

Document:-  
**A/CN.4/SR.2766**

**Summary record of the 2766th 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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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.<sup>10</sup> 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".<sup>11</sup> 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.*

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## 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.

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### **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.4/531<sup>1</sup>)**

[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-

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

cation of loss and the prompt, full and adequate compensation of innocent victims, doctrine, practice and jurisprudence contained enough elements for the codification and progressive development of general principles governing allocation of loss and compensation. As had been stated in the Sixth Committee, that was also justified by the fact that the consideration of the topic was the logical extension of the Commission's work on prevention and State responsibility.

2. The possibility of formulating relevant rules of international law applicable directly or indirectly to natural and legal persons had been considered on other occasions. In his view, the purpose of the Commission's work must be not only to encourage States to adopt national law rules allowing to some extent for the proper allocation of loss and the protection of innocent victims, but also to establish general principles on the basis of which to formulate rules applicable to States and operators. Even though an overly "human rightist" approach should not be adopted, the main question was the protection of innocent victims from transboundary harm arising out of a hazardous activity. On the basis of a minimum standard of equity, victims not benefiting from the activity must be excluded from the allocation of loss. Although, as the Special Rapporteur indicated in paragraphs 13 and 14 of his report (A/CN.4/531), the Commission had already adopted "the principle that the victim of harm should not be left to bear the entire loss", which meant that compensation did not necessarily have to be full and complete, everything must be done to ensure that the innocent victim was compensated promptly and fully, subject to conditions and exceptions related, *inter alia*, to the measures he might have taken to mitigate loss.

3. The obligation to provide compensation for transboundary harm arising out of a hazardous activity might give rise to liability on the part of the State when the latter had not adopted the necessary measures to prevent such harm. The liability might be shared, but in all cases it must lead to the prompt and full compensation of the innocent victim. The regime for allocation of loss and compensation might provide that the company engaging in the activity in question had to compensate the victim and repair the environmental damage, even when no wrongful act had been committed. The liability of the State would be residual and would come into play when the victim had not been promptly, fully and completely compensated by the operator or the operator's insurance.

4. There could be practically no question of an obligation to compensate for harm arising out of lawful but hazardous activities carried out by a State which had fulfilled its obligations of prevention as a principle of customary international law, even if that principle could be derived from some of the instruments referred to in the report of the Special Rapporteur.

5. In order to formulate rules that would be acceptable to all, limits must be set, on the one hand, on scope, which must be hazardous activities or even ultrahazardous activities exclusively, and, on the other, on the level of harm in question, whence the concept of "significant harm". This concept was defined by the Special Rapporteur in paragraphs 31, 33, 34 and 39 of his report, reflected the

practice of States and was used in various international treaties.

6. Another question warranting careful consideration was that of rules which were different from the rules of private international law and which guaranteed victims access to national courts. Victims must be able to apply indiscriminately, at their convenience, to the courts of the State where the activity had been carried out or to those of the State in whose territory the damage had occurred in order to obtain compensation. That was how the ruling of the European Court of Justice in the *Mines de Potasse d'Alsace* case had interpreted article 5, paragraph 3, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

7. The establishment of appropriate rules relating to allocation of loss and compensation had a preventive effect because it encouraged companies to adopt more effective safety measures to prevent damage but did not hamper the activities they carried out with a view to the development of new technologies.

8. He generally agreed with the conclusions and proposals the Special Rapporteur submitted in paragraphs 150 to 153 of the report. Paragraph 153, subparagraph (c), stressed the need for harmony between the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session, in 2001,<sup>2</sup> and the draft articles on allocation of loss and compensation. That was logical and therefore acceptable. The same was true of the statement in paragraph 153, subparagraph (d), concerning the liability of the State and that of the person in command and control of the activity, as well as the analysis of joint and several liability. In paragraph 153, subparagraph (g), emphasis had rightly been placed on additional funding mechanisms, which must come primarily from the operators concerned, as provided in the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, referred to in paragraphs 66 and 67 of the report. Paragraph 153, subparagraph (i), stressed that each State should ensure that domestic remedies were available in order to guarantee victims equitable and expeditious compensation. Damage to the environment and to public areas in general, even if only to areas within the jurisdiction of a State, should also be taken into account. Consideration should be given to the possibility of the rehabilitation of the environment and of natural resources that had been damaged or other similar formulations. The case of damage to the global commons must nevertheless not be ruled out completely, even though that question was not dealt with in the draft articles on prevention—something that had, incidentally, given rise to criticism by the Sixth Committee and by several Governments. In any event, it was still too early to adopt a final position on the outcome of the Commission's work.

