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2601st MEETING

Tuesday, 13 July 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹ (concluded) (A/CN.4/496, sect. A, A/CN.4/501²)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. KATEKA said that the duty of prevention was essentially a duty of due diligence and the standard of due diligence could vary from State to State and region to region. Accordingly, the regime of protection had to bear in mind the interests and needs of developing countries. That opinion had been vindicated by advances in international law during the 1990s, especially the United Nations Framework Convention on Climate Change and the Rio Declaration.³ Eminent scholars also recognized that the due diligence standard had to be viewed in the context of a State's ability.

2. He did not believe the Commission needed to seek a special mandate from the General Assembly in order to prepare a separate protocol on compliance. Compliance was relevant to protection, since compliance regimes dealt with the enforcement of obligations, above all in the environmental sphere, before significant damage occurred and thus helped to prevent harm.

3. The Special Rapporteur and the legal writer, Philippe Sands, postulated that States were unwilling to accept any concept of strict State liability or the elaboration of rules on that subject.⁴ For his own part, he supported the Special Rapporteur's choice of option (b) set out in chapter V

of the second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/501) because he considered, like Roberto Ago, that prevention and punishment were simply two aspects of the same obligation and he concurred with the Special Rapporteur, Mr. Robert Q. Quentin-Baxter, that prevention and reparation formed a continuum and ought to be treated as a compound obligation.⁵ On the other hand, he disagreed with the views of Brownlie⁶ and Jiménez de Aréchaga.⁷ Rosalyn Higgins had been right to express disappointment about the separation of international liability from State responsibility and to ask why State responsibility should not attach to results from both lawful and unlawful acts.⁸ Nevertheless, that approach would raise the thorny issue of primary and secondary rules.

4. He suggested that the Special Rapporteur should refer not only to the draft protocol to the Basel Convention, entitled "Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal",⁹ but should also cite the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention), since the latter was of great importance to Africa, which was increasingly being used as a receptacle for all kinds of dangerous materials, including nuclear waste. The shifting of burdens and responsibility implicit in the "joint implementation" system instituted in connection with the countries listed in annex I to the United Nations Framework Convention on Climate Change was a very dangerous trend.

5. Mr. ADDO said that he was in favour of option (a) set out in chapter V of the second report. Citing the *Trail Smelter* case and the arbitration tribunal's findings, he drew attention to the fact that States' sovereignty over their own territory had long been limited by the obligation not to interfere with the rights of other States. The freedom of States to act was necessarily constrained by the duty to have regard to the rights of other States and to the environment in general. The principle of good neighbourliness also played a role in that context, because it was a feature of international law. Another pertinent principle established in the *Corfu Channel* case, namely that a State had an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States, was embodied in a number of international treaties and indeed extended to the protection of areas of the global commons, as well as areas outside national jurisdiction such as the high seas and the atmosphere.

⁵ See *Yearbook ... 1983*, vol. II (Part One), pp. 212-213, document A/CN.4/373, para. 40.

⁶ I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), p. 50.

⁷ E. Jiménez de Aréchaga, "International law in the past third of a century", *Collected Courses of The Hague Academy of International Law, 1978-I* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1978), vol. 159, p. 273.

⁸ R. Higgins, *Problems and Process—International Law and How We Use It* (Oxford, Clarendon Press, 1994), pp. 163-164.

⁹ UNEP/CHW.1/WG.1/9/2, annex 1.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1998*, vol. II (Part Two), p. 21, para. 55.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ See 2587th meeting, footnote 13.

⁴ P. Sands, *Principles of International Environmental Law* (Manchester, Manchester University Press, 1995).

6. A number of States were of the opinion that principle 21 of the Stockholm Declaration,¹⁰ which reaffirmed the duty incumbent on States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or areas beyond the limits of national jurisdiction, was declaratory of existing customary international law. The second duty of States was to cooperate in the prevention and mitigation of transboundary environmental harm. The duty to cooperate in the use of shared natural resources had been confirmed in the *Lac Lanoux* case and the principle had been reiterated in the Convention on the Law of the Non-Navigational Uses of International Watercourses. He therefore deduced that liability or responsibility would be incurred by States if they breached or did not perform a duty imposed on them by law. The distinction that the Commission had sought to make between State responsibility for wrongful conduct and international liability for non-wrongful conduct was rather confusing and he agreed with Barbara Kwiatkowska that what was needed was a globalization of environmental obligations.

7. Similarly, it was undesirable to refer in the second report to the civil liability of the operator and he disputed the idea that the State's liability was residual. Very serious, long-term damage had been done to health and the environment by the industrialized nations' habit of dumping their toxic and hazardous waste in Third World countries. Such practices, for example the events which took place in Kokoin, Nigeria, in 1987 and 1988, had been a factor prompting the adoption of the Bamako Convention in 1991. Hence there was a need for draft articles or rules on liability and, contrary to the Special Rapporteur's statement in the last paragraph of chapter IV, section B, of the report, there were plenty of pollution liability treaties from which he could deduce principles providing a basis for draft rules. In that connection, several conventions, starting with the Convention on Third Party Liability in the Field of Nuclear Energy and including the International Convention on Civil Liability for Oil Pollution Damage, would support a liability approach.

8. Moreover, since the *Nuclear Tests* cases, State practice had been considerably refined and expanded through the conclusion of bilateral and multilateral treaties on environmental protection. Furthermore, the draft articles on State responsibility had contributed to the development of thinking on States' obligations towards other States in respect of the environment. The cases he had already mentioned likewise testified to the existence of customary international law on the subject. It was unfortunate that ICJ had not seized the opportunity to develop the law in that respect, although a former President of the Court, Sir Robert Jennings, believed that it was a principal task of the Court to decide whether the provisions of multilateral treaties had turned into rules of general customary international law.

9. Environmental matters, which were frequently the central issue in cases concerning liability, were of global importance and general principles of international law therefore applied to them. Indeed, the issues raised in environmental law were clearly part of international law, in that they related to topics like the law of treaties and the

nature of customary international law. In that respect, the Commission had not only to codify existing law but to progressively develop the law to fill lacunae. The Commission therefore had shown that it was determined to look beyond traditional international law.

10. With reference to the issues raised in chapter V of the second report, the activities that should be covered were air and atmospheric pollution, ozone pollution, climate change, pollution from nuclear activities, pollution of the marine environment, oil pollution, dumping of waste at sea, transboundary movements of hazardous waste, protection of biological diversity, protection of forests and desertification. The definition of damage could be distilled from numerous instruments, treaties or declarations.

11. As for the identification of the person against whom claims should be brought, it was axiomatic that it should be the State in whose jurisdiction the injurious activity had been carried out. That principle had been established in the *Trail Smelter* case and since it had never been questioned, it had become a customary rule of international law. The State had to be responsible for both its own activities and those of individuals or private or public corporations under its jurisdiction. It had to enact the requisite legislation to regulate the activities of companies, enforce laws against persons economically active in its territory and take responsibility if it failed to prevent or terminate illegal activities. He therefore disagreed with the position of the United States of America stated in the comments and observations received from Governments,¹¹ as quoted in chapter IV, section A, of the report and he cited the section of American law on State obligations with respect to the environment of other States and the common environment in support of his thesis. A State could naturally bring a claim, as it had done in the *Trail Smelter* case. He was convinced that it would be a retrograde step to abandon the topic of liability on the threshold of the new millennium.

12. Mr. Sreenivasa RAO (Special Rapporteur) reminded members that he was asking for guidance with regard to the choice of options listed in chapter V of the report.

13. Mr. ECONOMIDES said that the debate should focus on procedure, not substance. In his opinion, the draft articles on prevention of transboundary damage from hazardous activities should be adopted on second reading before the Commission went on to examine liability for injurious consequences arising out of acts not prohibited by international law. He therefore supported option (b) proposed by the Special Rapporteur in chapter V of the report, especially as the concept of due diligence was a very fluid notion which was constantly evolving and, moreover, depended on the individual circumstances of each case. He agreed completely with the views of the first Special Rapporteur on the topic of State responsibility, Mr. García Amador, on due diligence,¹² as

¹¹ See *Yearbook ... 1997*, vol. II (Part One), document A/CN.4/481 and Add.1, para. 24; and *Official Records of the General Assembly, Fifty-first Session, Sixth Committee*, 39th meeting (A/C.6/51/SR.39), and corrigendum, paras. 31-33.

¹² *Yearbook ... 1961*, vol. II, p. 47, document A/CN.4/134 and Add.1, article 7.

¹⁰ See 2569th meeting, footnote 7.

quoted in chapter III, section A, and did not believe the situation had changed in the meanwhile. Hence the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be set aside for the time being, along with the question of finalizing the form of the draft articles on prevention of transboundary damage from hazardous activities.

14. In contrast, the Commission must, in line with the proposal made by the Government of Switzerland in the Sixth Committee,¹³ set itself the objective of completing a procedure on the settlement of disputes at its fifty-second session. The draft article that already existed dealt with the subject in a wholly incomplete manner.

15. Mr. HAFNER said that, as the discussion on the Special Rapporteur's second report would not be completed before the next session, he would reserve his position on its merits.

16. It was surprising that the report dealt so extensively with due diligence. Having himself referred to the topic earlier in the session in the context of State responsibility, he was convinced that it should be tied in with the topic of State responsibility. Personally, he preferred option (a) proposed by the Special Rapporteur in chapter V of the report, which was not very far removed from option (b). The Commission could separate liability and prevention only insofar as it had enough time and opportunity to do so.

17. Mr. AL-BAHARNA said that the Special Rapporteur's second report provided an excellent analysis that concentrated on the essential issues relating to the topic. One particular merit was that the report clarified with great skill many of the complex matters involved in the topic of prevention at the present stage, especially those relating to the interpretation and implementation of the obligation of due diligence as a principle known in international law. Thus, in chapter III, section A, the Special Rapporteur had established a relationship between the duty of prevention and the duty of due diligence, stating that any question concerning implementation or enforcement would necessarily have to deal with the content of the obligation and hence the degree of diligence which should be observed by States. However, as the report went on to note, the notion of due diligence had given rise to different interpretations as regards the standard of care involved.

18. Those statements showed that even the separation of the issue of prevention from that of liability did not seem to help solve the complexities of the topic. To speak of prevention alone still involved the problem of the interpretation of the obligation of due diligence and of its practical implementation, as shown by the summary of the discussions in the Sixth Committee contained in chapter II of the report.

19. The objective of the 17 draft articles adopted by the Commission on first reading at its fiftieth session was to reflect procedures and content in the context of the duty of prevention. The Commission's focusing on the issue of

prevention had followed on from its earlier decision to separate prevention from liability, a decision that had attracted general support in the Sixth Committee, which had largely endorsed a proposal to postpone consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law until the Commission had completed its discussion on the topic of prevention of transboundary damage from hazardous activities. However, a number of delegations had emphasized the need for the work on liability to continue in parallel, maintaining that the principles concerning prevention could not be determined in isolation from those concerning liability.

20. In that connection, he considered that the topic of prevention of transboundary damage from hazardous activities would be incomplete without the development of certain rules governing liability arising from the consequences of harm or non-compliance in general. Consequently, it was essential for the Commission to strive, in its future work on the topic, to find a generally accepted definition of the scope of a liability regime for activities not prohibited by international law. In that regard, the elaboration of a number of international instruments and protocols relating to the international liability regime should be considered an encouraging and useful development. However, it could not yet be said that there existed a sufficiently developed set of norms or binding rules relating to the liability regime. It was the opinion expressed by the Special Rapporteur in his review of State practice, for he said at the beginning of chapter IV, section B, of the second report that most of the conventions on transboundary damage or damage to the global environment had only indicated the need for development of suitable protocols on liability and most of those protocols had been under negotiation for a considerable amount of time without any resolution of or consensus on the basic issues involved. Moreover, the general trend appeared to be against the evolution or formulation of the concept of State liability, and even more so, strict liability, even though it was regarded as more suitable to problems of transboundary pollution.

21. Those conclusions should not lead the Commission to reject the topic of international liability for injurious consequences arising out of acts not prohibited by international law and thus to suspend any attempt to deal with it at a more appropriate time in the future. Personally, he regarded the topic as an essential complement to consideration of the regime of protection and therefore endorsed the Special Rapporteur's advice, in chapter V of the second report, on the inappropriateness of rejecting it, namely, that rejection would create more confusion in respect of the applicable law in case of actual damage or harm occurring across international borders or at the global level because of activities pursued or permitted by States within their territory and it would not do justice to the strong sentiment among a large group of States in favour of providing a balance between the interests of the State of origin of hazardous activities and the States likely to be affected.

22. Consequently, he favoured the trend towards preserving the topic of international liability for injurious consequences arising out of acts not prohibited by international law for future treatment and evaluation in the

¹³ See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), and corrigendum, para. 67.

light of further development of norms and rules formulated in future protocols or conventions relating to the topic. The Special Rapporteur's review of the status of ongoing negotiations on international liability clearly showed that the international community was taking encouraging and positive steps towards the formulation of such norms and rules. Lastly, he preferred option (b) and supported the development of a suitable procedure for the settlement of disputes in relation to the regime of prevention.

23. Mr. HE said that the provisional adoption of the 17 draft articles and commentaries by the Commission on first reading at its fiftieth session had been an important achievement. It should be noted that the phraseology used in the draft was "risk of causing transboundary harm", as opposed to "causing transboundary damage" which had been used in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. The emphasis was thus placed on preventing or minimizing the risk of causing harm as the first and essential step towards preventing harm itself. It followed that the draft articles should recognize a general obligation for the State of origin to prevent or minimize the risk of causing transboundary harm, which implied that the State must ensure that all adequate precautions were taken or if harm had occurred because of the nature of an activity, that all necessary steps should be taken to minimize the effects.

24. As defined in article 2 (Use of terms), the words "risk of causing transboundary harm" seemed to apply to the low probability of causing disastrous harm and the high probability of causing other significant harm. Thus, disastrous harm seemed to be excluded from the scope of the draft articles.

25. In international practice, States never considered themselves under the obligation of requiring previous consent from neighbouring States or other presumably affected States before permitting a hazardous activity to develop in their territories or other areas under their exclusive jurisdiction and control. There seemed to be no customary rule in that respect. Furthermore, the Experts Group on Environmental Law of the World Commission on Environment and Development (Brundtland Commission) had observed that, if the benefits to the country concerned and human society as a whole created by the hazardous activities outweighed or far outweighed the benefits of eliminating the risk by ending the activity, the activity could be permitted and its unlawfulness lifted.¹⁴

26. On the other hand, international practice had also provided for certain procedures for the participation of presumably affected States, particularly when the seriousness of the risk had become manifest. Such procedures allowed legal regimes to emerge between the States concerned regarding the activities in question. In some instances, such as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, an activity had even been prohibited. Thus, the prohibition of a dangerous activity on the basis of a relevant procedure could not be ruled out. To attempt to do so in the

present instance would require a sector-by-sector approach.

27. With regard to the concept of due diligence, a key element in the draft articles on prevention of transboundary damage from hazardous activities, chapter III of the second report provided a comprehensive and admirable survey of various viewpoints helpful to the understanding and implementation of the articles. On that crucial issue, it was recognized that the prevention and minimization obligation was one of due diligence, which required States to take all necessary measures to prevent or minimize the risk of significant harm. It was generally accepted that the extent of due diligence should be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. The standard of care could change from time to time in response to scientific and technological advances. Ultra-hazardous activities would require a much higher standard of care. Thus, due diligence required a State to keep abreast of technological and scientific changes. Its discharge of the obligations of due diligence would depend upon the State's capacity and stage of economic growth. Accordingly, the degree of obligation could vary from State to State and over time. The economic level of States was one of the factors to be taken into account in determining the standard of obligation of due diligence in respect of a particular State.

28. Such a view had been articulated by many developing countries in the Sixth Committee. They had further pointed out that the concept of prevention as proposed by the Commission did not place it sufficiently within the broad realm of sustainable development to allow equal and due weight to be given to the consideration of environment and development respectively. The differences between levels of economic and technological development and the shortage of financial resources in the developing countries were cited in support of that position. The relevant part of the commentary to the draft should be expanded to highlight the fact that none of the articles addressed the interests and needs of the developing countries, which both represented the great majority of the world's peoples and faced the greatest burden in attempting to make their societies and economies more viable and environmentally sound.

29. Lastly, with regard to the future course of action on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he favoured option (b) proposed by the Special Rapporteur in chapter V of the report.

30. Mr. LUKASHUK commended the Special Rapporteur on a report which was both realistic and juridically sound. Each proposed decision was based on a wide range of material drawn from practice and on analysis of international legal documents. A major feature of the report was its balancing and counterpoising of the various conflicting interests. The approach was one which gave good reason to suppose that the report would attract the support of States. The significance of the report extended far beyond the topic itself—its emphasis on the analysis of practice and the number of progressive features it contained afforded the potential to produce a significant impact on environmental law.

¹⁴ See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1987), p. 79.

31. The first of those progressive features was the Special Rapporteur's treatment of the important and difficult concept of due diligence. Other important matters addressed were prevention and the problem of sanctions. The latter was currently a source of great concern worldwide and was of particular significance in the context of environmental law.

32. He agreed with the Special Rapporteur that even in a case of non-observance of obligations, compulsory measures were ineffective and ultimately incompatible with the regime of consent used by States to resolve major problems in society and also shared his belief that sanctions should only be used as extreme measures.

33. Similarly, he concurred with the contention that, in the crucial area of environmental protection, it was important to use "soft" remedial measures as widely as possible. That approach was the correct one, supported by all the practice, and the draft articles had been drawn up on that basis. "Soft" measures presupposed "soft" liability, from which it followed that both liability and countermeasures in many areas of international law could have their own essentially different character and, together with the relevant norms, form the basis of special legal regimes. That was consistent with the focus of Mr. Simma's work on special legal regimes.

34. The approach was also relevant to the procedure on peaceful settlement of disputes in the context of environmental law. The report demonstrated that disputes must be resolved by amicable means, thereby avoiding an abuse of court proceedings.

35. He shared the Special Rapporteur's opinion that matters relating to compliance with environmental protection norms should be considered as outside the scope of the draft articles—the proper view in such a specialized area of law. He also supported the Special Rapporteur's approach to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. However, the fact that the Commission had decided not to tackle that topic at the present stage did not mean that it was to be dispensed with entirely. Clearly, draft articles on liability must be prepared at the next stage.

36. He supported option (b) proposed by the Special Rapporteur in chapter V of the report, fully endorsed the report's main conclusions and was convinced that the draft articles would enlist the full support of States.

37. Mr. PELLET said he welcomed the second report, which bore the hallmark of the Special Rapporteur's customary diplomacy. The options outlined in chapter V of the report were opportune and appropriate, for the time had come to take a final position on the fate of a draft on a topic the Commission had been considering for 25 years.

38. His own very clear preference was for option (c), on the understanding that if the Commission continued to finesse he would accept option (b), in the hope that that would be the end of the matter. He found it hard to see why the Special Rapporteur recommended option (b), for at the beginning of chapter V of the report, he made it plain that the situation concerning international liability

had not changed in the 25 years the Commission had spent studying the topic, despite the abundance of information it had received and the number of reports prepared by previous Special Rapporteurs. The Special Rapporteur further stated that the majority of States were still against accepting any concept of strict State liability and hence there was no point in continuing the topic for the time being. But what did that mean? Would the situation change at the next session, when attempts at codification had shown so little progress over the past quarter of a century? Why would the Commission then be able to do what it had been unable to do in the past? The same causes would produce the same effects.

39. A number of members, particularly Mr. Addo and Mr. Kateka, had spoken of the large body of supporting precedents available to the Commission. That was true, but despite that material having been examined thoroughly by previous Special Rapporteurs, the Commission had proved itself totally incapable of deriving any firm principles from it. One example was the Commission's attempt to produce acceptable wording for the former principle V by stating in effect that, if harm had occurred, someone was responsible, but without identifying that someone. In fact, there could never have been any question of the Commission adopting a position on the matter, owing to the plethora of attendant political, economic, financial and human problems.

40. The logical conclusion to be drawn from the views expressed by the Special Rapporteur in chapter V of the report was that the Commission was in no better position to adopt principles than it ever had been. The extreme diversity of the same ad hoc texts mentioned by some members had made it impossible, over the years, to isolate a single principle on liability; the texts also testified to States' conviction that no clear general principle on strict State liability existed in international law. On rare occasions, a principle of strict liability emerged, such as the polluter pays principle, but it would hardly be appropriate for the Commission to unite over a single principle simply because it appealed to certain members or seemed progressive or fashionable.

41. The question posed by the Special Rapporteur in his report was whether it was right to codify the topic of international liability for injurious consequences arising out of acts not prohibited by international law. However, a number of members had addressed a different matter, namely whether it was right to codify environmental law. In his opinion, that was an altogether different subject which, if the Commission wished, it should include on the agenda.

42. He firmly believed that such a topic fell outside the Commission's scope. Not only was it in too fluid and unsettled a state, but discussion of it called for expertise that the Commission did not possess. He had always felt that law-making was far too serious a subject for jurists, and the present example was a case in point. Matters of life and death, and even the future of the planet, were at stake. Enormous economic interests were involved. The technical aspects were elusive. In such circumstances, it was beyond the ability of 34 experts, however distinguished, to embark on such a draft voluntarily, when they had not been asked to do so. To take a similar example, the codification of the law of the sea had involved thousands

of experts in all fields. How could the Commission possibly hope to act on its own on a topic that, in many respects, was even more wide-ranging and technical?

43. For once, the Commission would do well to demonstrate modesty and humility. In the codification and progressive development of international law, the Commission was in its element and had no need for humility. But members who had spoken so far had pressed for legislation, not codification, and that was not within the Commission's purview. It was States that had the role of legislators at the international level, and they should be placed before their responsibilities, while the Commission should admit that it was composed neither of biologists nor of environmental experts.

44. Option (c) proposed by the Special Rapporteur in chapter V of the report was, accordingly, the only reasonable solution, together with completion of the work on the draft articles on prevention of transboundary damage from hazardous activities, which were on the whole satisfactory and balanced. He did not share Mr. Economides' enthusiasm for drafting an addendum on dispute settlement.

45. Mr. RODRÍGUEZ CEDEÑO said he did not think the Commission could categorically reject consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, as the Special Rapporteur pointed out in chapter V of his report. Option (b) appeared to be the best course of action and he endorsed the description in that chapter of how to approach the topic of international liability in the future.

46. Mr. ROSENSTOCK said he found Mr. Pellet's statement to be convincing, though somewhat extreme. The best way to deal with the issue would be to adopt option (b), but not to make suspension of the work conditional on finalization of the regime of prevention of transboundary damage from hazardous activities on second reading. That would mean the Commission would not automatically revert to the topic of international liability for injurious consequences arising out of acts not prohibited by international law once the work on prevention was completed, but it would not close the door to that possibility either. That might not satisfy Mr. Addo and other members, but it did represent a reasonable compromise.

47. Mr. HAFNER, responding to Mr. Pellet, suggested that it was already possible to derive certain stabilized patterns and principles from the broad range of international conventions on civil liability. The contention that the Commission was not composed of specialists was refuted by the fact that it had worked in the fields of warfare and sociology when dealing with the right to self-defence and human rights. Finally, progressive development of the law came very close to legislation.

48. Mr. SIMMA said he could accept option (b), on the understanding that the reference to suspending work on international liability for injurious consequences arising out of acts not prohibited by international law "at least" until the regime of prevention of transboundary damage from hazardous activities was finalized meant suspending work indefinitely.

49. Mr. LUKASHUK said he agreed with the general thrust of Mr. Pellet's comments but not with the conclusion he had arrived at. Environmental law was so complex a subject that it required highly specialized knowledge. On the other hand, the course of action outlined by the Special Rapporteur was so cautious and carefully balanced that it did not prejudice the solution of the basic problems in the field of the environment. He therefore thought the provisions on prevention of transboundary damage from hazardous activities could be adopted.

50. Mr. KATEKA, responding to Mr. Pellet, said he did not agree that members of the Commission lacked the requisite expertise to discuss international liability in all its aspects: Mr. Pellet's remarks had focused on one aspect alone. In any event, article 16, subparagraph (e), of the statute of the Commission authorized it to consult with scientific institutions and individual experts. He was concerned to see that some members envisaged option (b) as a tactical manoeuvre to kill the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The manoeuvre could become a boomerang, however, and he himself hoped that the Special Rapporteur would not let the topic die.

51. Mr. CRAWFORD said he did not agree that the Commission was incapable of dealing with new topics. It was also untrue that it could not be progressive, as demonstrated by its efforts for the establishment of an international criminal court. Whether members liked it to be progressive was another matter, however. International lawyers had to grapple with technical issues nowadays. In regard to the high seas, fisheries or global warming, for example, legal issues were involved and a body of information was there for analysis.

52. Despite the best efforts of the Working Group at the forty-eighth session of the Commission, there had been such a lack of clarity in the formulation of the topic of international liability for injurious consequences arising out of acts not prohibited by international law that it had dwindled to prevention of transboundary damage from hazardous activities alone, which was unfortunate and cast a bad light on the Commission. A well-reasoned draft dealing with prevention could sufficiently respond to the mandate given to the Commission by the General Assembly and meet a genuine need. Anything that did not discharge that mandate would be a confession of failure.

53. He agreed with Mr. Rosenstock, for very different reasons than did Mr. Pellet, that the Commission should try to finish the topic of prevention of transboundary damage from hazardous activities with a proper understanding of what was involved: that it was laying down rules of responsibility and that if States, acting in good faith and within the parameters of due diligence obligations, did not prevent pollution, then they could be held responsible therefor, with all the consequences that ensued. He could not accept Mr. Simma's devious solution of killing the topic of international liability for injurious consequences arising out of acts not prohibited by international law by adopting option (b).

54. Mr. BAENA SOARES thanked the Special Rapporteur for his work and said he favoured option (b), not with the murderous intent of Mr. Simma, but with a view to the

survival of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He did not agree with the idea of prejudging the outcome of consideration of a topic and agreed with Mr. Crawford that first a clear conception was required. Foretelling a death was all very well for novelists, like Mr. García Márquez, but it was not a suitable activity for the Commission.

55. Mr. SEPÚLVEDA congratulated the Special Rapporteur on his second report and said that his preference was for option (b), but that did not mean he thought the Commission should discontinue its consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It had an obligation to complete its work on the sub-topic of prevention of transboundary damage from hazardous activities, which did not absolve it of its obligation to deal with international liability.

56. Mr. ECONOMIDES said he favoured option (b), but not with a view to burying the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He fully agreed with the comments made by Mr. Baena Soares and Mr. Sepúlveda. To take up the question of international liability after the regime of prevention of transboundary damage from hazardous activities had been finalized would make the Commission's work more orderly and effective.

57. Mr. MELESCANU said he endorsed most of the ideas put forward by Mr. Pellet but thought the wisest solution would be to adopt option (b). It should not, however, be viewed from the standpoint of the life or death of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Rather, it should be regarded as an opportunity for the Commission to reach some conclusions on the issue of prevention.

58. In cases of transboundary pollution, the first victims were civilians, and the main damage was material, so compensation for such damages had to be addressed. Liability was the equivalent in international law of strict or risk liability in domestic law. To transpose to international law the liability arrangements applied domestically would require solidarity, which was much harder to mobilize internationally than at the domestic level. Compensation funds would have to be set up, as they had been shown in most treaty systems to be the most effective solution. Unlike State responsibility, which dealt with moral damage and diplomatic apologies, liability dealt with reparation of harm done to people or their property. If no system for solidarity such as a compensation fund was created, the noble principle of the obligation of prevention would remain a dead letter. To take the example of Chernobyl, could Ukraine really be expected to pay compensation for damage done throughout Europe and even in other regions? To envisage a system of prevention unaccompanied by any provision for compensation through solidarity was unrealistic.

59. Mr. KABATSI said he had originally supported option (a) for the reasons outlined by Mr. Addo and Mr. Kateka but had come to the conclusion that, in practical terms, option (b) was more feasible. Unlike Mr. Simma,

he did not hope that the topic of international liability for injurious consequences arising out of acts not prohibited by international law would eventually die, however, and he could not go along with the adoption of option (c).

60. Mr. YAMADA recalled that, at its forty-fourth session, in 1992, the Commission had decided to consider the topic in stages.¹⁵ At its forty-ninth session, in 1997, it had defined the sub-topic of prevention of transboundary damage from hazardous activities.¹⁶ It had been able to complete the first reading of the draft articles on prevention in only one year, which amply justified its decision to deal with the topic stage by stage. He therefore fully endorsed option (b). Completion of the second reading of the draft articles—possibly by the fifty-second session—by no means precluded the possibility of dealing with other aspects of the wider topic of international liability for injurious consequences arising out of acts not prohibited by international law afterwards. The decision could be taken once the regime of prevention was finalized.

61. Mr. KUSUMA-ATMADJA said he favoured option (b) but had no wish to kill the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which should be given further consideration. He agreed with Mr. Crawford that the Commission should still endeavour to engage in progressive development of international law. In the South-East Asian region, the soft law approach was often used and problems were frequently solved bilaterally and pragmatically.

62. Mr. Sreenivasa RAO (Special Rapporteur) thanked the members of the Commission for their comments and noted that there were 16 in favour of option (a) or (b) and only one in favour of option (c).

63. The CHAIRMAN noted that an overwhelming majority of members supported option (b), though with differing expectations. He would therefore take it that, if there was no objection, the Commission wished to adopt that option, namely: to suspend its work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, at least for the time being, until the regime of prevention of transboundary damage from hazardous activities is finalized on second reading. The Commission should further await developments in the negotiation of some of the protocols on liability.

64. Mr. CRAWFORD suggested that the last sentence should be deleted as it might put the Commission in the position of waiting for a lengthy period.

65. Mr. ROSENSTOCK proposed that the phrase “until the regime of prevention of transboundary damage from hazardous activities is finalized on second reading” should likewise be deleted.

66. Mr. HAFNER disagreed with the proposal because the phrase corresponded to the Commission's mandate from the General Assembly.

¹⁵ See *Yearbook ... 1992*, vol. II (Part Two), p. 51, document A/47/10, para. 344.

¹⁶ See *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 168 (a).

67. Mr. GOCO said he agreed with Mr. Hafner: the Commission had to respond to the General Assembly's mandate, and it would be doing so in stages. The work on prevention would come first, but the Commission was committed to dealing with liability later.

68. The CHAIRMAN, noting that there was little support for the proposal to delete the last phrase of the first sentence, said that, if he heard no objection, he would take it that the Commission wished to adopt option (b) as amended by Mr. Crawford.

It was so agreed.

Jurisdictional immunities of States and their property (A/CN.4/L.576)

[Agenda item 9]

REPORT OF THE WORKING GROUP

69. The CHAIRMAN invited the Chairman of the Working Group on jurisdictional immunities of States and their property¹⁷ to introduce the report of the Working Group (A/CN.4/L.576).

70. Mr. HAFNER (Chairman of the Working Group), said that draft articles on jurisdictional immunities of States and their property¹⁸ had been submitted to the General Assembly at the forty-third session of the Commission, in 1991.¹⁹ Consultations had then been held in the Sixth Committee of the General Assembly at its forty-seventh, forty-eighth and forty-ninth sessions, under the chairmanship of Mr. Carlos Calero Rodrigues, a former member of the Commission, but had not produced results. The Assembly had set the matter aside until its fifty-third session and ultimately decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles, taking into account recent developments in State practice and legislation and any other factors related to the issue since the adoption of the draft articles, as well as the comments submitted by States, and to consider whether there were any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission.²⁰

71. In addition to the draft articles adopted by the Commission at its forty-third session, the Working Group had had before it a document containing the conclusions of the Chairman of the informal consultations held pursuant to General Assembly decision 48/413²¹ in the Sixth Committee of the Assembly at its forty-ninth session; comments submitted by Governments;²² the reports of the two working groups established by the Sixth Committee of the

General Assembly at its forty-seventh and forty-eighth sessions;²³ a valuable informal document prepared by the Codification Division containing a summary of cases on jurisdictional immunities of States and their property between 1991 and 1999 as well as a number of conclusions regarding those cases; an informal background paper and a number of helpful memoranda prepared by the Rapporteur of the Working Group, Mr. Chusei Yamada, on various related issues; the text of the European Convention on State Immunity; the resolution on "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement" adopted by the Institute of International Law at its session held at Basel, Switzerland, in 1991;²⁴ and the final report of the International Committee on State Immunity of ILA.²⁵

72. The Working Group had held ten meetings and focused on the five main areas identified in the conclusions of the Chairman of the informal consultations, namely: concept of a State for purposes of immunity; criteria for determining the commercial character of a contract or transaction; concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property.

73. Two small changes needed in the report of the Working Group had no effect on substance: in paragraph 60, the words "i.e. deletion of paragraph 2" should be inserted after "alternative (f)"; and the words "about the public service of the forum State", at the end of paragraph 102, should be replaced by "of the employing State". The annex to the report contained a short background paper on a further possible issue, namely, the question of the existence or non-existence of jurisdictional immunity in actions arising, inter alia, out of violations of human rights norms having the character of *jus cogens*. Rather than take up that question directly, the Working Group had preferred to bring it to the attention of the Sixth Committee, which could then decide on how to deal with it.

74. As far as the concept of the State for the purposes of immunity was concerned, which had been discussed in the context of article 2 (Use of terms), the Working Group had deemed it desirable to bring the relevant parts of that article into line with the draft on State responsibility. The expression "sovereign authority" had therefore been replaced by "governmental authority".

75. The suggestions consisted in particular in simplifying the text of article 2, as the words "constituent units of a federal State" had been joined to "political subdivisions of the State" in the current paragraph 1 (b) (iii) so that the phrase "which are entitled to perform acts in the exercise of the sovereign authority of the State" would apply to both categories. It was also suggested that the phrase "provided that it was established that that entity was act-

¹⁷ See 2569th meeting, para. 41.

¹⁸ *Yearbook ... 1991*, vol. II (Part Two), p. 13, document A/46/10, para. 28.

¹⁹ *Ibid.*, p. 12, para. 23.

²⁰ General Assembly resolution 53/98, para. 1.

²¹ A/C.6/49/L.2.

²² A/47/326 and Add.1-5, A/48/313, A/48/464, A/C.6/48/3, A/52/294 and A/53/274 and Add.1.

²³ A/C.6/47/L.10 and A/C.6/48/L.4 and Corr.2.

²⁴ Institut de droit international, *Tableau des résolutions adoptées (1957-1991)* (Paris, Pedone, 1992), p. 220.

²⁵ International Law Association, *Report of the Sixty-sixth Conference, held at Buenos Aires, 14 to 20 August 1994* (Buenos Aires, 1994), pp. 452 et seq.

ing in that capacity” should be added to the paragraph, for the time being in square brackets. Those suggestions sought to meet the concerns expressed by some States. They allowed for the immunity of constituent units, but at the same time addressed the criticism that the difference in treatment between constituent units of federal States and the political subdivisions of the State was confusing.

76. As to the criteria for determining the commercial character of a contract or transaction, the Working Group had been well aware of the overall importance of that question for State immunity and had considered a broad variety of possible alternatives. Since it had been felt that the facts of each case differed greatly, as did legal traditions concerning the use of the criteria, the Working Group had considered that the most acceptable solution would be simply to refer in article 2 to “commercial contracts or transactions” without further explanation and that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate on it might imply. Theory and practice had developed a wide variety of criteria—contained in the annex to the report—which could offer useful guidance to national courts in determining whether immunity should be granted in specific instances.

77. With regard to the concept of State enterprise or other entity in relation to commercial transactions, referred to in article 10 (Commercial transactions), the Working Group had been of the view that paragraph 3 of that article could be made clearer by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction entered into by a State or other entity established by that State where: (a) the State enterprise or other entity engaged in a commercial transaction as an authorized agent of the State; and (b) the State acted as a guarantor of a liability of the State enterprise or other entity. That clarification could be achieved either by calling the acts in (a) and (b) commercial acts or by a common understanding to that effect at the time of the adoption of the article. However, as to the waiver of immunity in cases where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, which had been raised by a number of States in their comments and also during consultations conducted under Mr. Calero Rodrigues, it had been thought that that question went beyond the objective of article 10.

78. The suggestions on contracts of employment, which were dealt with in article 11 (Contracts of employment) had raised a number of problems. The Working Group had reached the conclusion that the State enjoyed immunity if the employee had been recruited to perform functions in the exercise of governmental authority, in particular diplomatic staff and consular officers, as defined in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations; diplomatic staff or permanent missions to international organizations or on special missions; and other persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences. The Working Group had noted that there was a distinction between the rights and duties of individual employees and general questions of employment policy, which essentially concerned labour-management issues.

79. The Working Group suggested the deletion of article 11, paragraph 2 (c), which made a distinction between nationals or habitual residents of the State of the forum and other persons, as it could not be reconciled with the principle of non-discrimination based on nationality.

80. The question of immunity for measures of constraint against State property was of particular concern for several States from different regions of the world. Basically, the Working Group had concluded that a distinction between pre-judgement and post-judgement measures of constraint might facilitate the search for a solution. The Working Group had been of the view that pre-judgement measures should be possible in the following cases: measures on which the State had expressly consented, either ad hoc or in advance; measures on property designated to satisfy the claim; measures available under internationally accepted provisions; and measures involved in property of an agency enjoying separate legal personality if it was the respondent of the claim.

81. Post-judgement measures should be possible in the following cases: measures on which the State had expressly consented, either ad hoc or in advance; measures on property designated to satisfy the claim. In addition, the Working Group had explored three possible alternatives which the General Assembly might decide to adopt: alternatives I and II would imply recognition of judgement by a State and granting the State a two- or three-month grace period to comply with it as well as freedom to determine property for execution. If the State failed to comply during the grace period, property of the State could be subject to execution in accordance with alternative I, whereas under alternative II, the claim could be brought into the field of inter-State dispute settlement. In alternative III, the Working Group suggested not dealing with that aspect of the draft because of the delicate and complex issues involved. The matter would then be left to State practice, on which there were different views.

82. The annex to the report contained an elaboration of the additional topic presented to the General Assembly which took into account the fact that, in the past decade, a number of civil claims had been brought in municipal courts of individual countries against foreign Governments arising out of acts of torture committed not in the territory of the forum State but in that of the defendant and other States, and one State had even amended its legislation to make such claims possible in cases of torture, extrajudicial killings, aircraft sabotage, hostage-taking and so on. The attention of the General Assembly was also called to the so-called Pinochet case.²⁶ He stressed that the Working Group had not taken a decision on that issue, but only referred to that practice in order to enable the General Assembly to decide on the best way to deal with it.

83. Mr. Sreenivasa RAO commended the Working Group on an excellent report on what was a very difficult

²⁶ See United Kingdom of Great Britain and Northern Ireland, House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [1999] 2 WLR 827.

topic. It was a useful contribution to a dialogue that had been going on for a long time in the Sixth Committee.

84. There had been many developments in practice as far as the five substantive issues referred to in the report were concerned. In his view, the subject was not fit for a convention. It had been overtaken by national legislation and would continue to be in the future. Ultimately, it was national jurisdiction that would determine matters, because there was no higher appeal against a court of last decision in a country. National jurisdiction was evolving, and thus it was more difficult to have common international standards in terms of a convention either by way of progressive development or codification.

85. Mr. GAJA said that he had a number of proposals to make, although he realized that it might already be too late and he did not wish to reopen the discussion.

86. Paragraphs 18 et seq. of the report of the Working Group contained a summary of recent relevant case law concerning constituent units. However, the cases mentioned seemed to focus not on constituent units, but on agencies and instrumentalities. Perhaps the heading could be reworded slightly to make it less awkward.

87. With reference to paragraph 30 setting out the reformulation of article 2, paragraph 1 (*b*), he was not happy with the idea that a suggestion by the Commission should include a text in brackets. That kind of addition, although acceptable with regard to immunity from jurisdiction, was not acceptable in the case of immunity to execution, and since a general definition of the State was involved, it would be preferable not to have the addition within the brackets.

88. Perhaps a sentence could be added to paragraph 49 to say that in cases which had used the purpose test, as a supplementary test, reference had not been made to the law of the State concerned, namely the State whose immunity was in question. Since the suggestion was to drop the purpose test, it would add to the argument by saying that the purpose test, within the meaning of what had been suggested early on by the Commission, had not really been accepted in practice.

89. Paragraph 105 was unclear about the status of administrative staff that supported sovereign functions, because the examples given related to diplomatic and consular officers, but in the description of practice, there were also some references to immunity where a high administrative staff member brought a case against a State. A clarification was needed in that regard.

90. Paragraph 106 should be further developed. It spoke of non-discrimination on the basis of nationality, but in fact there were two types of non-discrimination. One was non-discrimination against an employee who was a national of a third State who could not bring a claim against the employing State, and the other was against nationals of the receiving States, because it would naturally be in the interest of the sending State to employ a national of a third State rather than an employee of the local State. Mention should also be made of the fact that the principle of non-discrimination had originated in the European Convention on State Immunity.

91. Paragraph 129 was confusing and it was not clear to what alternatives I and II referred. The important thing was to concentrate on the granting of a grace period, and not imagining a recognition procedure, possibly before the courts of the State whose property would be subject to execution.

The meeting rose at 1.05 p.m.

2602nd MEETING

Wednesday, 14 July 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.576)

[Agenda item 9]

REPORT OF THE WORKING GROUP (concluded)

1. Mr. SIMMA, commenting on the report of the Working Group on jurisdictional immunities of States and their property (A/CN.4/L.576), said that the reformulation of article 2 (Use of terms), paragraph 1 (*b*), of the draft articles, as proposed by the Working Group in paragraph 30 of the report, would not be an improvement on the draft articles as adopted by the Commission at its forty-third session, in 1991.¹ The first version had been satisfactory because the status of constituent units of federal States had been defined separately from the particular structure of a federal State. The new wording gave the impression that the constituent units of federal States could enjoy jurisdictional immunity only when they exercised the governmental authority of the central State, something which was not in conformity with the constitutions of many federal States. Within the Federal Republic of Germany, for example, Bavaria, where he came from, exercised a large share of what were considered as basic functions of the State, in, for example, the police, education and justice areas, and it did so entirely autonomously.

¹ See 2601st meeting, footnote 18.