

Document:-  
**A/CN.4/SR.2303**

**Summary record of the 2303rd meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1993, vol. I**

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

control, to evaluate the effects and to adopt the necessary legislative and administrative measures to minimize the risk of transboundary harm. Any further obligation would be incompatible with the sovereign right of a State to carry out legitimate activities in its territory without the agreement of another State as long as the rights of that State were not impinged on by the activities in question. Vigilance on the part of the State of origin must be considered sufficient at that stage. As to the protection of innocent victims, it had to involve compensation for any harm inflicted. To illustrate the scope of the State of origin's obligation, the Special Rapporteur emphasized that it was the people or the environment of that State that was the first to be harmed by a hazardous activity, and that, in the end, it was that State which had a primary interest in requiring prior authorization. In any event, whatever procedures were followed, they must not cause a given activity to be suspended until the State or States that might be affected were satisfied. In such cases, the action to be taken by the State of origin consisted in satisfying the requirements of absolute prevention, without that necessarily involving the suspension of the planned activity or the granting of some kind of right of veto to States that might be affected by the activity. All that was necessary was for the State of origin to carry out an in-depth analysis of the effects of the planned activity so as to prevent, control and reduce the risk of harmful effects.

44. Turning to article II of the annex (Notification and information), he said that the question that arose in connection with the role of international organizations was which of them was to be considered competent. That clarification had to be made in a legal instrument, especially when the interests of many States were at stake. Notification and information were essential when an evaluation brought to light the possibility of significant transboundary harm, but he was not convinced that provision had to be made for official consultations. The State of origin could not reasonably be expected to refrain from undertaking a lawful activity, especially when that activity was deemed indispensable to the country's development and when there was no other solution. Obliging the State of origin to consult all States that might be affected would amount to according them a right of veto, and that would be inadmissible. Stress should therefore be placed not on consultations, but on cooperation based on the principle of good faith and undertaken in a spirit of good neighbourliness. That should be spelled out in the text of article 17 (National security and industrial secrets) by adding the words "and in a spirit of good neighbourliness" after the words "in good faith". Similarly and in the light of the explanations that had been given, he believed that article 18 proposed by the Special Rapporteur (Prior consultation) was out of place in the body of the instrument being drafted.

45. The settlement of disputes (art. VIII of the annex) seemed to him to be closely related to the content and the type of instrument that was to be drafted. It would therefore be premature to discuss that question until the content and final wording of the draft articles had been established. As to article 20 (Factors involved in a balance of interests), it would be preferable to avoid the use of terms, such as the words "shared natural resources", which had been disputed and rejected by many bodies,

including the Commission itself. That article would be better placed in an annex.

46. In conclusion, he suggested that the Special Rapporteur should submit a long-term plan to the Commission specifying future stages in his work and start to prepare the final version of the draft articles on liability or in other words the obligation of the party responsible for the harm to provide compensation for it. Such a legal regime would be based on the liability of the operator rather than on that of the State. The reason was that liability derived from something other than failure to fulfil an obligation and did not entail full compensation for harm, regardless of the circumstances in which the harm had occurred. Transboundary harm resulting from an activity involving risk carried out in the territory or under the control of a State might, however, give rise to the liability of the State of origin.

*The meeting rose at 1.05 p.m.*

---

## 2303rd MEETING

*Friday, 4 June 1993, at 10.05 a.m.*

*Chairman: Mr. Gudmundur EIRIKSSON*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.*

---

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/446, sect. D, A/CN.4/450,<sup>1</sup> A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that all statements made so far had been interesting and deserved to be commented on. He proposed to do so in the usual way, but thought at the end of the exercise it would be useful for the continuation of the discussion if he responded to three of the statements at the present stage.

2. First, he agreed with most of the remarks by Mr. Pellet (2302nd meeting) and, in particular, with the criticism of article 18, proposed in the ninth report (A/CN.4/450), to the effect that the phrase "with a view to finding mutually acceptable solutions" appeared to

<sup>1</sup> Reproduced in *Yearbook... 1993*, vol. II (Part One).

establish a presumption of wrongfulness. It had not been his intention to create such an impression—quite the contrary—and he would have no objection to changing the wording in question or deleting it altogether. Mr. Pellet would also have preferred him to create a more complete system of prevention by enunciating a general principle, which was already contained in article 8, and including the concepts set out in article 3, paragraph 1, and articles 6, 7 and 8.<sup>2</sup> While agreeing with that view as well, he would point out that the articles in question had already been referred to the Drafting Committee and he had refrained from making any further proposals for fear of confusing the issue.

3. The thrust of Mr. Bennouna's statement (2302nd meeting) had been that the proposed procedure should be simplified. The point was well taken and deserved to be taken into account. Mr. Tomuschat (*ibid.*) had complained that the report failed to take account of developments in matters of prevention since 1985. Actually, it contained references to the Convention on the Transboundary Effects of Industrial Accidents, the Convention on Environmental Impact Assessment in a Transboundary Context and the Code of Conduct on Accidental Pollution of Transboundary Inland Waters.<sup>3</sup> It would be helpful to know what other developments since 1985, or aspects thereof, Mr. Tomuschat had in mind. Mr. Tomuschat had also suggested that he should have set out different categories of activities in groups so as to adapt the preventive measures to the specific dangers. In that connection, it had to be borne in mind that the document the Commission hoped to produce was a framework convention of a very general type. To group various activities in the manner suggested would, in his view, be both impossible and useless: impossible because no one could foresee what types of dangerous activities would develop in the future, and useless, because the Commission's aim should be to establish very general preventive measures. Due diligence was a general concept which applied, *mutatis mutandis*, to all activities.

