to make progress in drafting an international instrument of great use to the community of nations.

33. Mr. MAHIOU said that the Special Rapporteur's declared intention to limit the discussion as far as possible to the contents of the eighth report had not, perhaps, been well served by the inclusion in the report of general comments on articles already adopted by the Commission. Referring in that connection to Mr. Koroma's remarks (2269th meeting) to the effect that the Drafting Committee appeared to be encroaching on the role of the Commission, he stressed the need to distinguish between articles 1 to 10, which had been formally referred to the Drafting Committee, and the remaining so-called "experimental" articles, which were still before the Commission and open for discussion whenever they were touched on in a new report. The full Commission was, of course, at liberty to issue new directives to the Drafting Committee in respect of articles 1 to 10. While fully acknowledging the right of new members to raise general issues relating to the topic as a whole, he welcomed the Special Rapporteur's approach of concentrating on one set of problems at a time in order to enable the Commission to come to grips at last with the substance of the topic. The central point addressed in the report was whether measures of prevention should be in the nature of obligations, and should therefore be included in the body of the convention envisaged, or of recommendations relegated to an annex. Two opposing positions had emerged on that important question. On the one hand, the Special Rapporteur himself, in the light of opinions voiced in the Commission and the Sixth Committee as well as of existing conventions, favoured the second alternative. At the other extreme, Mr. Pellet considered that prevention was the core of the topic and that the entire draft should be constructed round it. No doubt the truth lay somewhere between those two points of view.

34. Prevention did indeed lie at the heart of the problem, but it was situated, as it were, upstream of the area the Commission was mandated to consider. It belonged to a preliminary phase. The crucial question, as he saw it, was what happened if an activity not prohibited by international law caused injurious effects although every appropriate preventive measure had been taken. To concentrate exclusively on prevention would be merely to postpone facing up to that problem. He agreed with the opinion of the previous Special Rapporteur, Mr. Quentin-Baxter, that prevention, harm and reparation formed a continuum. As had been said, the problem was as slippery and elusive as an eel. The advances in technology, however, made it essential to grasp the eel and bring it under control.

35. The Special Rapporteur's views as reflected in the report appeared to have undergone some modification. For his own part, he remained convinced that measures of prevention should be mandatory. He would also prefer the instrument to take the form of a draft convention, but felt that the determination of its precise status should be left until later. A framework convention along the lines of the draft articles on the law of the non-navigational uses of international watercourses was not an appropriate solution in the present case, which specifically involved liability.

36. As to the draft articles on prevention proposed for the annex, draft article I could bear some improvement. A reference to the concept of urgency should be included in the article or elsewhere among the provisions on prevention. As for draft article II, the duty to inform already existed in internal law and the proposal to introduce it in international law should not give rise to any serious objections. The saving clause in draft article III was also acceptable, but there too the drafting should be improved. So far as draft articles IV and VI were concerned, he was not yet clear in his own mind whether provisions on consultation in the case of activities with harmful effects should be different from those in the case of activities involving risk; the point undoubtedly required further analysis. Under draft article IV, a veto was possible for activities with harmful effects, because if the States concerned could not reach an agreement, the activity could not take place, whereas no such veto was possible for activities involving risk. That was one of the most important differences between the two activities. Surely, when a veto was involved, it caused problems of ensuring a balance of interests for both the State of origin and the affected State.

37. With reference to draft article VII, he wondered whether the distinction drawn in draft articles IV and VI had an impact on an initiative by an affected State, especially in regard to paying the cost of the study referred to in draft article VII. If the activity had harmful effects, clearly the affected State should receive compensation for the study it had undertaken, because it was precisely the study that had revealed the presence of injurious consequences. Yet he doubted whether there was a basis for making the State of origin pay for a study if the activities only involved risk. He endorsed draft article VIII, on settlement of disputes, but if preventive measures were to be contained in the draft convention, a mechanism was needed and should be included in the form of an annex. States should have the choice of deciding whether they wanted to start a procedure for the settlement of disputes. Lastly, while it was important to indicate to States what the basis for consultations was, the factors referred to in draft article IX should only be recommendations; otherwise, the framework would be too inflexible. He preferred to see that article as an annex that would serve as a guideline for States in dealing with the question of activities with harmful effects and activities involving risk.

