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Summary record of the 2765th 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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the strengthening of democracy. The Meeting with Legal Advisers and hemispheric security were also important items. At a more practical level, since the Committee and the Commission both held annual seminars, the programmes of those seminars should perhaps be harmonized and a dialogue encouraged between them, through their secretariats as well as reciprocal visits, possibly involving members of the two bodies.

45. Mr. GRANDINO RODAS (Observer for the Inter-American Juridical Committee) expressed satisfaction at the Commission's interest in the Committee's work and in strengthening the ties between the two bodies. With regard to the relationship between amnesty laws and access to justice, thus far, the Committee had focused on access to justice for the thousands of people who were too poor to afford a lawyer. It had considered the question of amnesty laws, but not in any depth. The issue might regain prominence. Of the 35 countries in the region, 34 belonged to the inter-American legal system, but only 16 were parties to the Rome Statute of the International Criminal Court, a number which did not include some of the region's major countries. The International Criminal Court already had two judges from the region. Inter-American law was perhaps one of the oldest examples of a regional legal system. The Inter-American Juridical Committee predated the United Nations system, as well as OAS. Currently, inter-American regional law was a reality which expressed itself in various forms, including the Inter-American Democratic Charter, attesting to the development of an objective regional legal system, not just the production of soft law. How to disseminate the experience gained in that context was one of the problems with which the Committee was dealing. A wealth of information on the subject was available on the OAS website. There was also the question of feedback on the experience that was disseminated. All the Commission's comments would be relayed to the plenary Committee at its August 2003 session in Rio de Janeiro. In any event, he hoped that cooperation between the Committee and the Commission would continue to grow.

46. The CHAIR asked the Observer for the Inter-American Juridical Committee to convey to the plenary Committee the importance that the Commission attached to the relationship between the two bodies.

Organization of work of the session (*continued*)*

[Agenda item 2]

47. Mr. KATEKA (Chair of the Drafting Committee) announced that the Drafting Committee on the topic of the responsibility of international organizations would comprise the following members: Mr. Gaja (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Kolodkin, Mr. Koskenniemi, Mr. Sreenivasa Rao, Mr. Sepúlveda, Ms. Xue, Mr. Yamada and Mr. Mansfield (*ex officio*).

The meeting rose at 1.05 p.m.

* Resumed from the 2758th meeting.

2765th MEETING

Friday, 30 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/529, sect. D, A/CN.4/531¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. KOSKENNIEMI thanked the Special Rapporteur for a useful overview of existing regimes of liability and thought-provoking suggestions. Perhaps it was impossible to trace a direct route from existing regimes to new ones, but there was an unaddressed gap between the Special Rapporteur's overview and the suggestions at the end of his report (A/CN.4/531). That gap continued to raise criticisms about the codifiability of the whole topic. In particular, five criticisms continued to be voiced. It was thus necessary to deal with them so as to demonstrate that useful work could be done.

2. One criticism, voiced by Mr. Brownlie and a number of academic commentators, was that a conceptual error had been made and the topic of liability should have been treated as part of the State responsibility project. There was some truth to that. On the other hand, responsibility and liability were both doctrinal constructions—languages, he would even call them—whose coverage could extend to the problem of uncompensated victims. Whether it should do so or not was a question of policy, not of doctrinal pigeon-holing. The criticism failed to take account of the real concern that, even after private liability regimes had been put into motion, cases might arise in which innocent victims were left without compensation. Surely the Commission should do something about that, whatever doctrinal difficulties that might create.

3. A second criticism was that the activities involved were too varied to regulate: oil pollution, nuclear pollution and hazardous waste were all very different, and

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

that was precisely the reason for the existence of a variety of regimes geared to their particularities. Issues such as the operator's liability in relation to that of the insurer or whether compensation funds should be established were matters that could not be dealt with in general terms. The criticism was partly correct: one could not lay down detailed rules about compensation and liability. But that was not what the Special Rapporteur was suggesting. The rules were to be residual, of a general nature, the purpose being not so much to regulate an activity as to provide a background against which States could be encouraged to find better ways of dealing with the problem of innocent victims.

4. A third criticism, voiced by Mr. Pellet in particular, was that members of the Commission, as public international lawyers, should not be concerned with civil liability. If anything was to be done in that field, it should be through harmonization of private law and the establishment of treaty-based regimes of liability and compensation. Yet public international law contained a great deal of material that regulated activity conducted by private actors. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, for instance, was a treaty that fell under public international law but regulated activity based on private contracts, and the same was true of much of international environmental law.

5. A fourth criticism was that the Commission should not deal with the matter because its members were legal experts, not negotiators or government representatives who could reconcile the various interests involved. True, important economic interests were at stake in the work on liability, and at some point the stakeholders would have to be involved in the work. Yet there was a long tradition of fruitful interaction between legal experts and negotiators, the first preparing the way for the second by, for example, producing substantive proposals or legal documents as the basis for negotiation. In any case, it had been negotiators at the Sixth Committee who had requested the Commission to complete its work. So there should be no worry about the Commission stepping beyond its mandate.

6. The fifth criticism, already addressed exhaustively by Mr. Mansfield, was that the topic did not fall within the Commission's mandate. The Commission itself had decided otherwise, however, in setting the liability issue aside from that of State responsibility for further development—a decision that had been endorsed by the Sixth Committee. Though the five criticisms were not absurd, it seemed to him that they should not paralyse the Commission.

7. The overview of the sectoral regimes on liability set out in paragraphs 47 to 113 of the report was an excellent and up-to-date description of the kinds of regimes in existence and the differences between them, pointing to the near-impossibility of regulating activities in a detailed fashion. By and large, he agreed with the conclusions, termed "policy considerations", contained in paragraphs 43 and 44. The expression "innocent victims", while perhaps not analytically correct, was useful in that it pointed to the overriding policy goal. The Commission should be concentrating not on a technical fine-tuning of liability regimes but on what might be seen as a human rights issue:

when major industrial or technological activities broke down, innocent people bore the burden, and that was unacceptable. The victim's standpoint, not the technical concerns behind setting up a workable compensation regime, should be the focus of the Commission's attention.

8. Ms. Escameia had pointed out that in paragraph 43 the Special Rapporteur spoke of "encouraging" States to conclude international agreements, and he agreed with her that stronger language was desirable. On the other hand, the Commission was not in a position to create binding, detailed rules. The new title of the topic, "Legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities", was somewhat misleading, tending to point to the work of an expert technical or environmental body rather than a legal body. The report referred to "models", possibly a euphemism for "draft convention". All of those instances of linguistic uncertainty, which perhaps reflected the Commission's uncertainty about the nature of the final result, added up to one conclusion: the Commission should draft a declaration of principles which, through mandatory language, would focus the attention of States on their duty to protect the human rights of innocent victims. The document would, by definition, not be a detailed set of articles regulating the various activities, but it would certainly be more than a protocol. Existing protocols on the environment, for example, the Montreal Protocol on Substances That Deplete the Ozone Layer, were full of technical detail, but that was not really the Commission's objective, which should be to draw the international community's attention to the dangers faced by individuals who lived in proximity to industrial and technological activities entailing a significant amount of risk.

9. In short, the criticisms of the topic should be taken seriously but not viewed as vitiating it, and there was an achievable objective that could be conceived as the drafting of a declaration of principles.

10. Mr. FOMBA said the report was a scholarly work, but conceptual and epistemological difficulties continued to plague the topic. The very feasibility of the exercise was open to question because of the thorny problem of how to clearly delineate State responsibility and liability. It was too late to turn back, however, since the Commission had been engaged in the exercise since 1978 and its very credibility might be at stake.

11. Mr. Pellet had argued that the exercise did not consist of codification and progressive development but rather of negotiation, while Ms. Escameia had rightly recalled the favourable reaction to the topic in the Sixth Committee. The Commission must try to do useful work by finding the common denominator between the *lex specialis* which reigned virtually unchallenged in that area and the *lex generalis* that seemed so hard, if not impossible, to find. A way must be found of squaring the circle.

12. Therein lay the merit of the Special Rapporteur's work. After outlining the Commission's previous efforts, reviewing the sectoral and regional approaches to the central issue of allocation of loss and addressing the difficult subject of civil liability, the Special Rapporteur made a summation and offered submissions for consideration. His attempt to reconcile what should be done from the

policy and legal standpoint with what the Commission could do from a technical standpoint should be supported, and he should be encouraged to go forward as far as possible without prejudging the final form the draft would take. Accordingly, for his own part, he accepted the spirit of the Special Rapporteur's recommendations.

13. Ms. XUE said that the first report on the topic was an impressive work containing a thorough review of existing liability regimes as a basis for further deliberation. In her view, it was difficult to codify and develop rules of international liability for transboundary damage caused by hazardous activity based on the existing regimes as examined by the Special Rapporteur. Allocation of loss caused by ultra-hazardous activities, both internally and externally, was not simply a matter of compensation of the injured: it involved various economic, political and social factors. Whether to allow an activity such as nuclear energy production often required important political decisions based on economic analysis, financial arrangements and the balancing of various social interests. The problem of how to handle possible mishaps was simply part of the package.

14. An examination of existing regimes revealed that neither the limits of liability nor the amount of financial guarantee given by the Government had remained unchanged, and they had sometimes been increased, indicating a gradual leaning towards public safety and environmental protection as opposed to industrial promotion in terms of policy concerns. Over the years, industrial countries had managed to develop a set of generally applied mechanisms for engaging in ultra-hazardous activities: technical standards, safety criteria, insurance-reinsurance schemes and harmonized procedural rules for compensation. At the international level, the extent of cooperation among States was determined not only by the nature of the activity itself but also by practical needs, particularly geopolitical considerations and economic conditions. A typical example was the differing practices adopted by the Western European countries under the Convention on Third-Party Liability in the Field of Nuclear Energy and by the United States under its national legislation on the same subject.

15. Even for activities characterized as ultra-hazardous, liability regimes differed, although they shared some common elements. The extent of State participation depended to a great extent on an activity's possible adverse effects internationally. A case in point was maritime oil shipping. The imposition of a loss allocation scheme would mean higher operating costs for the industry, higher prices for consumers, a more sophisticated insurance market and a heavier financial burden on the State. A balance thus had to be sought between economic development and the interests of the public in safety and environmental protection.

16. Could one conclude that the Commission should not proceed with the topic and leave liability to be covered by special regimes? She thought not, for a number of reasons.

17. The "polluter pays" principle had been incorporated into national legislation and reflected in international legal instruments. Specific rules on liability under which

the polluter was required to bear responsibility for damage caused to other countries were being negotiated in a number of areas. That was important for controlling the large-scale, high-risk-bearing industries that could inflict catastrophic damage on vulnerable developing countries which had limited means of coping with such damage. International law should look into the question and offer general principles for the conduct of such activities.

18. Transboundary damage did not affect the interests of one country alone. Conflict of interest between the author State and the injured State often began when an activity was still in the planning stage and did not end even after preventive measures were taken. General principles on damage recovery would help States to make appropriate arrangements to be applied to specific cases. Existing regimes on international liability had a strong regional and sectoral character. When ultra-hazardous activities were moved from one region to others owing to environmental concerns, general principles regarding allocation of loss became especially pertinent.

19. In short, despite the difficulties involved, States rightly expected the Commission to go ahead with the topic and come up with useful legal guidance. All the doubts about the topic had not yet been cleared up, however. The tough questions recently raised by Mr. Brownlie needed to be considered and answered. Were most cases of international liability that arose in fact cases of State responsibility, and if so, was there any need for rules on international liability? Such questions had often been raised when the rules on State responsibility were being drafted, and Mr. Brownlie had once described the whole topic as being misconceived. Now that the rules on State responsibility had been adopted, the subject could be re-examined.

20. In order for State responsibility to be invoked, there must be a breach of an international obligation through a wrongful act, and the act must be attributed to a State. In the case of transboundary damage caused by hazardous activity, it was questionable whether there was always a wrongful act on the part of a State. The principle enunciated by the tribunal in the *Trail Smelter* arbitration, namely that no State should allow activities in its territory to cause serious damage to another State, was often cited as an international rule prohibiting transboundary damage. If applied to its full extent, however, it would mean that international law should look into each and every case of transboundary damage. In reality, the law did not go that far.

21. Besides, under such a rule, a State would be held responsible for every act within its territory and any act carried out by its subjects. More importantly, when technology could not provide absolute safety, the injured State might insist on termination of the activity concerned, which indeed often happened in real life. Rules on State responsibility might be used by the injured State but might also provide a legal argument for the author State to walk away from the injurious consequences of its act, because no wrongful act in itself had been committed. When primary rules of conduct were not well-developed, it would be difficult to apply secondary rules based on breach of obligation. From that standpoint, she endorsed the Commission's approach of first working out preventive rules, and she appreciated why the Special Rapporteur had

changed the topic to allocation of loss. She agreed with the conclusions contained in paragraphs 150 to 152 and the recommendation that the model proposed should be general and residual in character.

22. With regard to the Special Rapporteur's submissions, she experienced no difficulty with those set out in paragraph 153, subparagraphs (a), (b) and (c), and agreed with subparagraph (d) in principle, but thought that the operator of an activity should first be held liable, since the word "operator" was understood to mean the person who carried out the activity and who was in practice responsible each step of the way. Otherwise, the person who was actually in control of the operation should be held liable. Without that premise, the words "in control" and "in command and control" in subparagraph (e) might give rise to differing interpretations as to who controlled the activities (the ship owner or the ship operator, for instance).

23. As to paragraph 153, subparagraph (e), the test for causal connection should be proximity. With regard to the exceptional cases referred to in the report, the first one might concern joint or several liability—to use the term for convenience—if the harm was caused by more than one source. The second might relate to situations where the operator should be exonerated from liability, for example, *force majeure* or fault of the injured or third party.

24. The phrase "in accordance with their national law and practice", in paragraph 153, subparagraph (f), should be deleted so as to give States more leeway for settlement through negotiations, arbitration or other options.

25. The assumption behind paragraph 153, subparagraph (g), was that limited liability was clearly inadequate for compensation. She wondered whether that was always true with every existing regime on liability. That kind of arrangement depended on the type of activity and the targeted economies.

26. She endorsed paragraph 153, subparagraphs (h) and (i), and, referring to subparagraphs (j) and (k), said that compensation for damage to persons and property was the norm. Damage to environment and natural resources was a more complicated issue. In principle, the distinction drawn between environment under national jurisdiction and control and environment *per se* was also acceptable. It should be noted that in some cases prevention, response measures and restoration measures could be quite different. The restrictions suggested in the report were very useful.

27. Mr. ECONOMIDES, commending the Special Rapporteur for a remarkable report, said that, like Mr. Pellet and Mr. Pambou-Tchivounda, he was somewhat reticent about the use of the word "loss" in the title of the topic and proposed that it be replaced by "compensation", which was employed several times throughout the report, in particular in paragraph 38, where the Special Rapporteur spoke of "a more equitable and expeditious scheme of compensation to the victims of transboundary harm".

28. The assertion in the footnote to paragraph 32 of the report to the effect that "States do have the sovereign right to pursue activities in their own territory even where they cause unavoidable harm to other States ... provided

they pay equitable compensation for the harm done"² was not in keeping with international law. On the contrary, States were under an obligation to respect the sovereignty and territory of other States. Paragraph 43 of the report mentioned that the Working Group created at the Commission's forty-eighth session, in 1996, had noted in that connection that the articles must ensure to "each State as much freedom of choice within its territory as is compatible with the rights and interests of other States".³

29. The question of liability posed many difficult problems, including that of its legal basis. Yet there was virtual consensus that liability was applicable to hazardous activities and that for such activities, the most suitable regime was that of strict or absolute liability. The relevant regime did not require the commission of a wrongful act or a prior violation of an international obligation, but only harm arising from hazardous activities. The harm alone gave rise to liability and opened the way to compensation. Finally, there was virtual consensus that no customary rules had ever existed imposing the regime of strict liability in international law. Such a regime had been instituted exclusively through international conventions for each particular hazardous activity.

30. A number of conventions and other texts had already adopted strict liability and had been discussed by the Special Rapporteur. Another example was the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, signed by 22 States, including Greece, at the Fifth Ministerial Conference "Environment for Europe" held in Kiev from 21 to 23 May 2003. The Protocol, prepared in Geneva by UNECE, filled a gap, because such damage was not covered by any existing instrument, with the exception of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, whose entry into force was very doubtful. The Protocol sought to avoid the Convention's tactical errors, such as the vague definition of "damage to the environment", its very general scope, which even included non-transboundary damage, and the clause in favour of European law that made the Protocol inapplicable to the major part of the territory of Europe and thus considerably reduced its normative scope.

31. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters fit in well with the international instruments cited by the Special Rapporteur which focused on the civil liability of the author of the damage. It contained mechanisms for the application of strict liability which enabled victims to have access to the courts without losing themselves in the complexities of private international law, and it introduced compulsory insurance arrangements which protected the victims against the insolvency of the author of the damage. The Protocol had a number of innovative elements,

² A. Boyle, "Codification of international environmental law and the International Law Commission: injurious consequences revisited", in A. Boyle and D. Freestone, eds., *International Law and Sustainable Development* (Oxford University Press, 1999), p. 78.

³ *Yearbook ... 1988*, vol. II (Part Two), para. 82; text reproduced in the report of the Working Group of 1996 [*Yearbook ... 1996*, vol. II (Part Two), annex I, p. 112 (para. (4) of the commentary to art. 5)].

which he would refer to in commenting on the Special Rapporteur's submissions.

32. It would be premature to take a position on paragraph 153, subparagraph (a), of the report, but it would be noted that the Protocol allowed the victim of the damage to choose the applicable law: either the domestic law of the party on whose territory the industrial accident took place, or the provisions of the Protocol itself. The possibility open to the victim of "law shopping", an innovation in the area of civil liability in connection with damage caused to the environment, was motivated by the desire to give a maximum of options to the weaker party. As for the second part of the subparagraph, it would be easier and safer to rely from the outset on existing solutions in regard to strict liability, which was more suitable for hazardous activities. If due account was taken of existing precedents, the Commission would complete its mandate properly.

33. Again, it was too soon to express a view on paragraph 153, subparagraph (b), but on subparagraph (c) he agreed that the Commission should restrict the scope of the topic to the one adopted for the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.⁴ It would be difficult to do otherwise. The threshold for compensation must be such that harm which was more than negligible or minimal had to be taken into account (paras. 31, 39 and 114 of the report).

34. While he endorsed paragraph 153, subparagraphs (d) and (e), it would be preferable in regard to subparagraph (f) to provide for the principle of equitable apportionment in a general form, leaving application of the principle to States or third parties.

35. Paragraph 153, subparagraph (g), was acceptable. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters required the operator's strict liability to be covered up to a given amount by a financial security, which would usually take the form of insurance, a bond or a declaration of self-insurance with regard to State-owned operators.

36. He supported the submissions contained in paragraph 153, subparagraphs (h) and (i). As to compensable damage (subpara. (j)), it should indeed take account of damage to the environment as broadly as possible, something the Protocol already did, since it allowed for measures to reinstate or restore damaged or destroyed components of transboundary waters to the conditions that would have existed had the industrial accident not occurred or, where that was not possible, to introduce the equivalent of those components into the transboundary waters (that being an innovative development), as well as response measures following an industrial accident to prevent, minimize or mitigate the damage.

37. Concerning paragraph 153, subparagraph (k), he noted that the Protocol contained a provision on loss of income. To cut short claims which causally were very remote from transboundary damage, it used another approach, that of legally protected interest. Only persons

with a legally protected interest in any use of the transboundary waters could claim loss of income, which was a reasonable approach.

38. The draft should take the form of an international convention. A binding instrument would render the best service to States and to international law and would be the best addition to the draft articles already prepared on transboundary harm arising out of hazardous activities.

39. The draft should also contain dispute settlement provisions, which would contribute to the development of international law and even facilitate the friendly settlement of disputes by the parties themselves. The Protocol made provision for arbitration before the Permanent Court of Arbitration in accordance with the Court's recently adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.⁵ The Rules, mentioned for the first time in a convention, opened the courts to private individuals. But the Protocol also paved the way to the settlement of disputes between States. States parties thus had excellent opportunities to exercise diplomatic protection in cases in which the courts of other States parties improperly applied the provisions of the Protocol to their nationals.

40. Finally, the Commission should include in its future long-term programme of work the subject of protection of the environment of the global commons, which was of great interest to the entire international community.

41. Mr. GALICKI noted that the Special Rapporteur's informative and comprehensive report had highlighted the important work of his predecessors, Mr. Quentin-Baxter and Mr. Barboza, on the basis of which the Commission had rightly concluded that questions concerning the responsibility of States for internationally wrongful acts needed to be dealt with separately from the topic of international liability for injurious consequences arising out of acts not prohibited under international law. Their experience had shown that a comprehensive approach to the topic might not be the best one and that partial, sectoral solutions might be more effective.

42. The report included an interesting presentation of recent models of allocation of loss negotiated and agreed upon in respect of specific regions of the world or a specific sector of harm. However, those models did not really provide sufficient grounds for codification or even progressive development; more analytical work would be needed.

43. The Special Rapporteur identified a number of common features from the models, including the rule that State liability was an exception and that, as was stated in paragraph 153, subparagraph (d), of the report, liability and obligation to compensate should be first placed at the doorstep of the person most in control of the activity at the time the accident or incident occurred. Although States should have some secondary obligations, the picture became so vague that considerable efforts would be required before codification was possible.

44. It was unfortunate that the only clear system of State liability, which was accepted in the case of space activi-

⁴ See 2762nd meeting, footnote 7.

⁵ The Rules are available at www.pca-cpa.org.

ties, was of an exceptional nature and must be treated instead as an example of a “self-contained regime”. The Special Rapporteur examined the background of that regime solely on the basis of the 1972 Convention on International Liability for Damage Caused by Space Objects. Yet the principle of State liability for such damage had already been established in article VII of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies and, even earlier, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.⁶ The Principles Relevant to the Use of Nuclear Power Sources in Outer Space might also be cited in that context.⁷ Those three texts had also introduced a distinction between the international responsibility of States for national activities in outer space and their international liability for damage caused by space objects launched from their territories or facilities. It might be useful to analyse whether and to what extent that approach could affect other models of international liability or whether the space model could be modified in the future under the influence of other sectoral liability models, especially with reference to the possibility of introducing liable subjects other than States.

45. The Special Rapporteur rightly argued that the scope of the topic should be limited to the same activities as those covered by the 2001 draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission. Such continuity and consistency would make for greater flexibility in deciding whether to have a separate document or an addition to the existing articles on prevention.

46. While it was too early to decide definitively on whether the topic was ready for codification or progressive development, it would still be useful to draft a recommendation or a set of guidelines to assist States in their practice. The Commission should continue its work on producing its own model of allocation of loss, which should be both general and residual in character, leaving States sufficient flexibility to develop schemes of liability to suit their particular needs.

47. The submissions in paragraph 153 were largely acceptable, although some required further clarification. For example, with regard to subparagraph (e), it was not clear what criteria should be used for the proposed “test of reasonableness” in the case of liability of the person in command and control of the hazardous activity, given the variety of activities to which such a rule might apply.

48. He agreed on the need to follow, as far as possible, the approach used in the draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission. The same threshold of significant harm should be applied as in the case of prevention and certain kinds of harm; for instance, harm to the global commons should be excluded.

49. He was convinced that the Commission should be able to develop the Special Rapporteur’s proposals into

basic general rules. An appropriate first step would be to reconvene the working group on the topic.

50. Mr. YAMADA commended the Special Rapporteur for an excellent report which provided a sound foundation for future work.

51. At an earlier meeting, Ms. Escarameia had asked why the Commission had taken so long to address the issue and failed to produce tangible results. It had always been his view that the topic of international liability was relevant and met the current needs of Governments. But until 1996, the discussions in the Commission had run around in circles, despite the efforts of its members. It had been very difficult to conceptualize the topic, which was very broad. The breakthrough had come when the Commission decided to proceed step by step, an approach Mr. Tomuschat had been instrumental in devising.

52. Two categories of activity had been identified: those having a risk of causing significant transboundary harm, and those which in fact caused transboundary harm if accumulated. It had been decided to deal first with activities having a risk of causing significant transboundary harm, namely, hazardous activities. It had also been decided that the aspects of prevention and liability were distinct, though related, and that the prevention aspect should be tackled first. Within the short five-year period of the last quinquennium, the Commission had been able to complete the two readings of the draft articles on prevention of such activities, under the able guidance of the present Special Rapporteur, and had reported on them to the General Assembly. The approach adopted had proved to be correct.

53. The Commission was now in the second stage of its step-by-step approach. What it should do was to build upon the first stage. As the Special Rapporteur rightly pointed out, the scope of the activities must be exactly the same as that for prevention. To change the scope by altering the level of the threshold, by expanding it to include activities of creeping pollution or to include global commons would bring the Commission back to square one, and to the situation in which it had found itself before 1996.

54. The case it was now dealing with was the one in which, in spite of fulfilment of the duties of prevention to minimize the risk, significant transboundary harm had been caused by hazardous activities. In most cases such activities were conducted by non-governmental operators. That gave rise to the questions of liability of operators on the one hand, and the liability of the States that had authorized such hazardous activities on the other. The majority of operators would be limited liability corporations. Thus, the questions of compulsory insurance schemes and the establishment of compensation funds would arise. As those activities were not unlawful and were in many cases essential for the advancement of the welfare of the international community, the other parties, including those who suffered direct injury, must also bear some of the burden. Accordingly, the Special Rapporteur’s decision to focus on the allocation of loss was the most appropriate approach.

55. Any failure to abide by the duties of prevention—primary rules formulated in the draft articles on preven-

⁶ General Assembly resolution 1962 (XVIII) of 13 December 1963.

⁷ General Assembly resolution 47/68 of 14 December 1992.

tion—entailed the responsibility of the State. In that context, he was rather disappointed that the General Assembly had not indicated its position on the draft articles on prevention. A firm position on prevention was essential if the Commission was to complete its work on the liability topic.

56. Some comments were called for on the Special Rapporteur's extremely useful analysis of the various sectoral and regional regimes. First, the Commission might also need to study the classical case of civil aviation, which also entailed hazardous activities. Since the Convention for the Unification of Certain Rules relating to International Carriage by Air, a series of treaty arrangements had been put in place. Second, as the Special Rapporteur had noted, the outer space regime was an exceptional case. At the time of its negotiation, it had been assumed that space activities were generally conducted by State agencies for public service purposes. Accordingly, State liability, strict liability and unlimited liability had been adopted. Now that private corporations also participated in space activities for commercial purposes, the outer space regime might need to be reconsidered.

57. All those regimes were set up as a result of new legislation, through negotiations by governments. Each regime had its own characteristics, and most of them were self-contained—a typical case of the fragmentation of international law. While consideration was given to alleviating the burden on the victims by establishing strict liability or transferring the burden of proof to operators, Governments tended to try to limit their liability, as Mr. Brownlie had pointed out. One such example was nuclear damage and liability under the Convention on Third-Party Liability in the Field of Nuclear Energy and the Convention on Supplementary Compensation for Nuclear Damage. Japan had not acceded to those conventions because Japanese domestic law provided much more comprehensive relief to the injured parties. In that connection, he strongly endorsed the Special Rapporteur's submission in paragraph 153, subparagraph (a), of his report that any regime that might be recommended should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. He had no problem with the Special Rapporteur's other submissions in paragraph 153, and he also endorsed the Special Rapporteur's approach based on the recommendations of the Working Group established at the Commission's fifty-fourth session, in 2002.⁸

58. The Commission's task was thus to examine whether it would be possible to extract generally applicable rules from those special regimes. Aware as he was of the extraordinary difficulty of that task, he nonetheless looked forward to receiving draft articles from the Special Rapporteur at the Commission's next session.

59. Mr. BROWNLIE said that, doubtless through inadvertence, Mr. Koskenniemi had totally misrepresented his position, which was not a negative one. As a member of the Commission of seven years' standing, he had participated in the work of the 1997 Working Group and in the execution of the step-by-step approach, and had played a cautious but constructive role in the development of the

work. It was not his position that there was no subject. His main concern, whether as an academic or as a practitioner, was that the Commission should not inadvertently construct a set of rules that would then be widely misunderstood by the outside world—by people in the Sixth Committee and people in government. The result would be a set of principles that were not understood in relation to other existing important areas of international law. State responsibility was not simply a chapter in a book: it was the very cement binding together international law. And it would be particularly ironic if the Commission were to damage that bond, as it had only recently completed a vast enterprise devoted to the codification and clarification of the principles of State responsibility. It was crucially important to isolate the actual topic to be dealt with, and having listened to other members' contributions, he was, with all due respect, not at all assured that that had yet been achieved.

60. There were two major policy problems. The first was to identify the nature of the subject, which, in his present view, was precisely to deal with those situations in which there was no responsibility according to existing general principles of State responsibility but in which there had been catastrophic damage to innocent parties. It was a form of social engineering that was very difficult—but not impossible—to perform in a codification mode. The Special Rapporteur had already pioneered the step-by-step approach, so he was not particularly dismayed by the task ahead. But that task must be undertaken with care; and one problem was that, when there had been no determination of responsibility, quantification was difficult.

61. The second policy problem was the social cost, to which Ms. Xue and Mr. Koskenniemi had referred. The problem was that social cost was differentiated from sector to sector. The issues of social cost, the process of trading off the cost of an adequate compensation regime against the reduction of a certain type of activity within the State concerned, tended, quite rightly, to be solved on a sectoral basis. The Commission's enterprise, on the other hand, was to produce general principles. That seemed to him to present quite a considerable problem.

62. Mr. Sreenivasa RAO (Special Rapporteur) thanked those members who had contributed to the debate thus far. Many ideas had been touched upon and some clarifications requested. On the issue of the scope and legal basis of the topic, some old bones of contention had again resurfaced. While he could see the case for revisiting those arguments, he was not enthusiastic about the prospect of the Commission going over them yet again if there was no realistic prospect of any final solution. It seemed to him that, after so many years of debate, no more time should be spent on mere procedural issues, or on reopening issues which might conceivably admit of some solution.

63. In that connection, he reminded members of the suggestion, endorsed by the Working Group in 2002, to focus on a model of allocation of loss keeping in mind the interests of the innocent victim who suffered damage even after all obligations of prevention had been met. On the definition of "innocent victim", he wished to make it clear that it was not to be expanded to include the environment, as some had suggested. It referred essentially to

⁸ See 2763rd meeting, footnote 2.

those persons who were not directly involved in the conduct of hazardous activities.

64. The suggested focus on allocation of loss would obviate the need to go back to the debate on the relevant basis for compensation. State responsibility as a legal basis was, however, not to be prejudiced. Attribution of private acts to a State was acknowledged to be a truly difficult legal exercise and one that could not assure the innocent victims compensation in all circumstances. It was therefore useful to avoid designating the topic in terms of “reparation”, which might suggest a return to the topic of State responsibility. Equally, reference to the concept of compensation was to be avoided, so as not to link the topic too closely to the topic of civil liability, which was better addressed in the domestic legal context. Further, it would be hard to attempt to establish a comprehensive legal regime reconciling different elements of a civil liability regime, since that would involve many national jurisdictions and different legal systems. Moreover, it might also be helpful to leave the innocent victim some scope for forum shopping. However, it was also important to prevent claims for compensation for the same injury from being pursued simultaneously in different forums.

65. Members would recall that the Commission had in the past discussed extending the scope of the topic to the global commons, but that it had proved impossible to reach agreement on the inclusion of that issue because it was difficult, first, to identify the geographical scope, and second, to determine the quantum of damages in the absence of any impact on persons or property.

66. There were also other issues, such as *locus standi*. But to the extent that environment within a national jurisdiction could not be separated from environment outside that jurisdiction, the problem that remained uncovered was that much less significant. In any case, the issue could be revisited once the Commission had finalized the model of allocation of loss covering the same scope of activities as had been covered by the draft articles on prevention. Allocation of loss had the advantage of not involving liability or State responsibility, making it possible for the Commission to mix different elements, drawing on the outcomes of various international negotiations until a universally acceptable solution was found.

67. Some members had questioned whether the Commission was suited to engaging in a task that was best left to States to negotiate. Rejecting that line of argument, he noted that it had not prevented the Commission from working on draft articles on the law of the sea and the law of treaties which had later become the subject of negotiations among States. Indeed, the Commission had a duty to complete a mandate given to it by the representatives of States. He was concerned, however, to ensure that the exercise undertaken by the Commission did not drag on interminably. While he offered his assistance, as Special Rapporteur, to the Commission in discharging its mandate, it was up to members themselves to decide when it would succeed in discharging that mandate.

68. The CHAIR said that the Commission had received a mandate from the Sixth Committee, which had certain expectations of it. He trusted that it would not take another 20 years to complete the topic. It seemed to him that

the approach taken in 2002 and 2003 was more realistic than in the past and that the Commission was considerably closer to a final draft that would fulfil the Sixth Committee’s expectations. The Commission must achieve its objective by specifying certain principles that could be deduced from its past work and from new developments. Countries drew up agreements on the basis of principles of general international law, and there was a lot of substance on which the Commission could work constructively and realistically to clarify the topic. Admittedly the task was a difficult one, but the Commission could not give up when it had been entrusted with the progressive development of international law. The Special Rapporteur’s comments were therefore very timely.

69. Mr. KATEKA said that he sympathized with the Special Rapporteur and appreciated his worthwhile efforts. The Special Rapporteur should bear in mind that members of the Commission had also demolished his predecessors’ reports. The Commission had to make sure its proposals were up to standard. The topic posed a number of terminological problems, such as the definition of “innocent victim”, whether to replace “allocation of loss” by “liability and compensation” or how to define the “global commons”. He believed that a global commons did exist and hoped that, once the Commission had defined the necessary legal principles, a residual regime would be applied to it. The Special Rapporteur should not consider abandoning his important task, no matter how thankless.

70. Mr. PAMBOU-TCHIVOUNDA noted that when Luc Ferry, France’s embattled Minister for Education, had said recently that he would gladly resign his post, President Jacques Chirac had had to express his personal support for Mr. Ferry. The Commission must do the same for the Special Rapporteur. Even the pessimists among its members eagerly awaited his next report, which they trusted would contain proposals guided by the suggestions they had made at the present session. No one had ever doubted the Special Rapporteur’s abilities.

71. He wished to suggest two further avenues that the Special Rapporteur might explore. First, he could draw on the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session⁹ to determine how to approach the question of compensation and what form it should take. The concept of “significant harm” could also be developed. With regard to modalities, compensation would have to be compartmentalized. The Special Rapporteur could help the Commission draw conclusions on those questions. A second avenue would be transboundary harm as it related to the global commons. The latter evoked the idea of cooperation, since more than one State would have to respond to the harm. The Commission might also draw on the idea of cooperation in discussing the modalities of compensation. Thus far, it had adopted a somewhat individualistic interpretation of who should pay for transboundary harm. It might be preferable to adopt a more open interpretation and advocate a shared, community approach to liability for harm.

⁹ See 2751st meeting, footnote 3.

72. Again, the Commission might approach UNEP for help in integrating the idea of shared responsibility and compensation in its future work. He wished to reiterate his encouragement to the Special Rapporteur and trusted that his next report would contain some new ideas for the Commission to consider.

73. Mr. MANSFIELD said that the Commission could and must deal with the topic within five years. The Working Group's excellent work in 2002 had provided a solid basis for the Special Rapporteur's first report. It was precisely because of its earlier decisions on State responsibility that the Commission was having to deal with the topic at all. At present, in a situation where lawful activities caused catastrophic losses even though the State had fulfilled its duty of prevention, the relevant countries were under no obligation to do anything. The Sixth Committee and Governments were aware that that situation reflected a widening gap in international law. The Commission did not need to complicate matters so much. It might have to develop general principles based on existing regimes, or its task might be far easier than that. All it had to do was stipulate that loss could not fall entirely on the innocent victim and that countries must at least get together to work out an effective remedy and allocate loss. Failure to do so would entail responsibility. He was confident that, with the Special Rapporteur's guidance, the Commission could complete its work on the topic within five years.

74. Mr. ROSENSTOCK recalled that the United Nations Conference on the Human Environment had adopted a principle that was expected to provide a basis for legal responsibility in such matters.¹⁰ The principle had never been put into effect, however. The same would doubtless happen with the three instruments adopted at the Fifth Ministerial Conference "Environment for Europe".¹¹ The Commission was in danger of drafting yet another instrument that might be supported by a handful of States but was unlikely to obtain universal acceptance.

75. Mr. Sreenivasa RAO (Special Rapporteur) expressed appreciation for members' words of encouragement and pledged to continue his task, although its success was in the Commission's hands. With all due deference to Mr. Rosenstock's vast experience, he felt that if the Commission did only what it felt Member States would fully accept, it would end up doing nothing. It could not be faulted if countries failed to implement and recognize the articles it drafted. As long as it did its work as mandated by the Sixth Committee, it was up to States whether or not they applied the resulting instruments. Even so, many courts used the various instruments developed by the Commission as a basis for their judgements. The Commission

should not compromise, therefore, simply because States were reluctant to apply what it had developed.

The meeting rose at 1.05 p.m.

2766th MEETING

Tuesday, 3 June 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. RODRÍGUEZ CEDEÑO, commenting on the concerns to which the topic had given rise in the Commission and in the Sixth Committee, said that, despite the doubts expressed and the problems involved, the topic could be the subject of codification and progressive development, and the Commission should deal with it as such. The rules relating to liability arising out of activities resulting from technological advances were not clearly established in international law, although international instruments of a sectoral nature did embody rules on international liability, prevention, civil liability, reparation and compensation, and important principles had been established on strict liability, the allocation of loss, the limited liability of the owner or the operator and damage, not to mention the rules stated in the very recent Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. Despite the gaps in international law and the national law of States with regard to the allo-

¹⁰ See the Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

¹¹ The Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context; the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters; and the Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).