9. Mr. CHEE said that the allocation of loss amounted to the allocation of damage to persons, property and the environment. As to the scope of the work to be undertaken by the Special Rapporteur, he endorsed the position the Special Rapporteur had adopted on the three criteria relating to the definition of "transboundary damages" and

<sup>2</sup> *Yearbook ... 2001*, vol. II (Part Two), para. 97.

the four recommendations made in paragraphs 37 and 38 of the report. The definition of damage and compensation was a particularly important and difficult question involving both economic loss and moral damage. As far as moral damage was concerned, reference might be made to the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>3</sup>

10. In chapter III of the report (Summation and submissions for consideration), the Special Rapporteur concluded that the models for liability and compensation schemes he had surveyed made it clear that “States have a duty to ensure that some arrangement exists to guarantee equitable allocation of loss”, but he was in favour of the idea expressed by the Special Rapporteur in paragraph 153 of the report that the model of allocation of loss should be both “general and residuary in character”. He agreed with the argument put forward in paragraph 153, subparagraph (a), that the innocent victim should be given the possibility of obtaining compensation through civil liability and that the “polluter pays” principle available in the national law of many States should be applicable. He also agreed with the suggestions made in subparagraphs (b), (c), (d) and (e). Subparagraph (f) referred to joint and several liability. In such a case, could liability be equitably apportioned? That principle would be difficult to apply in practice. He therefore supported the proposal in the last sentence that the option of equitable apportionment could be left to States to decide in accordance with their national law and practice.

11. The idea stated in paragraph 153, subparagraph (g), that limited liability should be supplemented by additional funding mechanisms was commendable, but difficult to realize: Would a State be willing to make an additional contribution? However, he was entirely in favour of the idea stated in subparagraph (h) that a State should assume responsibility for designing suitable schemes to solve problems of transboundary harm. In that connection, he referred to principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>4</sup> which provided that “States have, in accordance with the Charter of the United Nations and the principles of environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. Although the Stockholm Declaration was not legally binding, it was as much a source of law as the Universal Declaration of Human Rights. The idea was reaffirmed in principle 13 of the Rio Declaration on Environment and Development (Rio Declaration),<sup>5</sup> which had in turn been confirmed by the World Summit on Sustainable Development held in Johannesburg, South Africa, from 26 August to 4 September 2002. The principle that States had an obligation to ensure that transboundary air pollution did not cause any

harm to other States had also been affirmed in the *Trail Smelter* case and in the advisory opinion handed down by ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case. Those international instruments and decisions thus imposed an obligation on States to ensure that they did not cause any environmental harm to other States. That obligation could be characterized as being *de lege lata*. He therefore agreed with the Special Rapporteur that States must take measures to prevent transboundary harm caused by atmospheric pollution.

12. With regard to paragraph 153, subparagraph (i), he pointed out that, if a State had an obligation under international law to prevent harm to persons, property and the environment, it would be logical that a State should also have a duty to introduce means of redress for injuries sustained as a result of an internationally wrongful act of a State or the failure of a State to fulfil its international obligations. In that connection, it should be noted that a denial of the right of an injured person to access to the courts to obtain redress for environmental harm arising out of transboundary air pollution would be contrary to article 8 of the Universal Declaration of Human Rights, which provided that every person had a right to an effective remedy by the competent national tribunals, and to article 3, which guaranteed everyone the right to life, liberty and security of person. The right of access to the national courts of the wrong-doing State should therefore be guaranteed to individuals seeking compensation for damage caused by transboundary atmospheric pollution. He asked what was meant by the term “evolving international standards”, as used in subparagraph (i). He also endorsed subparagraphs (j) and (k), which reflected current State practice.