38. Mr. SHI thanked the Special Rapporteur for his illuminating report, and said that it gave much food for thought. He would confine his comments to the matter of prevention. As a number of members had already pointed out, an understanding had been reached during the general debate at the previous session that the final form of the draft articles would be decided later on in the Commission's work. Yet, in the eighth report, the Special Rapporteur proposed that the draft articles on prevention should take the form of recommendations and constitute an annex to the draft. Did that mean that the Special Rapporteur intended the entire set of draft articles, apart from the proposed annex, to be binding? If so, the draft would have to take the form of an international convention. That was certainly not in accord with the understanding reached at the Commission's forty-third session.

39. He did not object to the inclusion of an article on prevention in the draft, but it had always been his view that for activities not prohibited by international law, failure on the part of a State to take measures to prevent accidents from occurring, or the inadequacy of such measures, could not give rise to action; otherwise, the present topic would not be any different from that of State responsibility. Liability only arose in the event of transboundary harm caused by an activity not prohibited by international law. The Commission still seemed to be divided on the activities involving risk of harm and those with harmful effects.

40. Leaving aside the issue of the final form of the draft articles, he agreed with the Special Rapporteur that articles on prevention, including procedural provisions, should not be binding. The proposed articles themselves were actually a simplified version of those presented in the sixth report,[10] which, as the Special Rapporteur acknowledged, drew on the relevant part of the draft articles on the law of the non-navigational uses of international watercourses. As he recalled, a number of members, including himself, had pointed out at the time that the present topic was not the same as the regime of the non-navigational uses of international watercourses. In presenting his new draft articles on prevention, the Special Rapporteur had to some extent taken into consideration the comments made by members at the forty-second session. For example, some of the original articles had been omitted, and the new articles had been included in non-mandatory terms.

41. It was true that draft article I stated the obvious. For the activities covered by the present topic, it was life, property and the environment in the State of origin that would in most cases bear the brunt of the harm caused. Today, for such activities, States demanded authorization, which would be granted only after careful consideration of the relevant documents and data, including an assessment of the social, economic and environmental impact of a projected activity. That article provided for the assessment of transboundary harm, but sometimes such an assessment was not possible. For example, in the case of a satellite launch, surely it could not be determined that an accident causing transboundary harm would occur. Another example was the assessment of creeping transboundary harm. It was hardly possible to assess transboundary harm caused by the emission of carbon dioxide resulting from the use of fossil fuels in a given country. The Special Rapporteur was aware of those difficulties, because the article ended by stipulating that States should ensure that those responsible for conducting the activity applied the best available technology.

42. The other proposed articles might be useful or applicable to certain specific activities, but not as a general rule applicable to any activity within the scope of the topic. For instance, in the matter of notification and information dealt with in draft article II, if the then Soviet Union had concluded from its assessment that its nuclear-powered satellite would one day crash on Canadian territory, would it have changed its plan, and would the Government of Canada, being informed of the assessment, have agreed to the satellite being launched? In such a case, the article would be of doubtful practicality. Another example was the requirement of prior consultation for activities with harmful effects, set out in draft article IV. Suppose State A planned to build a series of power plants run on fossil fuels and State B called for consultations because it thought the power plants would emit large quantities of carbon dioxide, causing transboundary harm on its territory. Suppose also that State A had only fossil fuel resources and virtually no technology or financial resources to reduce carbon dioxide emissions or to change over to other forms of energy. In such a situation, would consultations lead to any legal regime for the activity in question as conceived in draft article IV? Requests for alternatives, called for in draft article V, would also be impractical. And what was the use of dispute settlement under draft article VIII in the event of the failure of consultations and requests for alternatives? The articles would put State A in a helpless situation, and they were also open to abuse by potentially affected States. International cooperation would be needed, not consultations, requests for alternatives or dispute settlement.

43. Lastly, if there was to be a regime of prevention, even in the form of recommendations, special consideration should be given to the needs and interests of developing countries, particularly the least developed. The draft articles proposed by the Special Rapporteur had put the developing and developed countries on a footing of formal equality, but in reality the developing countries were placed at a disadvantage.

44. He endorsed the Chairman's views that, instead of drafting a set of articles, the Commission should formulate guidelines for States that responded to their actual urgent needs. At the thirty-ninth session, in 1987,[11] he had suggested that the Commission should either request the General Assembly to allow it to defer consideration of the topic or should stop engaging in polemics and take a more pragmatic approach to meeting the real needs of States by formulating such guidelines. Today, the subject-matter had become very topical, and it would be

[10] *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1.