4. He sometimes wondered whether some members wanted him to prepare a report or an encyclopedia. In any case—and the remark was not intended for Mr. Tomuschat, of whose good faith he had no doubt—he felt that those members who, for many reasons including their own country's interests, did not like the topic would be well advised to say so and ask the General Assembly to drop it, instead of imposing impossible conditions on him in his capacity as Special Rapporteur or engaging in criticism of the most whimsical nature.

5. Mr. BOWETT said that the core provision of the ninth report was undoubtedly the obligation imposed on the State to require an environmental impact assessment to be undertaken before authorizing any activity likely to cause transboundary harm to be carried out on its territory. The provision should, in his view, be spelled out, perhaps in some detail, so that the essential components of a good environmental impact assessment were clearly defined. Precedents for such definitions existed, both in conventions and in decisions of the Governing Council

of UNEP. Unless the essential requirements were thus identified, there was a risk that a State might appear to have fulfilled its obligations by carrying out a study of some kind, whereas, in reality, it had totally failed to have the potential risk properly assessed.

6. The consequences of an inadequate assessment could be of different kinds. First, if the assessment revealed that no risk existed and the State therefore did not notify any neighbouring State and authorized the activity, what would happen if, notwithstanding the assessment, harm to a neighbouring State did ensue? Would the State which had carried out the assessment be immune from any suit in respect of the harm caused, or could the injured State still bring a suit, claiming either that the assessment had been faulty or that the first State's conclusions on the basis of the assessment had been wrong? Secondly, if the assessment did reveal a risk of significant harm, the State of origin was required only to notify the affected State or States of the situation, but not to transmit the actual assessment. Why was that so? The reason could hardly be a matter of national security and industrial secrets, something that was dealt with separately in article 17. The participation of the public, a matter mentioned in the report, would appear to rule out such considerations. To ensure that the State gave sufficient and adequate information to the affected States it might be necessary to introduce a provision to the effect that failure by the State of origin to communicate information to a neighbouring State which proved in due course to be essential to any assessment of the risk would in itself constitute grounds establishing the liability of the first State.

7. As to the procedure for further consideration of the topic, there was clearly some overlap between articles 1 to 9, already referred to the Drafting Committee,<sup>4</sup> and the new set of articles 10 to 20 *bis*, on prevention. Articles 10 to 20 *bis* should be referred to the Drafting Committee so that it could concentrate on prevention issues, as decided by the Commission. However, with the help of the Special Rapporteur, the Committee could perhaps perform a wider role than that of simply carrying out a drafting exercise. It could consider whether the scheme of the new articles was logical and complete and, if not, what new provisions might usefully be included. Then, and only then, should it concern itself with the actual drafting of the articles. Finally, when a satisfactory set of articles on the prevention of risk had been thrashed out, the Committee might turn to the question of how the new articles fitted in with the general provisions in articles 1 to 5 and with the principles set forth in articles 6 to 9. By adopting such a course, the Commission would be proceeding in a systematic manner, which in his view was preferable to requesting more and more reports from the Special Rapporteur.

8. Mr. CRAWFORD said that he did not intend to comment on the report in detail, for two reasons. First, he agreed in substance with Mr. Pellet's comments, the only point of disagreement—apart from the second point raised by the Special Rapporteur earlier in the meeting—being that of compulsory insurance (art. 14). Insurance was essentially a private sector matter and could not

<sup>2</sup> For the texts of the draft articles, see *Yearbook... 1990*, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add. 1, annex.

<sup>3</sup> E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

<sup>4</sup> See 2300th meeting, footnote 18.

form the subject of an international obligation with respect to a risk which might or might not be commercially insurable. He also concurred with Mr. Bowett on the subject of how the Commission should proceed further with the topic.

9. Secondly, the Commission might well fall into some disrepute in connection with its handling of the topic under consideration. It was ironic that the Working Group concerned with the long-term programme of work should have favourably considered the idea of the Commission doing some work in the field of environmental law when, for the past 10 years, the Commission had failed to do any such work because of its mishandling of the present topic. In that regard, he strongly disagreed with Mr. Tomuschat. It was neither appropriate nor proper to hold up the debate in plenary because some members disagreed with specific proposals or with the topic as a whole. What the Special Rapporteur needed was access to the Drafting Committee, not more discussion in plenary; and what the Commission needed was not more reports, however excellent, but work in the Drafting Committee on the substance of the topic. For that reason, he would simply commend the Special Rapporteur and suggest that the articles proposed in the ninth report should be referred to the Drafting Committee. If the Committee could not devote substantial time to the topic at either the current or the next session, the Commission might consider setting up a special working group or a second drafting committee with a different membership. In any event, progress on the topic had to be made.

10. Mr. FOMBA said that nowhere was the saying "prevention is better than cure" truer than in the case of the environment. The fundamental question was how to avoid, at best, the occurrence of international environmental harm or, at worst, how to make good such damage if it did occur. Admittedly, no universally accepted legal definition of the term "international environmental harm" existed as yet, but customary international law today recognized that States were duty bound to refrain from causing such harm. It was therefore important to achieve agreement among States on a minimum of principles of conduct, with due regard for biological and political diversity. The scope *ratione materiae* of those principles necessarily involved cooperation in both the prevention and the reparation of environmental harm. Thus, the two main elements of any legal regime to be established were the question of notification and consultation of neighbouring States before commencing activities capable of causing significant transboundary harm; and, the definition of "international environmental harm" and of the nature of international liability incurred for causing such harm. In that connection, the fundamental issue was the precise substance of the State's obligation to make sure that activities carried out within its jurisdiction or under its control did not cause environmental harm in other States.

11. The element relating to preliminary information and consultation sometimes gave rise to fears that the consulted State might, in effect, exercise a right of veto over lawful activities performed in the consulting State or might unjustifiably delay such activities. Another fear was connected with the potentially confidential nature of the information to be divulged. Such fears needed to be

dispelled in the most flexible manner possible and in a spirit of respect of State sovereignty.

12. In Africa, the principle of prevention of transboundary harm was enshrined in a number of legal instruments, such as the African Convention on the Conservation of Nature and Natural Resources; the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (hereinafter referred to as the Bamako Convention); the Convention relating to the Status of the Senegal River; the Convention and Statutes relating to the development of the Chad Basin; the Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger; the Convention creating the Niger Basin Authority, and others. Quoting extensively from those instruments, he pointed out that only the Bamako Convention contained provisions on liability, the others dealing essentially with prevention and cooperation issues.

13. He agreed with other members that in regard to prevention, the scope *ratione materiae* was not risk but harm, the point at issue being to prevent the occurrence of harm from an activity which, by its very nature, involved a risk. He also agreed that prevention *stricto sensu* was *ex ante* rather than *ex post facto*, and also that material liability had to cover both the prevention and the reparation of harm.

14. As for preliminary notification and consultation, it was not wise or realistic to try and impose a precise obligation on States in connection with information to be made public at the domestic level. The supply of information to other States should be governed by the two fundamental principles of good faith and good neighbourliness, which were more a matter of conduct than of the means employed. Lastly, he was generally in agreement with the comments as to both substance and form made by Mr. Bennouna, Mr. Pellet and Mr. Pambou-Tchivounda (2302nd meeting).

15. Mr. VILLAGRÁN KRAMER congratulated the Special Rapporteur on his useful report. He noted that efforts to render the title more concise had been unsuccessful; some of the members at any rate were working on the assumption that the topic concerned international liability for injurious consequences arising out of lawful activities.

16. Mr. Pellet had reported on a number of terminological and theoretical problems raised by the concepts of strict liability and fault. Most members of the Commission had agreed that it was important to decide when strict liability would come into play and when, as an exception, the theory of fault might be acceptable. The Special Rapporteur had addressed the duality of the theory in connection with the concept of prior authorization, which he regarded as essential. To a certain degree, even when the general rule of strict liability applied, in the case of prior authorization the Commission must consider whether the theory of fault was applicable. The Drafting Committee would ultimately have to deal with that problem.

17. Over the years, the concept of harm had taken on a more defined profile. Regulations involving the concept existed for accidents with aircraft and space objects, in the nuclear energy field, for industrial accidents and for

the transport of dangerous substances by road, rail and sea. Regulations were beginning to take shape in connection with harm caused to the environment through maritime, land and air pollution. Furthermore, regional efforts had been made in that area, and he thanked Mr. Fomba in that context for the list of instruments adopted in Africa that touched upon the concept. In the case of Latin America, the matter was reflected in the Convention on the Conservation of the Living Resources of the Southeast Atlantic and other instruments.<sup>5</sup>

18. As to the question of principles, in his view the Special Rapporteur had not sufficiently stressed the relationship between benefit and transboundary harm. No State should be able to benefit from an activity without being subjected to its consequences, and it would be useful if the Special Rapporteur could focus on that issue. Concerning the principle that the State which in the exercise of an activity caused harm should make reparation for that harm, the Special Rapporteur had spoken of "the polluter pays" principle, but it was a principle that called for clarification of certain acts, both before they had occurred and after the State had been informed that they had begun: transboundary risk, harmful activities, activities prohibited by international law, activities not prohibited by international law, hazardous activities and ultra-hazardous activities. He was not sure whether those activities should be listed in the articles or not, but they must be taken into consideration in some way.

19. That raised the question of the role of the State. The very fact that members were prepared to discuss the Special Rapporteur's proposal that prior authorization by the State should be required for certain activities that might cause transboundary harm made it imperative for the Commission to face certain realities: there was a trend in the private sector to call for a smaller State role, for deregulation and for fewer regulations and restrictions. In bringing up the question of prevention, the Commission would be directly addressing the issue of State activities and the legal consequences thereof. The Special Rapporteur had taken the right approach by stressing that the purpose of the activities of the State was to seek to minimize the risks that could lead to transboundary harm and then to contain any harm that occurred. Thus, the State did not regulate activities *per se*, but assumed responsibility for minimizing the risks and containing any actual harm. Yet as the State was confining itself to a legal text on prevention, the question that might then be raised in the private sector was what its own responsibilities would be and whether it was expected to implement those provisions, and in that context he thought that the idea of encouraging the adoption of compulsory insurance was a good one.

<sup>5</sup> For example, the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, 24 March 1983) and the Protocol concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region (Cartagena de Indias, 24 March 1983) (*International Legal Materials*, vol. XXII (1983), pp. 227 and 240, respectively); the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima, 12 November 1981) and the Supplementary Protocol to the Agreement on Regional Cooperation in Combating Pollution of the South-East Pacific by Oil and Other Harmful Substances in Cases of Emergency (Quito, 22 July 1983), documents reproduced by UNEP (United Nations, New York, 1984).

20. He thanked the Special Rapporteur for the list of recent international instruments on prevention and related activities. In that connection, the arbitrators who had ruled in the *Trail Smelter* case<sup>6</sup> and the *Lake Lanoux* case<sup>7</sup> deserved the gratitude of jurists the world over. In the former case a decision had been reached on a complex problem concerning the environment at a time when there had been no debate on that issue. In the latter case, the decision was most useful for the Commission in connection with the topic of the law of the non-navigational uses of international watercourses. If those jurists had succeeded, despite the absence of relevant case-law, in reaching decisions, how much easier it should be for the Commission, given the rich jurisprudence on the question under consideration, to agree upon an adequate text.

21. He shared the Special Rapporteur's view that for prevention and notification, it was important to ensure that all participating States had a legitimate interest in preventing harm or, if such harm had occurred, in containing it. He wondered, however, what type of liability would apply for non-compliance. He would also stress the importance of consultations, which had the advantage of ensuring the participation of the affected States. Involving all States concerned in the participation process created a sense of community that would be useful for dealing with problems of transboundary harm.

22. Lastly, he wondered whether it would be possible to examine in greater detail the concept of equity: even if the Commission did not refer to its parameters, judges would take them into account. No international court could ignore the question of equity, and the Commission should attempt to provide greater clarity as to its scope.

23. Mr. KOROMA paid tribute to the Special Rapporteur for his efforts in elaborating a regime on the topic, which included the environment, pollution control, the transfer of hazardous wastes, the use of nuclear materials and matters relating to economic and industrial development. He also thanked Mr. Bowett for his useful suggestion, which might help the Commission find a way out of the current deadlock.

24. After some 14 years spent on the topic, the Commission had decided in 1992 that attention should be focused at the current stage on drafting articles in respect of activities having a risk of causing transboundary harm and that the Commission should not deal, at the present time, with other activities which in fact caused harm.<sup>8</sup> Accordingly, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm. The Special Rapporteur had interpreted that to mean that the discussion of whether rules of prevention were needed was suspended for the time being. Yet prior to the 1992 decision, the Commission had been working on the understanding that the topic encompassed the physical consequences of a particular activity which had caused transboundary harm. With the 1992 decision to focus on activities hav-

<sup>6</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>7</sup> *Ibid.*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook... 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

<sup>8</sup> See *Yearbook... 1992*, vol. II (Part Two), p. 51, para. 346.

ing a risk of causing transboundary harm, the scope of the topic had not only been unnecessarily narrowed, but had also become conceptually problematical.

25. First of all, international law recognized no liability for risk of damage without damage having actually taken place. State practice did not support the risk proposition either. States had not been willing to take on such an obligation. Furthermore, assuming that the risk proposition was tenable, it was not clear how the risk could be assessed or how the possible compensation for such a risk could be determined. Adopting the risk approach would mean that the mere release of pollutants into international watercourses or into the atmosphere could be enough to incur liability if the act was of such a nature as to endanger human health or harm the environment, without taking into account the fact that in concrete cases the pollutants might not have reached the frontier. With the risk approach, the very existence of a nuclear plant in the border region of a State could be considered as the basis of a claim for compensation, without material damage having occurred. However, if compensation was to be determined as the cost of measures taken for the anticipated harm, it seemed unlikely that States would accept such an obligation. Therefore, although the risk approach was included in many international legal instruments, the aim was not to allow for compensation, but to control pollution through international co-operation. That was the reason for the procedures for information, consultation and mutual assistance between Governments and authorization of polluting activities, dumping and the like contained in those legal instruments, which did not link transboundary pollution with international liability. Accordingly, it could be concluded that liability for environmental risk did not exist and had little chance of being accepted by the international community.

26. He wished to go on record as not supporting the Commission's decision in 1992 to change the title of the topic,<sup>9</sup> which was no longer tenable in its current form. The closest support one could find for the risk proposition related to ultra-hazardous activities, the liability for which was neither strict nor absolute; yet even that liability arose from the serious damage or harm that was likely to occur in the event of an accident rather than from the risk involved. But the scope of the topic before the Commission was not confined to ultra-hazardous activities for draft article 1 spoke of all types of activities that might cause transboundary harm.

27. In his view, in elaborating the articles, the approach should be based on harm and the physical consequences of harm or, if the Commission was determined to continue with its existing mandate, to amend the scope of the topic to confine it to ultra-hazardous activity. His preference was for the broader approach of liability for the physical consequences of an activity, a concept which also encompassed risk. That would seem to be the approach in many legal systems and not only in common law. Even proponents of a civil law approach had demonstrated that present-day international law did not recognize the principle of international liability for

risk, as that would mean that even without any actual damage to the environment of a country, a State would be liable for activities that might possibly cause damage. That was also the position adopted in the United Nations Convention on the Law of the Sea.

28. The Special Rapporteur had noted that though the principle of prior authorization had been widely supported, the opinion had also been expressed that such an obligation was unnecessary. The trend in international agreements was to require States parties to adopt legislation on specific issues in order to ensure that specific obligations were carried out. If an agreement required prior authorization and a private operator violated that obligation, the State would still be liable, since it had undertaken a binding obligation. To protect themselves, and in view of the realities of modern-day life, States tried to impose liability on the operator, who was usually in the best position to exercise supervision. That led to an impasse, however. If a State imposed too many regulations on operators, it could be accused of impeding private investment. Yet if it refrained completely from regulating economic activities, it could be held liable for accidents occurring in its territory. Therefore, two standards would have to be set: one for States that were able to exercise the controls stipulated in an agreement, and another for those that lacked the necessary scientific and technical infrastructure.

29. Increasingly, international agreements demanded that prior notice be given and consultations be held before certain activities were carried out. The Bamako Convention, for example, prohibited the export of hazardous waste unless the other State had agreed to import it and undertaken not to export it to countries that had prohibited the import of such products. Yet the Convention dealt specifically with hazardous substances, while the topic being developed by the Commission encompassed ordinary activities as well—building a dam on a watercourse, operating a factory, and so on.

30. Hence, although the Commission's topic was linked with environmental law, it was not identical to it. Although the materials for elaborating it overlapped with those for the topics of State responsibility and the law of the non-navigational uses of international watercourses, the Commission should not lose sight of the autonomy of the topic itself.

31. The importance of the informed consent safeguard, particularly for developing countries that lacked the necessary machinery for risk assessment, could not be denied. But that safeguard should be handled with care, as it could become a double-edged sword, used to veto genuine attempts at economic development.

32. Under a preventive regime, States had to minimize the risk of transboundary harm by reducing the frequency of accidents or minimizing the magnitude of the potential harm. Yet that approach did not entail prevention *per se*, it was described in the report as "prevention *ex post facto*". However, simply seeking to prevent the frequency or magnitude of dangerous operations like those at Chernobyl and Bhopal might not be enough. The requisite preventive regime was one that would fully safeguard environmental integrity and human health from the dangers of transboundary harm. Under the

<sup>9</sup> *Ibid.*, para. 348.

Fourth Lomé Convention,<sup>10</sup> for example, the European Community had agreed to prohibit the export of radioactive and hazardous wastes to African States party to the Convention.

33. Article I of the annex could at first glance be said to state the obvious, but on further reading it should put operators on notice that they would be held responsible if they caused transboundary harm and had not received overt authorization in advance for a given activity.

34. As to article 13, on pre-existing activities, when a State discovered that an activity that might cause transboundary harm was being carried out under its jurisdiction without authorization, the most appropriate response would be not only to warn those responsible but also to enjoin them to comply with the established requirements. In its present wording, the article merely provided for the issuance of a warning, however, a stronger tactic should be adopted.

35. Article 14 should be interpreted in the light of section B of the introduction of the report, which indicated that a State would not, in principle, be liable when it had taken all reasonable measures to ensure compliance with the relevant regulations. His own view, however, was that when a private operator violated an agreement requiring a State party to adopt legislation on a given activity, the State was still liable, since it had undertaken a binding obligation. A State should protect itself by not only imposing liability on the operator, but by insisting that sufficient insurance coverage be taken out to make sure that the burden of any eventual harm would not be borne by the State alone.

36. Articles 15 to 18 were reasonably well drafted, and he supported them, in principle. It would none the less be interesting to see what additional materials the Special Rapporteur would bring to bear in constructing a regime to cover activities entailing the risk of transboundary harm should the Commission decide to elaborate a separate regime for activities with harmful effects—as he hoped it would.

37. With reference to activities involving risk, he would point out that, even with nuclear activities involving risk, liability would be incurred only if the State where the nuclear activity took place caused harm to another State. The fact that a nuclear activity was risky in and of itself was not a sufficient basis for liability.

38. On dispute settlement, he could support provisions similar to the ones in the Convention on Environmental Impact Assessment in a Transboundary Context or the Convention on the Transboundary Effects of Industrial Accidents, provided that the issues to be determined were real and not hypothetical.

39. Article 20 was appropriate in a draft like the present one, designed as a framework convention whose provisions were meant not to be binding but to act as guidelines for States. The article referred both to equitable principles and to scientific data. It was not clear how it would be applied in practice, but as long as it was intended to help in applying the provisions of a framework convention, he could endorse it.

40. Lastly, he shared the Special Rapporteur's opinion that the "polluter pays" principle should be included as a component of the general principles regulating the topic and wished to thank the Special Rapporteur for his industry and perseverance in his task.

41. Mr. MAHIOU said the report met with the Commission's request that efforts should be focused at present on activities involving risk, and specifically on preventive measures, with the understanding that corrective measures, or reparation, would be dealt with at a later stage. The Special Rapporteur was on the right track in attempting to define prevention and in putting forward a set of articles that improved on what had been proposed at the previous session.

42. Referring to unilateral preventive measures and to article 14 of the draft, he noted that the Special Rapporteur had outlined three types of measures. The first type included steps to reduce the likelihood of accidents, in accordance with the classic definition of prevention. Such measures were extremely important, and it was often at the design or organizational stage that they had to be adopted. The second type aimed at reducing harmful effects, if, despite all precautions, an accident did occur. Steps that States could take in advance to reduce harmful effects and prevent them from affecting neighbouring States, and the preventive deployment of human, material and other resources were envisaged in that category.

43. The third category differed from the first two and entered a domain—called by the Special Rapporteur "prevention *ex post facto*"—that might give rise to some doubts. Indeed, the term "prevention" did not seem entirely appropriate for dealing with measures taken after the harm had already been done. Such measures were really in the nature of reparation for, or correction of, harmful effects, and could therefore more suitably be covered at the next stage in the Commission's work. It was true, however, that the dividing line between prevention and correction was often difficult to pinpoint. With that minor reservation, he agreed with the line taken by the Special Rapporteur in the draft articles.

44. He particularly welcomed the replacement of article I of the annex by articles 11 to 14, as article I had involved numerous complex subjects that were better handled separately. With reference to the problem of developing countries that lacked the necessary technological, financial or human resources to perform risk evaluation of activities carried out in their territories, that problem must be kept in mind in elaborating a set of articles that placed many obligations upon States. Yet at the same time, the need for vigilance must be impressed on developing countries, since the harmful effects of accidents in their territories would usually affect other developing countries that were themselves lacking in technological and financial resources. The old adage "An ounce of prevention is worth a pound of cure" was especially apt in that context, particularly as prevention costs less. So, while prevention must be emphasized, developing countries must be helped in acquiring the necessary technological competence and resources to carry out risk assessment.

45. Article 15 dealt, appropriately, with the role that international organizations could play, but restricted that role to notification and information. However, notifica-

<sup>10</sup> Concluded between the European Community and the States members of the African, Caribbean and Pacific Group and signed on 15 December 1989 (see *The ACP-EEC Courier*, No. 120 (March-April 1990)).

tion was something for the States concerned, except in certain cases. International organizations, with their financial and technological resources, could provide assistance in many other areas, such as preventive measures and risk assessment. Their involvement should therefore be envisaged, and the conditions should be outlined in a separate article or articles. One of the major concerns would be to prevent States from opposing action by international organizations if it was truly justified, and to ensure that they agreed on the way in which such action was to be carried out.

46. He agreed with the Special Rapporteur on the desirability of incorporating the obligation to consult at the request of an affected State (art. 18). It was the very basis of the notion of cooperation around which the draft articles were being articulated. Yet the parallel obligation to reach agreement among States seemed to go too far; he therefore welcomed the changes introduced by the Special Rapporteur. While it was clearly desirable that States should be obliged to consult, it was impossible to require them to reach agreement. A mechanism for settlement of disputes would have to be considered for cases in which no agreement was reached.

47. In his opinion the draft articles could be sent to the Drafting Committee for further elaboration.

48. Mr. SHI said that, in keeping with the decision adopted by the Commission at its forty-fourth session, the Special Rapporteur's helpful report confined itself to an examination of prevention in respect of activities involving risk of transboundary harm and presented a revised version of the relevant articles. The Special Rapporteur was to be commended for his efforts to make as much progress on the topic as possible.

49. The Commission had been working on the topic for 14 years, but not one single draft article had yet been adopted on first reading. The reason lay in the difficulties inherent in a topic that involved sharp divergences in the rights and interests of States, divergences which had to be reconciled by the Commission as part of the progressive development of international law. The Commission did not work in a vacuum: its members all came from countries at varying stages of development and with different legal and cultural backgrounds. To some members, the decisions made at the previous session seemed a step backward, while others thought otherwise. On the whole, he was happy with the decisions, though he somewhat regretted the reversion to the usual practice of taking a decision on the final form for draft articles only after completion of the work on a topic, and believed that an exception to that rule should have been made. For example, a decision at an early stage that the draft should take the form of guidelines for States would speed up the Commission's work and make the draft more acceptable to States in general. Nevertheless, he would abide by the Commission's decision.

50. The proposed draft articles on prevention raised two points of concern. In the first place, he wondered whether some of the articles could be applied in general to all activities which involved a risk of transboundary harm. It would not be either easy or appropriate to derive rules of general application from the many treaties which regulated specific activities, since each activity had its own characteristics. The Convention on International Liability for Damage Caused by Space Objects, for exam-

ple, provided for absolute liability for damage but did not include any provision on prevention. Would the proposed draft articles apply to space activities? In the case of the transboundary harm caused by the Soviet satellite which had crashed on Canadian territory, if the Soviet Union had been able to assess the extent of that harm prior to the launching of the satellite it would probably have changed its plans; but the ensuing notification and consultation would also probably have been tantamount to inviting Canada to veto the planned activity. Furthermore, the Special Rapporteur had proposed, in his fifth report,<sup>11</sup> that activities involving risk should be delimited by reference to the physical consequences of those activities. Such a broad delimitation would, however, make it extremely difficult to formulate rules on prevention suitable for application to a wide range of activities, particularly if it was hoped to secure acceptance of those rules by the international community. For all those reasons, the scope of activities involving risk should be further defined.

51. The second point of concern was that the proposals did not make adequate provision for the special needs of the developing countries. The Special Rapporteur's suggestion, in his ninth report, that some general form of wording should be included in the chapter on principles to take account of the position of those countries did not go far enough. Their needs, including the need for preferential treatment, should also be reflected in the articles on prevention, which should take account in particular of the principles laid down in the Rio Declaration on Environment and Development.<sup>12</sup> Also, with regard to preventive measures, the standards which applied to developed countries might be unsuitable for developing countries since the costs, in social and economic terms, might be so great as to impede their development. Again, article 14 provided for "the use of the best available technology". Did that mean the best technology available in the State of origin or available throughout the world? For many developing countries, it was something that would make a great difference. The articles on prevention should therefore include general provisions on ways of facilitating the transfer of technology, including new technology, in particular from the developed to the developing countries.

52. Mr. Sreenivasa RAO, noting that the subject of international liability had been before the Commission for some time, said that there was an understandable impatience at the absence of any preliminary conclusions on a matter which was so crucial to the development of that area of the law.

53. One of the reasons why the topic had not acquired any logical structure of its own was that it had not altogether broken free of the topic of State responsibility. Unlike that topic, where the State was accountable for its failures as a State, and unlike the topic of the law of the non-navigational uses of international watercourses, where the State owned, regulated and maintained the natural resource, international liability was concerned with acts over which the State might not, or could not,

<sup>11</sup> *Yearbook . . . 1989*, vol. II (Part One), p. 131, document A/CN.4/423.

<sup>12</sup> A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 3-8.



have control. That was because of the human rights and freedoms enjoyed by individuals, because of the need to separate the State from other entities engaged in production, commerce and services, and because of the need to meet the demands of entrepreneurs in terms of the technology and financial resources needed to promote development. There was inevitably some hesitation in accepting the view that States should be liable for activities that caused transboundary harm, since it was felt that, in the interest of allowing market forces free play, excessive regulation was to be avoided. The matter was further complicated where no direct and immediate causal link could be established between the activities within the territory of the State and the harm allegedly caused across international borders. None the less, the basic principle that no State should allow its territory to be used so as to cause transboundary harm was so well accepted as not to need any repetition, provided the causal connection between the activity and the transboundary harm was well-established. Accordingly, the position of the State involved was governed by State responsibility, while the position of the operator or the owner was well regulated by the law of tort and the law of agency. Any principle the Commission might indicate as a basis for laying down the consequences of liability at the international level could not, therefore, be altogether dissociated from those branches of the law.

54. It would perhaps be easier to prescribe the appropriate rules on prevention, both for the State and for other entities, if the State was dealt with separately from the operator or owner. The State's role, as noted by the Special Rapporteur, was essentially to prescribe standards and to enact, and monitor the implementation of, laws and regulations. The role of the operator was different and more demanding. His obligations could be, among others, to submit an environmental impact study of the activity concerned, to give an indication of the level of risk entailed, to propose measures to deal with such risk and to contain any consequences. If an activity was likely to cause transboundary harm, a requirement could also be laid down that the activity should be carried out in such a way that it would cause no foreseeable harm to another State, or, the operator could be required to obtain the necessary authority to carry out the activity after engaging in consultation with those responsible in the State or States concerned.

55. The State, for its part, could under its own laws, which were enforceable through its judicial system, take various measures to prevent the likelihood of harm being caused, and where such harm was caused seek damages against the operator. In other words, while the State would have sovereignty and a measure of freedom to allow certain activities to be carried out on its own territory in the interests of its own development, the principle that the innocent victim should not be made to bear the loss could be protected in a variety of ways other than through the medium of State liability. It was therefore incumbent on the Commission to explore all avenues to develop a regime of liability that focused on the operators without neglecting the role that a State should play in ensuring, for instance, proper protection for the environment, prevention of pollution, and damage to foreign States. The proposed articles were not, in his view, sufficiently clear in that regard.

56. The Special Rapporteur said in the report that "the State will not, in principle, be liable for private activities in respect of which it carried out its supervisory obligations" and he apparently contradicted that view when in the footnote he suggested the State should have "residual liability" to meet the costs of damage caused if "the operator or his insurers cannot produce the sum required to cover the harm caused . . . or in other cases which might be imagined". The Special Rapporteur had also made the helpful suggestion that the large majority of States, which did not have the necessary technical know-how and resources to monitor activities within their jurisdiction and to assess the potential for causing transboundary harm, should be able to call on the competent international organizations for help. As the Special Rapporteur had rightly remarked himself, however, such an obligation could not be imposed on international organizations under the proposed articles but could only arise between an international organization and a State under the terms of a treaty between the two or under the constitutional provisions governing the particular organization.

57. While the obligation on States to cooperate in the conduct of activities likely to cause transnational harm was unexceptional in principle, there was no guidance as to how it would actually be put into effect. A State should first satisfy itself that an activity was likely to cause significant harm before notifying the other State or States and entering into an obligation to consult. Unless the activity was State-run, the State would usually have to depend on the operator to provide the necessary information: it would not have to assume full responsibility to plead the case of the operator with the other State or States. The Commission might wish to consider that point.

58. The requirement that individuals should obtain insurance, mentioned in the report, was a necessary condition for authorization of an activity, but it would be preferable to deal with it at the prevention stage.

59. With regard to article 12, the obligation to provide an environmental impact assessment should rest with the operator. He did not altogether understand the circumstances in which article 13 (Pre-existing activities) would come into play. Once the State had undertaken new obligations to allow certain activities to be conducted on its territory, with due regard to its duties towards other States and to environmental considerations, it should normally prohibit any activity that did not meet those standards. In any event, it was normally the operator, not the State, that would be required to pay for any damage caused. The phrase reading "... the State shall be liable for any harm caused, in accordance with the corresponding articles" was confusing and should be re-examined. Article 14 should likewise be re-examined. The obligation imposed under that article was for the State to prescribe a duty or duties for the operator to undertake; it was not an obligation to ensure that the operator in fact carried out those duties. Should the operator fail to do so, the obvious sanction would be for the State not to authorize the activity.

60. As for article 15, the authorizing State did not always need to become directly involved in satisfying the other States likely to be affected: the burden of providing the necessary information and engaging in consultation

could therefore be left, at least in the initial stages, to the operator himself. Similarly, while article 16 was reasonable in principle, the obligation to provide information periodically should rest with the operator. Protection of national security and industrial secrets, the subject of article 17, was a very necessary element in regulating the supply of information to other States. The article required careful drafting, however, in order to achieve a satisfactory balance of interests.

61. Articles 18 and 19 made an obvious point with respect to the granting of requests for consultation in connection with activities likely to cause transnational harm. A problem would arise, however, where one State considered that an activity was not likely to cause such harm while the other insisted on limiting the freedom of the citizens of another State to engage in activities beneficial to them. Even if the complainant State was not allowed a right of veto, as explained in the commentary to article VI, the obligation to consult would itself entail a duty to satisfy that State and to accept conditions which were perhaps so onerous that the activity itself would have to be abandoned. In such instances, one obvious solution would be to adopt some means for the peaceful settlement of disputes, such as recourse to neutral expert opinions. He was none the less doubtful about the value of such proposals, as well as about the list of factors the Special Rapporteur had suggested for incorporation in another article in a framework convention. He shared the Special Rapporteur's misgivings on that score and would recommend that any articles on those subjects should be omitted at the present stage. The balance-of-interest factor was not peculiar to that particular field but lay at the heart of the operation of international law. He was also hesitant about entering into details of the kind proposed in article 20 *bis* and about the "polluter pays" principle. Such matters could be reviewed when more progress had been made on the basic concepts.

62. Lastly, he agreed that prevention could not be dealt with in the abstract and that different types of principles of prevention might be relevant to different types of activities. He also endorsed the view that the topic should not generate a new set of conditions for the transfer of the resources and technology which the developing countries required to sustain their development. Further effort should be devoted to clarifying the basic principles, although the drafting of the procedural principles could be left largely to States themselves.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>13</sup> (continued)\* (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,<sup>14</sup> A/CN.4/449,<sup>15</sup> A/CN.4/452 and Add.1-3,<sup>16</sup> A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)**

[Agenda item 3]

REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

63. Mr. KOROMA (Chairman, Working Group on a draft statute for an international criminal court) said that

\* Resumed from the 2301st meeting.

<sup>13</sup> For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

<sup>14</sup> Reproduced in *Yearbook... 1993*, vol. II (Part One).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

the Working Group had made considerable progress in the past two weeks. After examining and reaching a preliminary understanding on a series of draft provisions dealing with such general aspects of the matter as the status of the court, judges, the registrar and the composition of chambers, it had set up three subgroups to deal with jurisdiction and applicable law, with investigation and prosecution, and with cooperation and judicial assistance. The subgroups had produced detailed reports with specific draft provisions accompanied in some cases by notes or preliminary comments, which had then been discussed in the Working Group. The subgroups had subsequently resumed their work with a view to incorporating into the draft articles, in so far as possible, the observations made in the Working Group and to considering certain issues which had been identified as possible additional matters for a statute. It had been agreed that, after the subgroups had completed their work, the task would be undertaken of consolidating in a coherent whole the various provisions and commentaries from the Working Group and its subgroups.

64. He was confident that the Working Group would be able at the present session to place before the Commission a substantive piece of work that would put it on the road towards complying with the mandate entrusted to it by the General Assembly,<sup>17</sup> namely, the drafting of a statute for an international criminal court.

*The meeting rose at 1.10 p.m.*

<sup>17</sup> See General Assembly resolution 47/33.

## 2304th MEETING

*Tuesday, 8 June 1993, at 10.10 a.m.*

*Chairman:* Mr. Gudmundur EIRIKSSON

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, 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. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.