13. As to the outcome of the Commission’s work on liability, he agreed with the Special Rapporteur that it should take the form of a protocol to the instrument on prevention. In concluding, he recalled that the current work had been undertaken in accordance with a General Assembly resolution and the provisions of the Rio Declaration.

14. Mr. KOLODKIN said that the problem was complex because it affected the interests of persons, corporations and States, and those interests were certainly not always the same. Points of view on the question of liability for harm arising out of activities not prohibited by international law continued to differ. In 1985 Akehurst stated that there were few actual cases of liability for the consequences of activities not prohibited by international law, and those cases were not related to the environment.<sup>6</sup> More recently, in 2001, in the monograph *Liability and Environment*,<sup>7</sup> Bergkamp expressed doubt about the applicability of the concept of environmental liability.

15. States, groups of States and regions with different levels of development and hence different priorities could not view the concept of development in the same way, and that explained why the positions of States on that question differed. A great deal of rule-making activity was going on, particularly in Europe.

<sup>3</sup> See 2751st meeting, footnote 3.

<sup>4</sup> See 2765th meeting, footnote 10.

<sup>5</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.

<sup>6</sup> See M. B. Akehurst, “International liability for injurious consequences arising out of acts not prohibited by international law”, *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 3–16.

<sup>7</sup> See L. Bergkamp, *Liability and Environment* (The Hague, Kluwer, 2001).

16. But national legislation was not uniform. Within States, approaches could differ according to the types of activities in question. For example, in the Russian Federation, the 1999 Air Protection Act provided for liability in the event of wrong-doing, whereas the 2001 Use of Nuclear Power Act provided for the no-fault liability of the operator in the event of loss or damage caused by radiation.

17. The report also contained an analysis of many sectoral agreements establishing different systems of liability and compensation. Because there were so many different regimes, a regime of liability or at least civil liability for hazardous activities could not be formulated at the present time. There was the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which not only had not yet entered into force, but was not all-embracing in nature. In particular, it did not apply to harm caused by nuclear substances or the transport of dangerous goods.

18. It was necessary to point out that treaties concluded in the 1990s on issues of responsibility were mostly not ratified by States.

19. The diversity of the approaches adopted by States was illustrated by the comments received from Spain and the United Kingdom. Spain was very much in favour of the work being carried out and even considered the draft to be too restrictive, stating that it would be possible to develop a more ambitious treaty regime that would encompass liability for harm to the environment, as well as to areas beyond the territory of a State, whereas the United Kingdom had reservations about the success of the Commission's work in that regard and the possibility of harmonizing the positions of States. The truth probably lay somewhere between the two.

20. Despite their fragmentary nature, treaty regimes reflected certain trends and contained some common elements, as the Special Rapporteur pointed out in his report. For example, they attached great importance to the "polluter pays" principle, which emphasized the liability of the operator.

21. In his own view, the framework of prevention that had been defined continued to be valid, and the Commission should restrict the scope of the topic to the consideration of the types of activities to which the articles on prevention applied and, for example, limit the threshold for the implementation of the articles on compensation. In other words, the harm in question must be significant, since it was caused by an activity not prohibited by international law. He also agreed with the comment that the regime the Commission was proposing should not relate to activities under special regimes, which were governed by *lex specialis* and should be of a general nature.

22. He was of the opinion that, at the current stage, the Commission's work should not relate to harm originating beyond the limits of the territorial jurisdiction of States. There was a great deal of vagueness in that regard. Who, for example, could be regarded as an innocent victim if reference was being made to the idea of the common heritage of mankind? Who would determine the extent

of damage? Who would be the subject of the request for compensation?

23. With regard to allocation of loss, the Commission should focus on a single model. One could argue about the relationship between absolute and objective liability or cases genuinely involving liability for injurious consequences arising out of activities not prohibited by international law, as opposed to responsibility for acts contrary to international law. There was nevertheless a consensus on certain fundamental principles, which were stated in paragraphs 43 to 45 of the report and which might serve as a basis for the Commission's work.