[11] *Yearbook ... 1987*, vol. I, 2020th meeting, para. 33.

inappropriate to make a request of that type to the General Assembly. Hence the Commission must work on producing guidelines for States; being too ambitious might well lead to complete failure.

45. Mr. IDRIS said that the subject was complex and not only involved legal issues, but also had political and economic implications. He had to confess that he experienced difficulties with the report, which did not show the development of what was a long-standing subject. The conceptual framework of the topic was not yet ready, and the basic objective was still ambiguous. In that connection, he agreed with the statements by Mr. Vereshchetin (2269th meeting) and Mr. Sreenivasa Rao (2270th meeting) and endorsed the pertinent comments by Mr. Bowett (2269th meeting).

46. Despite worldwide concern about contemporary environmental problems, particularly in the wake of the Chernobyl accident, he was doubtful whether the present topic should be dealt with independently of the general rules of State responsibility. There was a basic substantive relationship between the topics that had not been dealt with by the Special Rapporteur or resolved by the Commission. He wondered whether a code on liability would improve the current status of international law and practice and be more efficient than an aspect-by-aspect approach geared to the adoption of realistic and carefully defined separate legal instruments.

47. The instrument now being devised was intended to cover only lawful activities. Harm, when caused without breaching an obligation, might be regarded as the result of an act beyond the control of the State concerned. In that case, there would be two victims, namely the State in which the event took place and the State suffering transboundary harm. Actually, the physical harm to the former could be more serious than to the latter. With regard to prevention, it was important to strike a balance between allowing States their legitimate freedom of action on their territories and ensuring that they exercised due care in preventing transboundary harm arising out of their activities. The goal should be not to prohibit lawful activities, but to regulate them.

48. The records of the Commission and the current debate showed that little progress had been made. The Commission was still considering basic issues and even questioning the value and objectives of the topic. International environmental law, including that related to the "global commons" and the United Nations Convention on the Law of the Sea, had been evolving effectively outside the Commission. The Commission had been experiencing considerable difficulty in reaching a consensus, partly because the goal of its work was not clear. He was not convinced that it was too early to examine the status of the topic. Once that was decided, it would be a simple matter to clarify the content and structure of the proposed instrument. In that respect, he wondered whether it was timely and realistic for the Commission to pursue its endeavours to formulate a general and multilateral convention or whether it would be reasonable to have the results take the form of general guidelines or a declaration of general principles by the General Assembly.

49. Lastly, he supported Mr. Rosenstock's suggestion (2269th meeting) that the Commission should establish a small working group to define the basic concepts involved and focus on the form and nature of the instrument to be adopted.

50. Mr. CRAWFORD said that, as shown by the debate, there was no consensus on where to place the draft articles on prevention. For his part, he agreed with Mr. Pellet (2269th meeting) that those provisions should not be recommendatory and they should not be relegated to an annex. The status of the draft articles was still unresolved, and it was not the right moment for the Commission to decide that prevention was less important than any other aspect of the topic. It was high time for the Commission to devote closer attention to the subject, and in that context he strongly supported Mr. Rosenstock's suggestion for a working group.

51. Mr. BARBOZA (Special Rapporteur), referring to Mr. Crawford's remarks, said that he had had the impression that the Commission was in favour of placing all the procedural articles on prevention in an annex. In his report, he had suggested that the same course should be followed for unilateral measures of prevention, but that did not imply that a consensus had been reached. As he saw it, there was general agreement in the Commission on not making procedural measures binding.

52. As to the comments by Mr. Idris, there had been debate in the Commission on the difference between the present topic and the topic of State responsibility. He had sought to make that distinction clear and wished to draw attention in that regard to the record of the debate at the forty-first session.[12]

53. Mr. IDRIS said he did not mean to suggest that there had been no debate, but simply that it had not yielded any concrete results. The topic under consideration and that of State responsibility continued to overlap somewhat and the problem must be resolved before the articles were drafted.

The meeting rose at 12.55 p.m.

[12] For summary of debate, see *Yearbook . . . 1989*, vol. II (Part Two), p. 89, para. 340.

2272nd MEETING

Friday, 12 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi,