

Document:-  
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**Summary record of the 2641st meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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97. Mr. TOMKA said that, in the interests of uniformity, care should be taken to ensure that the vocabulary used was consistent throughout the draft guidelines. The expression *du traité* could be found not only in draft guideline 1.7.1, but also in draft guidelines 1.4.6 and 1.4.7. He was therefore inclined to favour leaving the text of draft guideline 1.7.1 unchanged.

98. Mr. GAJA (Chairman of the Drafting Committee) added that that formulation appeared in some of the draft guidelines already adopted (1.1.4, 1.1.5 and 1.1.6). The problem raised by Mr. Economides was a general one and it would be advisable to reconsider the draft guidelines as a whole in order to ensure that the formulations were homogeneous and, if necessary, to amend them. Meanwhile, the Commission might adopt the text of the guidelines now proposed without change, subject to verification at a later stage.

99. With regard to the proposal by Mr. Economides on draft guideline 1.1.8, he noted that, if the Commission were to adopt the formulation “with a clause appearing in that treaty”, the word “and” would need to be added before the words “expressly authorizing the parties”, thereby making the text somewhat cumbersome.

100. The CHAIRMAN said it was difficult to deal with drafting matters in a plenary meeting. He proposed that, as the Chairman of the Drafting Committee had suggested, the Commission should endorse the Committee’s recommendation that the draft guidelines under consideration should be adopted in their current form, on the understanding that the finishing touches would be put to them when the remaining draft guidelines had been adopted. If he heard no objection, he would take it that the Commission wished to proceed in that fashion.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2641st MEETING

*Tuesday, 18 July 2000, at 10.05 a.m.*

*Chairman:* Mr. Chusei YAMADA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

### International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)<sup>1</sup> (*continued*)\* (A/CN.4/504, sect. D, A/CN.4/509,<sup>2</sup> A/CN.4/510<sup>3</sup>)

[Agenda item 4]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. Sreenivasa RAO (Special Rapporteur), introducing his third report (A/CN.4/510) on the subtopic of prevention of transboundary damage from hazardous activities under the broader topic of international liability for injurious consequences arising out of acts not prohibited by international law, began by giving a brief overview of the background against which the Commission was embarking on a second reading of the draft articles on prevention. The topic had originally emerged from the Commission’s consideration of the question of State responsibility arising out of the commission of an internationally wrongful act. The question had arisen of international liability in the event of damage caused by an activity not otherwise wrongful—“wrongful” being, in that context, the antonym not of “lawful”, but of “not prohibited”. The Commission had taken the view that such situations merited consideration from a slightly different angle and, accordingly, had appointed a special rapporteur to consider the new topic. Initially, the Commission had wrestled simultaneously with the topics of liability and prevention. By the forty-fourth session, however, the feeling had emerged that it should deal first with prevention, so as to capture an emerging consensus regarding the duty of due diligence embodied in that concept, before subsequently deciding on the most appropriate course of action with regard to international liability.<sup>4</sup> While that decision had been appreciated as a means of facilitating progress on the topic, concern had been expressed by States in the Sixth Committee about the desirability of a separation of the two topics that might lead to their eventual divorce—an approach which, furthermore, overlooked the main objective of the Commission’s mandate. At its fifty-first session, the Commission had nonetheless taken the decision first to complete its second reading of the draft articles on prevention,<sup>5</sup> and only then to decide whether—and, if so, how and when—to deal with the topic of liability.

2. As the Special Rapporteur on the topic of prevention of transboundary damage from hazardous activities, he had been faced with a number of policy questions. Thus, he had had to consider, for instance, what activities fell within the scope of the topic; what the components of the duty of due diligence were; and what the consequences of failure to perform obligations of due diligence would be. They were difficult matters, on which no consensus had

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\* Resumed from the 2628th meeting.

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> See *Yearbook . . . 1992*, vol. II (Part Two), p. 51, paras. 344–349.

<sup>5</sup> See *Yearbook . . . 1999*, vol. II (Part Two), p. 141, paras. 607–608.

emerged over the years, either in the Commission, in doctrine or in State practice.

3. Nor could the subject be divorced from the broad theme of promotion of sustainable development, one which meant according equal weight to the environment and to development in policy-making; or from capacity-building, which involved the formulation and enhancement of standards aimed at minimizing the risk associated with inherently hazardous technologies. The question of how to deal with situations in which compliance with the best available standards and use of the best available technologies failed to avert damage was one that could best be addressed at a later stage—perhaps during consideration of the topic of liability—but one which in any case need not detain the Commission at the current juncture.

4. In the light of those considerations, the Commission should deal with prevention in the strictest and narrowest terms possible, confining its scope to those activities that involved a physical connection between the State of origin and States likely to be affected, where the activity involved a risk of “significant transboundary harm”—“significant” being not so ambiguous a term as it might seem, since States could bilaterally prescribe the levels applicable in the context of a regime constructed to serve a particular purpose. In thus facilitating its task, the Commission would exclude from consideration such phenomena as creeping pollution, actual harm, harm resulting from the cumulative effect of several activities (as in the case of air pollution), or harm to areas not falling within any one State’s jurisdiction—the so-called “global commons”. Nevertheless, those proposals had met with very broad support in the Sixth Committee and had provoked no outright opposition. Those four or five areas whose exclusion from the current scope had given rise to some concern remained promising candidates for progressive development at a later stage—more so than such components of prevention as the precautionary principle and the “polluter pays” principle, which could not be dealt with in isolation—a point to which he would return if necessary.

5. Most of the work on prevention placed before the Commission and the international community in the form of 17 draft articles had essentially constituted progressive development, for no one set of universally accepted procedures was applicable in the sphere of prevention. His work, and that of the Commission, was guided by the need to evolve procedures enabling States to act in a concerted manner rather than in isolation.

6. One question that had arisen during consideration of the draft articles in the Sixth Committee was whether the duty of due diligence was in any way diluted by the requirement for States to negotiate a regime taking account of an equitable balance of interests where a risk of significant transboundary harm existed. In his opinion, article 12 adopted on first reading merely defined the obligation in a mutually acceptable manner and did not subtract from it. That view was reflected in his third report. Another question that had arisen concerned the exact nature of due diligence. His conclusions on that question, set out in his second report,<sup>6</sup> were recapitulated in paragraph 20 of his

third report. The question of the consequences of a failure to comply with the duty of due diligence was dealt with in paragraphs 35 to 49 of the second report. His conclusion in that regard, set forth in paragraph 49 of the same report, was that the matter of compliance fell outside the realm of the preparation of the draft articles on prevention.

7. The most important point addressed in the third report was the question whether—now that it had agreed to shelve the topic of international liability for injurious consequences arising out of acts not prohibited by international law for the time being and to focus on the duty of due diligence—the Commission still needed to address the subtopic of prevention of transboundary damage from hazardous activities within the broader categorization of “acts not prohibited by international law”. What would be the implications of retaining that categorization, or the consequences of eliminating it? It was a question that had rightly exercised some members of the Commission and had also been raised in other forums.

8. The question could not be avoided, and was dealt with in chapter V of his third report. While State responsibility dealt with wrongful acts, international liability dealt with compensation for damage arising out of acts which were not necessarily prohibited by international law. So if prevention was essentially a question of the management of risk, the phrase “acts not prohibited by international law”, originally intended to distinguish them from wrongful acts, might not be necessary or, indeed, appropriate. However, the concept could not be dispensed with easily because it had come to be associated with the expectation that, if certain obligations of due diligence were prescribed by way of prevention and certain failures occurred, then the intended activity would be automatically prohibited because the duty of due diligence was not being complied with, or that the activity would still be treated as permissible because the State was only required to fulfil its due diligence obligation as effectively as possible. In other words, the question was whether, if it was not emphasized that the activity was not prohibited, it would become prohibited as a result of the failure of due diligence obligations. It was a fear that lay at the heart of deciding whether or not to delete the reference to “acts not prohibited by international law”. Although the fear was a genuine one, none of the authorities he had surveyed had indicated to him that non-compliance with the obligation of due diligence made the activity prohibited. It did, however, give rise to a right of engagement between those who were likely to be affected and those who were promoting the activity, which was built into the entire concept of due diligence. In his opinion, deleting the reference would not create further problems, and might even secure a greater consensus within the Commission behind the draft articles.

9. A number of large States had expressed great concern that emphasizing the principle of prevention in isolation, rather than linking it to international cooperation, capacity-building and the broader themes of sustainable development, would discourage them from adopting the regime now being elaborated. The views that had been expressed were very serious, and he had sought to deal with them as far as possible in chapter IV.

<sup>6</sup> Ibid., vol. II (Part One), document A/CN.4/501.

10. In order to encourage a broader consensus and universal endorsement of the articles, the Commission should pay some attention to what was said in the preamble; such a preamble was essential to securing general support for the draft.

11. During the first part of the current session all the changes suggested to the draft articles adopted on first reading, except the preamble, had been considered in the Working Group, which had held five meetings and examined comments made by States. A consensus had been reached on all the draft articles now being submitted to the Commission. A number of essentially drafting changes had been made. The numbering in square brackets corresponds to that of the articles adopted on first reading.

12. Article 2, subparagraph (a), had been redrafted in the light of comments made, so as to eliminate possible confusion because of the conjunction “and” used in the version adopted on first reading. The idea that the risk involved for the purpose of the draft articles was within a particular range from a high probability to a low probability of causing significant harm had been made more explicit.

13. Article 2, subparagraph (f), was new, but it had been deemed necessary because of the frequent occurrence of the term “States concerned” in the draft articles.

14. Article 4 contained the additional word “competent” in order to highlight that not all international organizations in general were involved.

15. Article 6 [7], paragraph 1, was a redrafted version of the principle of prior authorization, but the changes were of a purely drafting nature in the light of comments made. The changes made in article 6, paragraph 2, were also essentially of a drafting nature, but, even with those changes, paragraph 2 could still face problems in its implementation, as Chile had pointed out, with respect to acquired rights and foreign investment which could even lead to international claims. However, those were matters which could and should be sorted out by States in accordance with domestic law requirements and their international obligations. It was hoped that they would not pose insurmountable problems because State regulations governing hazardous activities were generally bound to change from time to time as experience was gained with their operation and in the light of scientific and technological developments.

16. Article 7 [8] contained the word “environmental” in the title and emphasized that any assessment of the environmental impact must, in particular, be based on the transboundary harm likely to be caused by the hazardous activity.

17. Article 8 [9] simply introduced the term “States concerned”, so as to indicate that both the State of origin and the States likely to be affected had a duty to provide their public with relevant information relating to the hazardous activity.

18. Article 9 [10], without attempting to alter the substance of the previous article, brought out the requirement of suspending any final decision on prior authorization of the hazardous activity until a response from the States likely to be affected was received within a reasonable

time, which in any case should not exceed a period of six months.

19. Article 10 [11] left it open to States concerned to fix the time-frame for the duration of the consultations. A new paragraph had been added to the revised draft article, reproducing article 13, paragraph 3, as adopted on first reading, with only one change. The new article emphasized that the State of origin might agree to suspend the activity in question for a reasonable period of time instead of the period of six months which had been suggested under the former article 13, paragraph 3. Moving that paragraph was considered necessary as reference to article 10 [11] was made under article 12 [13]. The procedure to be followed would be the same, even if it was initiated at the request of States likely to be affected, but in that case, to the extent that it was applicable, such a procedure would have to deal with operations already authorized by the State of origin and in progress.

20. Articles 11 [12], 12 [13] (apart from the removal of paragraph 3), 13 [14], 15 [16] and 19 [17] remained the same. Article 14 [15] was essentially the same as the former article except for the addition of the words “or concerning intellectual property” in accordance with a useful suggestion that had been made.

21. New articles 16 and 17 had been added in response to suggestions made by States. Their addition in the framework of prevention had been considered reasonable since contingency measures or measures of preparedness were required to be put in place by every State as a measure of prevention or precaution. The content of the articles was essentially based on similar articles contained in the Convention on the Law of the Non-Navigational Uses of International Watercourses. Article 18 [6] was former article 6 which had been moved in the interest of better presentation.

22. Lastly, the preamble was considered essential in order to accommodate, at least partially, the views of several States which had emphasized the right to development, a balanced approach to deal with the environment and development, the importance of international cooperation and the limits to freedom of States. They were ideas which pervaded the draft articles, and it was hoped that such a preamble, rather than specific articles dealing with those principles, as had been suggested by some States, would offer a reasonable basis for most States to accept the set of articles proposed. Such a preamble was also appropriate to a framework convention, which was the form in which the articles could be recommended for adoption.

23. Mr. LUKASHUK congratulated the Special Rapporteur and the Commission as a whole for completing work on the draft on prevention of transboundary damage, observing that in his opinion it was ready for adoption. The Special Rapporteur had managed to overcome a large number of obstacles, to take account of the various positions of States and to prepare a draft which enabled many very complex and important questions to be resolved.

24. While the Special Rapporteur had rightly drawn attention to the importance of the preamble, there was a doubt in his own mind because it contained references only to General Assembly resolutions, which were

important documents but “soft” law. There was a whole series of conventions which contained provisions with a direct bearing on the draft articles, and it was very important to show that the articles had a sound basis not only in “soft” law but also in positive international law.

25. Article 5, on implementation, rightly imposed an obligation on States to take all necessary measures, and national law had a very important, indeed decisive, role to play in implementation of the future convention. It was not merely an organizational matter but also one of how such a convention was interpreted. In many cases the corresponding provisions in national law were more developed and more detailed.

26. One example was a law entitled “Atmospheric Air Protection”, adopted by the Russian Federation, in April 1999, on the protection of air quality, which was directed towards implementing the constitutional rights of citizens to a favourable environment and to reliable information on the environment. Its stated basic principle was the priority of protecting the life and health of current and future generations and it provided for the creation of a developed system for managing the protection of air quality, including monitoring, just as the draft article in question also required. The Russian law contained a separate chapter on citizens’ rights in regard to the protection of air quality. They had the right not only to relevant information but also to participate in taking relevant decisions. Persons guilty of violating the law bore civil, administrative and criminal responsibility, and full compensation was provided to victims. What was of interest was that the law devoted considerable attention to transboundary pollution and obliged all operators to take the necessary measures to reduce it. The law contained a specific chapter on international cooperation which stated that the Russian Federation would undertake such cooperation in accordance with international treaties, noting that the provisions of international treaties took priority over national law, which could be used to interpret a future convention. The Russian law contained a very detailed definition of transboundary air pollution. His example gave grounds for concluding that the draft under consideration was entirely realistic from the point of view of national law, and its implementation should encounter no legal obstacles on the part of States.

27. Mr. GOCO drew the Special Rapporteur’s attention to an article entitled “Sun, sand and toxic waste”,<sup>7</sup> in which it was stated that for the first time the European Court of Justice (in the case of *Commission of the European Communities v. Hellenic Republic*) had levied a fine on a member of the European Union. Greece was having to pay US\$ 19,000 a day until its authorities cleaned up a toxic waste dump in a waterless ravine not far from the tourist beaches of western Crete. The article stated that the local authorities responsible for Crete’s waste management had resisted State plans to close the dump and replace it with a hi-tech recycling plant closer to an inhabited area. The article quoted Greece’s Environment Minister as saying that, every time he had moved to solve the crisis, locals had blocked State workers from beginning the construction of an interim waste storage site.

28. He hoped that the Special Rapporteur would agree that it was a situation in which the State had exercised due diligence but had been prevented from implementing its plans because of circumstances beyond its control. Such a situation was applicable to the topic under consideration.

29. Mr. GAJA commended the Special Rapporteur for his persistent efforts to improve the text and have it adopted by the Commission, and particularly for having moved the draft articles from the elusive subject of international liability for injurious consequences arising from acts not prohibited by international law to the more solid topic of prevention of transboundary harm from hazardous activities.

30. As to the question of retaining the phrase “activities not prohibited by international law” in article 1, he wondered whether it might not be preferable to refer to obligations to prevent significant risks irrespective of whether the activities in question were or were not prohibited by international law. If an obligation was imposed because a significant risk was involved, why should it matter whether the activity was prohibited, and for reasons which might be totally unrelated to the risk? Moreover, an activity might be prohibited under international law but not necessarily in relation to the State which might suffer the harm. Why should an obligation undertaken by the State of origin towards third States have an influence on the application of the draft articles when it came to procedures designed to prevent significant harm being caused to another State? He supported the view that article 1 should no longer make reference to activities that were not prohibited under international law as a condition for the applicability of the draft articles.

31. The Special Rapporteur had referred to criticism voiced by some States concerning the fact that the draft articles as adopted on first reading related solely to inter-State transboundary harm and did not address the question of harm caused to areas beyond national jurisdiction or to the global commons. At the current stage it would be difficult to attempt to cover that question, but something could be said about it in the preamble or in a “without prejudice” provision, if only to show that the Commission was aware of the issue and was concerned about industrial activities which might be hazardous to the ozone layer, for example, and could consequently affect all mankind.

32. The core of the draft articles, in his view, was the triggering for the State of origin of a duty of notification and consultation. Under article 9 [10], the obligation to notify arose only when the State of origin had made an assessment that significant risk was involved. Under article 7 [8], the State of origin had an obligation to make such an assessment in the case of possible transboundary harm, but it might be inclined not to carry out the assessment very thoroughly—partly because, if a risk of significant harm was detected, then further obligations would arise. The draft thus gave an incentive to the State of origin not to do precisely what was intended, namely, that there should be advance notice when there was a risk of significant harm.

33. Under article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, notification by the State of origin was mandatory in the case of

<sup>7</sup> *Time*, 17 July 2000, p. 23.

activities that could even potentially have substantial transboundary impact. The draft articles were not intended to impinge on that obligation, but they set out weaker ones, and that might affect the correct implementation of the Convention.

34. States that were likely to suffer harm had a genuine interest in becoming involved in the assessment of risk. It should be possible for them not only to request, but also to receive, prior notification so that they could contribute to the assessment, thereby making it undoubtedly more thorough than it would otherwise have been.

35. Lastly, there was the matter of the obligations incumbent on the State concerned once the risk of significant harm had been assessed. Under article 10 [11], those obligations were intended to lead to an agreed solution. Little was said about the possible contents of an agreement, but some indication thereof might help States in reaching an agreement that responded to the concerns behind the draft articles. One approach might be to suggest that States agree to establish a joint monitoring body to be entrusted with activities such as ensuring that the balance of interest was correctly maintained, that the level of risk did not substantially increase and that contingency plans were properly prepared. Such an approach, as had been seen in agreements on watercourses and in other areas, was often the best way of ensuring cooperation among States.

36. Mr. BROWNLIE said he supported Mr. Gaja's criticisms of the phrase "activities not prohibited by international law". He commended the Special Rapporteur's policy, as outlined in paragraphs 27, 32 and 33 of the third report, of emphasizing that the topic of prevention was concerned with the management of risks.

37. The only difficulty he experienced with regard to the general conceptual apparatus was the emphasis, particularly in paragraphs 18 to 49 of the second report,<sup>8</sup> on the duty of due diligence. Caution was needed, since reliance on that concept could create the very confusion with issues of State responsibility that the Special Rapporteur was trying to avoid. In the context of the draft on prevention, the operational value of the duty of due diligence was limited. Due diligence as a concept had no autonomy, for it depended on the context. It was merely a reference to the relevant legal standard. It might be confused with negligence or the breach of a duty of care, whereas the standard should not be confined to non-intentional creation of risk.

38. On the whole, the Special Rapporteur had succeeded in delimiting his subject from that of State responsibility. The topic of prevention must be seen as constituting part of environmental law, and that should be taken into account in reaching a final decision on the long-term programme of work.

39. Mr. HAFNER asked for clarification of Mr. Gaja's comment on the need, as one of the results of negotiations, for States to agree on the establishment of joint monitoring bodies: should that be a duty incumbent on the State or only a possibility it could envisage?

40. Mr. GAJA said he saw it as a possibility that could be mentioned, but that it would be for the States concerned to decide whether they wished to establish such bodies.

41. Mr. SIMMA commended the Special Rapporteur on his able and exhaustive presentation of the report and proposed draft convention. Over time the topic had been gradually pruned of the most controversial issues. Liability, the "polluter pays" principle and the precautionary principle had all been lopped off, and what was left was a rump project the content of which was almost over-ripe for codification. He shared the Special Rapporteur's preference for a convention instead of a declaration as envisaged earlier. A set of draft articles in soft law format would only add to the catalogues of principles already developed over the past 25 years. In addition, since the work on State responsibility was likely to result in a declaration, that was all the more reason for the draft on prevention to take the form of a convention. It was the only product of the current quinquennium that could do so.

42. As an introduction to a set of articles on prevention in environmental law, the preamble came down too heavily on the side of freedom of action. The second and third instruments that it mentioned concerned natural resources and development, but they should be preceded by a reference to the fourth one listed, the Rio Declaration on Environment and Development (Rio Declaration),<sup>9</sup> which was squarely within the field of environmental law. In line with Mr. Lukashuk's advice, mention might be made of the obligation under general international law to look after the territory of one's neighbour: *sic utere tuo ut alienum non laedas*.

43. From the start of the debate on prevention there had been considerable confusion about the legal nature of the principles, and the Special Rapporteur had done much to dispel it. The draft articles, in his own view, were a self-contained set of primary rules on risk management or prevention, and the work on the topic mainly entailed codification of the primary obligations of due diligence in essentially procedural form. The future convention would be without prejudice to higher standards and more specific obligations under other environmental treaties. The reference to customary international law in article 18 [6] should be construed as relating solely to "obligations" under customary international law, not to the freedom of action that was very much a part of customary international law. Non-compliance with the future convention would entail State responsibility unless procedures were developed as *leges speciales* under treaties on specific cases of pollution. The Special Rapporteur was right to say that there was no negative overlap with State responsibility.

44. He endorsed Mr. Gaja's comments about deleting the phrase "activities not prohibited by international law",

<sup>8</sup> See footnote 6 above.

<sup>9</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex I.

in article 1. When the draft had been concerned not only with prevention but also with damage, the phrase might have been necessary to prevent juridical and intellectual overlap with State responsibility, but now that liability had been detached, it could be deleted. Accordingly, the duty of prevention applied to prohibited activities as well, a more open approach that he welcomed. A distinction must be drawn, however, between activities prohibited under international environmental law, very few of which involved risk creation, and those prohibited by entirely different rules of international law such as those on disarmament.

45. Since the draft was opened up to cover activities not prohibited by international law, perhaps the entire text should be reviewed. For example, article 6 [7], requiring prior authorization, was now problematic in that it stated that authorization would have to be given for an activity prohibited by the rules of international law, in other words, one that was entirely illegal. Perhaps a fourth paragraph should be included in article 6 [7] to indicate that illegal activities, prohibited by international law, could not be authorized.

46. Mr. BROWNLIE said his preference would be for the *sic utere tuo* maxim to be inserted, not in the preamble, but in a saving clause like article 18 [6]. The careful demarcation established by the Special Rapporteur between prevention and other areas of international law had to be maintained.

47. References to due diligence carried the implication that the draft would not apply to intentional or reckless conduct, something that was wholly unrealistic and indeed retrograde. The range of sources of risk could certainly include activities that were intentional or completely reckless in that they took absolutely no account of the risks to other States. There was a strange tendency in the literature to ignore *dolus*. The “*Rainbow Warrior*” materials were a case in point in that, on the whole, they failed to refer to intentional conduct. He would like to hear the Special Rapporteur’s views on that subject.

48. Mr. SIMMA said that he found it hard to incorporate malicious or intentionally harmful conduct in the content of the draft. In the context of article 6 [7], for example, it would mean that, if a State intended to harm another by environmental pollution of some kind, it would have to engage in prior authorization, impact assessment, and so on. The entire draft was premised on activities undertaken in fundamentally good faith but for which a considerable degree of due diligence had to be exercised.

49. Mr. ROSENSTOCK said he did not see why, in the cases discussed, the failure of prior authorization could not be regarded as compounding the sin, as another breach of an obligation. The modern origin of the due diligence obligation was to be found in the “*Alabama*” case, in which the activities had gone above and beyond checking whether improper action was being undertaken. From that model, the obligation of due diligence could certainly be seen as applying to activities that were malicious and intentional.

50. Mr. HAFNER said he did not agree with Mr. Simma that the requirement of prior authorization was incompat-

ible with removing the restriction concerning activities not prohibited by international law. As he read article 6 [7] and the others relating to prior authorization, they did not confer a right to prior authorization, but merely said that if an activity was carried out, authorization was required. He saw no need to review the draft to accommodate the change in the activities envisaged.

51. Mr. Sreenivasa RAO (Special Rapporteur) said that the thrust of the draft articles was clear. If a State undertook an activity that risked causing transboundary harm, that State was expected to make the necessary assessments, arrange authorization and subsequently review the project to ensure that it conformed to a certain standard. The kind of project envisaged was generally on a large scale, such as an atomic energy plant or a hydroelectric project, and might involve the risk of dumping toxic waste. At every stage of the process, however, the State carrying out such activities was answerable to the other State or States involved. The element of *dolus* or the intention or legality of the activity was not relevant to the purposes of the draft articles. If the activity was prohibited, other consequences would inevitably ensue and a State continuing such activity would have to take full responsibility for the consequences. Deleting the phrase “activities not prohibited by international law” would therefore make little difference, if the activities were illegal and were seen as such by States. Nor would deletion of the phrase make it imperative to review the provisions of the draft articles. If an activity was illegal, the draft articles ceased to apply; it became a matter of State responsibility. In his view, the draft articles were concerned rather with mismanagement and the need for vigilance by all the States involved. He welcomed the reference by Mr. Rosenstock to the concept of due diligence arising from the “*Alabama*” case, which to a certain extent illustrated his point. He would not oppose deletion of the phrase but thought it unnecessary.

52. Mr. TOMKA said that the question before the Commission was prevention, within the larger topic of injurious consequences arising out of acts not prohibited by international law. If, therefore, the Commission wished to broaden the scope of the draft articles to include acts prohibited by international law, it should seek the approval of States in the Sixth Committee. Secondly, the effect of the recommendation in paragraph 33 of the report might be to weaken the notion of prohibition. He questioned whether States engaging in prohibited activities would notify the other countries concerned, even if they were aware that their activities could cause harm. States should therefore not be invited to ignore the provisions of the draft articles, if the Commission considered that they should apply to all activities. In his view, the draft articles should apply only to activities not prohibited by international law.

53. Mr. BROWNLIE said the drawback to citing the “*Alabama*” case was that it concerned not due diligence but a deliberate breach of the standards of neutrality applicable during the American Civil War period. As for article 6 [7], he understood the point raised by Mr. Simma, but the article was not conclusive on the issue of intentional conduct; if the draft became a convention, there would presumably be cases in which States had not properly applied the provisions. The Commission must

therefore ensure that the draft articles covered intentional conduct. There was often no clear distinction between *dolus* and negligence; as in the “Alabama” case, it might not be clear to what extent a Government was guilty of negligence or worse. The difficulty he had noted, however, might be a matter more of language than of substance.

54. Mr. GAJA said that his main concern regarding the draft articles was the provisions concerning notification, information and consultation. The draft articles should make it clear that they applied to all sorts of activities. The question was not whether an activity was prohibited per se but whether it would involve a breach of an obligation by the State of origin towards the State where the harmful consequences of the activity would be felt. He therefore advocated wording articles 6 [7] and 11 [12] in such a way as to provide for authorization to be given for any kind of risky activity.

55. Mr. SIMMA said that the view put forward by the Special Rapporteur was not unknown in international law, as the principles *jus in bello* and *jus ad bellum* illustrated. It was, however, hard to understand. It was as though, before being stabbed, the victim asked for the dagger to be disinfected so as to prevent blood poisoning. With regard to the draft articles singled out in paragraph 33 of the report, article 3 was a *chapeau* article from which other articles followed. Its inclusion seemed to reaffirm that the articles referred only to activities not prohibited under international law.

56. Mr. Sreenivasa RAO (Special Rapporteur) said that, in considering various drafts over the years, the Commission had concentrated not on the nature of various activities but on the content of prevention. Confusion had therefore arisen simply because that aspect of the topic had not been discussed before. To his mind, the Commission had succeeded in setting out the principles on which prevention should be based. Some members maintained that by retaining the phrase “activities not prohibited by international law” there was a danger of distracting the reader from the content of prevention by discussing which activities were prohibited and which were not. He himself, like a predecessor as Special Rapporteur, Robert Q. Quentin-Baxter, had been concerned not with settling all aspects of acts prohibited by international law but with explaining and demarcating the concept of prevention. Scholars, however, as was their wont, had lit and fanned the flames of controversy as to what was or was not prohibited. In order to avoid such a needless, doctrinaire debate, he had made the recommendation contained in paragraph 33, with which he had attempted to reassure colleagues who were concerned about retaining the phrase “activities not prohibited by international law”. Such activities would, however, still have to be subject to the provisions of articles 10 [11], 11 [12] and 12 [13]. If, on the other hand, an activity was clearly prohibited by international law, it was not for the draft articles to deal with the consequences. There was no need for duplication.

57. Mr. ILLUECA asked the Special Rapporteur to elucidate two matters. First, he wondered whether, as some States had asserted, military activities lay outside the scope of the articles. He meant military activities in the

broadest sense, covering both peace and war, and including military occupations, the siting of military bases in foreign countries and the deployment of United Nations peacekeeping forces. If the environment or natural resources were harmed in the course of such activities, the articles should have more to say on that score. Secondly, he would welcome more details on the scope of the definition of transboundary harm in articles 1 and 2. In particular, he wondered how they would apply to harm caused by a State which was the author or sponsor of activities within a territory controlled by it but not belonging to it. A pertinent example was the phosphate mines in Nauru, when it had been a protectorate of Australia, the United Kingdom and New Zealand. Australia had caused serious harm by the intensive phosphate mining. It had carried out rehabilitation work, but the case concerning *Certain Phosphate Lands in Nauru* had gone to ICJ and a peaceful settlement had finally been reached. As a recent study suggested, however, the question of harm caused in such a case—by a State whose boundaries were not contiguous with the territory in which the harm had been caused—should be covered by the articles on prevention.

58. Mr. Sreenivasa RAO (Special Rapporteur), referring to the question of military activities, said that the matter had been considered by the Working Group, which had come to the conclusion that all activities, whether military or not, would, if they caused transboundary harm, be covered by the prevention regime, assuming that they were fully permissible under international law. If their permissibility was doubtful, they should still be covered. If, however, they were prohibited, the articles would not apply; remedies under State responsibility would be available. A State affected by such activities as the operation of munitions factories or tests that involved cordoning off certain areas for security reasons had the right to be involved, to the extent that such operations had a transboundary effect. The State conducting the operations had a corresponding obligation to the State likely to be affected. The issue was briefly addressed in the commentary, but further elucidation could be added.

59. With regard to the phosphate mines in Nauru, Mr. Illueca had raised an important point. A similar situation had arisen in Namibia. In the *Namibia* case, ICJ had ruled that the State controlling a territory, whether legally or not, was responsible for all activities in that territory. The articles, however, might not provide the right formula to deal with harm caused in such circumstances; trust territory law, for example, might be more appropriate. In the case of the Nauru phosphate mines, the settlement by Australia had been a reasonable way of dealing with the matter. The situation with regard to certain other activities, such as nuclear testing, was not so clear-cut. He fully accepted, however, that the prevention articles should apply when one side considered an activity to be prohibited and the other did not.

*The meeting rose at 1 p.m.*