24. The Special Rapporteur's approach, which was to avoid the question of the form of liability and to deal directly with a regime of allocation of loss, was not very clear. If such a regime was based directly on the "polluter pays" principle and the purpose was to provide compensation for loss from harm arising out of activities not prohibited by international law, what was the legitimate basis for the residual liability of the State that was intended to compensate for loss not assumed by the polluter, namely the operator? If the State was not the polluter and had not broken any rule, why should it pay? The State's obligation to earmark funds for that purpose, as provided for in paragraph 153, subparagraph (h), of the report, would be an acceptable solution, as long as the basis for that obligation was known. If the State had to assume that residual liability, it must also be asked whether it must do so in every case or only in certain specific situations.

25. Since the Special Rapporteur proposed, in paragraph 153, subparagraph (g), that limited liability should be supplemented by additional funding mechanisms, should it be assumed that the liability of the State must always be limited? If so, on the basis of which criteria? He himself believed that liability was limited in the case of objective liability, and that was reasonable because the purpose was to compensate for harm arising out of an activity that was not unlawful.

26. In the case of liability of the guilty party, a reasonable question was whether the harm must be compensated in full. For example, the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters did not make the limitation of compensation provided for in the event of objective liability applicable to the case of liability for the operator's fault. It must then be asked whether the residual liability of the State was justified in the event of the operator's liability. All in all, his view was that the system of allocation of loss caused by activities not prohibited by international law was closely linked to the forms of liability.

27. He shared the Special Rapporteur's view that liability must be attributed not to the operator but to the person who was most in command and control of the activity at the time when the harm had occurred, but it was possible to define the operator as the person who had exercised such control, thereby solving the problem. He also supported the Special Rapporteur's proposal that the Commission should encourage States to conclude international agreements and provide in their national legal systems for intervention and compensation. It was to be expected that

the part of the thesis relating to encouragement of states to make agreements would be further developed. In this respect the provisions of articles 21 and 22 of the draft articles prepared by the Working Group of the Commission at its forty-eighth session, in 1996, and the commentaries thereto were of great importance.<sup>8</sup>

28. He also considered that damage to the environment as such could not give rise to compensation, as indicated in the first sentence of paragraph 153, subparagraph (k), but the idea the Special Rapporteur had put forward in the second sentence, namely, that “loss of profits and tourism on account of environmental damage are not likely to get compensated”, should be given more thought because it did not relate directly to the question of damage to the environment *per se* and because it had not been backed up by any argument in the report.

29. The Commission must continue its work on the topic, but it was too early to decide what form the final product of its work should take.

30. Mr. MELESCANU said that the topic was a difficult one because the practice of States in respect of liability was nearly nonexistent and the conventions adopted related to very specific types of activities, and because the different theoretical and doctrinal approaches to the question went from the outright denial that the topic existed to recognition of the existence of objective liability based on risk. He personally considered that the Commission should formulate rules, without which the regime of international liability would be incomplete. That was all the more important because in the future there would probably be more transboundary harm arising out of activities not prohibited by international law than harm arising out of activities that could be characterized as conventional.

31. The question dealt with in the report was linked to the work the Commission had already done on the prevention of transboundary harm. There was a relationship between prevention and the allocation of loss from hazardous activities. The Commission must therefore carefully consider that relationship, which was the basis for compensation, because it might otherwise end up in a grey area that involved social welfare, not law. The problem was that of the liability of the State in a situation where harm, and particularly transboundary harm, occurred despite its diligence and the adoption of measures of prevention in accordance with its international obligations. The Commission must thus consider the question whether the objective liability of the State for risk actually existed in public international law. If so, such liability would be exceptional because it would be based not on a wrongful act but on a principle of solidarity or of the protection of innocent persons, however controversial such a concept might be.

32. The approach which the Commission had adopted and which was pragmatic in the sense that it was intended to dissociate the question of objective liability from that of the allocation of loss would have to be provisional because of the problem of drafting a regime that was generally acceptable to all members.

33. The second question that the Commission had to consider related to the link between national regimes and treaty provisions on liability for risk and international law. A comparative study of national legislation showed that in civil-law countries the existence of objective liability was recognized, as in the case of the liability of building owners for damage caused by their property. In most of those countries, such provisions of the civil code, which came from Roman law, were regarded as the basis for objective liability for damage caused by the operators of nuclear power stations or by polluters, and in many of those countries no-fault liability had even been made applicable to administrative law. A study of international conventions on transboundary harm showed that they covered a variety of fields, such as damage resulting from oil pollution or the transport of dangerous substances, the disposal of hazardous wastes and the exploitation and exploration of outer space. In view of that diversity, the Commission's task was not so much to find a common denominator in such practice in order to codify it, but to establish general principles which could be applied and would serve as a model that States could follow, since in many cases national legislation was not enough to cover transboundary harm. In that connection, he believed that allocation of loss should be based not on a particular idea of the protection of human rights, as Mr. Koskenniemi had suggested, but on the idea of liability for risk, which was recognized in many civil-law countries. Those principles, which must be of a general and residual nature, as the Special Rapporteur had stressed, were already outlined in paragraph 153, subparagraphs (b) to (h) and (k), of the report. As to the idea referred to in paragraph 153, subparagraph (g), of supplementing limited liability by additional funding mechanisms, he was of the opinion that liability must be limited to a certain amount, because otherwise the burden to be borne by operators and States might be undefined and might hamper economic activities that were very important for the countries concerned.

34. To these principles which he approved of, he proposed to add others. First, the relevant regulations should take into account the double imperative of protecting innocent victims while not creating overly heavy burdens for operators. One should also establish the principle, mentioned by the Special Rapporteur in paragraph 44 of his report, according to which full restitution might not be possible in every case. This idea, which might be covered by a special rule, could also be combined with that of a minimum threshold, namely that of significant damage, and a maximum threshold such as was provided for in insurance contracts and in the complementary compensation regimes of States.

35. The Commission could also explicitly recommend that operators take out insurance to cover the risks. In reality, such insurance should be obligatory for risky activities that might cause transboundary damage. Otherwise it would in practice be difficult to ask operators to be responsible for such accidents. The establishment of a regime covering damages was absolutely necessary in order to enable insurance companies to set a ceiling for damages, for, if responsibility was not capped, one could not require operators to enter into insurance contracts, since the damages caused by accidents such as that in Chernobyl were not really insurable.

<sup>8</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, pp. 143–146.

36. With regard to the scope of the topic, he agreed with the Special Rapporteur that the principles and rules to be established should be linked to the draft articles on prevention, since the two questions were related. He was also in favour of the idea of establishing a drafting group to start formulating general and residual rules on allocation of loss in case of transboundary harm arising out of hazardous activities, based on the recommendations contained in paragraph 153 of the report.

37. Mr. KOSKENNIEMI said that he was concerned about the approach to the topic. At earlier meetings, he had taken the side of the victims of harm and suggested that rules or principles should be drafted from the viewpoint of those victims. Mr. Melescanu had probably been right to say that such an approach was not balanced, since the Commission had to find a happy medium between protecting the interests of victims and carrying out activities for the benefit of society as a whole, but it was specifically that idea of balance that should be called into question, because it could lead only to a dead end in terms of codification, since a balance between differing interests could not be struck without taking account of circumstances. Since circumstances could not be known in advance, such an approach amounted to remaining silent. A rule that only referred to “balancing of interests” in fact transferred decision-making powers to those interests that were well represented in the institutions whose task such “balancing” was. In fact, the victim’s standpoint was rarely represented in the relevant public or private institutions. A “balancing” rule would, in fact, work in favour of powerful commercial or industrial interests. Here the Commission was called upon to take a stand, and he suggested that such a stand should openly favour the interests of victims.

38. Mr. MOMTAZ said that he sympathized with the Special Rapporteur, who had, in a way, been a victim of his own intellectual honesty because he had openly recognized—for example, in paragraphs 2 and 3 of his report—that global and comprehensive liability regimes had failed to attract States, that the attempt to gain compensation for damage through the instrumentality of civil wrongs or the tort law of liability had its limitations, that State liability and strict liability were not widely supported at the international level, that case law on the subject was scant and that the role of customary international law in this respect was equally modest. Those statements, which explained why the Commission had not made any further progress, must not in any way serve as arguments for abandoning the topic. At most, it could be concluded that the task entrusted to the Special Rapporteur was very difficult and sensitive and that a great deal of ingenuity would be required. The excellent survey in the report of what were, of course, sectoral and regional treaties prepared thus far by States clearly showed that the international community was concerned about the need not to abandon the innocent victims of transboundary harm arising out of hazardous activities to their fate.

39. It had rightly been maintained that such harm was often the result of the fact that the State on whose territory the incident had occurred had not fulfilled its obligation of prevention. In such a case, harm would be compensated on the basis of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission

at its fifty-third session. It was now well established that the implementation of the best methods of prevention did not rule out the risk of accidents, and that harm could be caused even in the absence of breaches of international obligations. It would be interesting to consider the extent to which that could apply to the ecological disasters that had taken place in different parts of the world in recent years.

40. In any event, there was no doubt about the relevance and feasibility of the topic and the Special Rapporteur’s competence. The study was based on the assumption that the State in whose territory the harm had occurred had fulfilled its obligation of prevention. In such a case, the operator must be primarily liable and the State might have residual liability, but in both cases such liability could only be limited. Most of the treaty regimes that had been drafted to date were based on the civil liability of the operator and the “polluter pays” principle, which could be regarded as a general principle of international law. It was obvious that, where several operators were involved, joint and several liability could always be claimed.

41. When the operator could not be identified or was not solvent, the basis for the residual liability of the State concerned might be the principle that States were responsible for the activities carried out in their territory. States would then be entitled to require multinationals which carried out hazardous activities in their territory to inform them of the risks that such activities might involve. States whose national enterprises carried out such activities abroad should, in turn, ensure that such operations were carried out in accordance with international safety standards. That approach was entirely in keeping with the principle of the equitable allocation of loss among subjects of law which, in one way or another, benefited from the activities in question. The result would probably be that such activities would be more closely supervised and the risks would be reduced accordingly. A solution based on solidarity, which would draw inspiration from the approach of the law of cooperation, not that of coexistence, might lead more easily to a result. The question would thus be one of establishing a kind of collective insurance for innocent victims, something which the Special Rapporteur described as “joint and several liability”.

42. In any event, such liability could not be absolute, and harm would have to reach a given threshold in order to bring it into play. In that connection, the threshold of “significant harm” proposed by the Special Rapporteur was entirely acceptable and would cover environmental damage in the case where tourist activities were the key sector of a country’s economy and the damage seriously disrupted a tourist season.

43. There should be a savings clause which would rule out harm resulting from armed conflict and natural disasters.

44. It would be better to wait and see how the work on the topic progressed before taking a decision on the form the study should take.

45. Mr. DAOUDI, thanking the Special Rapporteur and congratulating him on his first report, which was clear and complete, said that it was too late to question whether the topic under consideration could be codified, since the

proposal the Commission had made in 2002<sup>9</sup> had been endorsed by the Sixth Committee and by the General Assembly.<sup>10</sup>

46. He agreed with the criticism levelled by some members concerning the restrictive criteria which had been used by the preceding Special Rapporteurs to define transboundary harm, and which ruled out harm to the global commons. He did, however, support the recommendation the Special Rapporteur had made in paragraph 39 of his report for the endorsement of the Commission's decision to designate "significant harm" as the threshold for the obligation of compensation to come into play. But he pointed out that, as was recalled in paragraph 31 of the report, the way that term had been defined by the Working Group in 1996<sup>11</sup> might cause disputes among States and give the courts broad powers of interpretation. The terms used to translate that idea, particularly in Arabic, must be given careful attention.

47. In paragraph 46 of his report, the Special Rapporteur noted that States had attempted to settle the issue of allocation of loss in most recently concluded treaties by relying on civil liability. In part II of his report, he gave a detailed description of the regime which had been established by various international conventions and which varied according to the type of activities in question. Depending on whether such activities were stationary or mobile, the person responsible could be the operator or the owner or the generator, the importer or the disposer. In some cases, the "polluter pays" principle was applied, while, in others, it was not. Some conventions provided for the establishment of an additional compensation fund, while others did not. Of all the conventions referred to by the Special Rapporteur, only the Convention on International Liability for Damage Caused by Space Objects referred to State liability and civil liability. In paragraphs 114 to 121 of his report, the Special Rapporteur nevertheless tried to describe the common features of civil liability. The problem was how to turn those features into rules of international law, and it was not at all certain that codification was the right method; the progressive development of international law in that field was essential.

48. He was very impressed by Mr. Melescanu's proposal that a body of principles should be drawn up to serve as guidelines for the practice of States. He nevertheless wondered whether such principles, apart from the "polluter pays" principle, were in fact general principles of international law recognized by civilized nations, in accordance with Article 38 of the Statute of the International Court of Justice. That was the crux of the problem, but the Special Rapporteur would undoubtedly be able to deal with it.

49. He endorsed the arguments the Special Rapporteur put forward in paragraph 153 of his report concerning the formulation of a model of the allocation of loss. He pointed out that environmental damage, as mentioned in paragraph 153, subparagraph (j), was extremely difficult to quantify, and he suggested that reference should be made to the work being done by the United Nations Compensation Commission (Iraq-Kuwait).

50. Mr. KABATSI said that the topic had been under discussion by the Commission for a quarter of a century and had already been the subject of 21 reports prepared by three different special rapporteurs, as well as several reports by working groups. Its original title had been internally contradictory and had been bound to give rise to problems because its purpose had been to promote the construction of regulatory regimes without resort to prohibition activities regarded as entailing actual or potential dangers of a substantial nature and having transnational effects. The topic was less easy to codify or progressively develop than that of harm arising out of wrongful acts under international law or internal law. The topic had nevertheless continued to attract interest in the Commission and among the majority of States in the General Assembly because, as was only fair and logical, the innocent victims of activities from which some persons nearly always benefited must not be left without compensation. That was why the topic could not be abandoned and progress had been made in studying it. In 2001, the Commission had thus completed a set of draft articles on the prevention of transboundary harm arising out of hazardous activities.<sup>12</sup> That progressive step had to be pursued by navigating through narrow straits between the provisions on State responsibility and those on special treaty regimes, at the international level, and between civil liability and various local arrangements at the internal level. Those narrow straits could be only the general and residual rules advocated by the Special Rapporteur, who had also rightly advocated that the threshold of seriousness of harm should be the same as that adopted in respect of prevention—in other words, the regime to be drafted must be limited to significant harm. With regard to the continuation of the Commission's work on the topic, the proposals made by the Special Rapporteur in paragraphs 152 and 153 of his report were a step in the right direction, and it would therefore be appropriate to establish a working group which would, under the chairship of the Special Rapporteur, continue to discuss and refine the general and residual rules in question, bearing in mind that whatever regime might be established should be without prejudice to claims under international law and, in particular, the law of State responsibility.

51. Mr. AL-BAHARNA, reviewing the history of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that the Commission had decided at its twenty-second session, in 1970, to confine the study of international responsibility to the consequences of wrongful acts of States.<sup>13</sup> That decision had led the General Assembly to declare in 1973 that it was also desirable to consider the injurious consequences of activities which were not regarded as unlawful.<sup>14</sup> The Commission had then decided in 1997 to divide the topic into two parts, one on prevention and the other on liability.<sup>15</sup> The Commission had thus established a working group in that year and had requested the present Special Rapporteur to begin the study of the first part of

<sup>12</sup> See footnote 2 above.

<sup>13</sup> *Yearbook ... 1970*, vol. II, document A/8010/Rev.1, p. 331, para. 66.

<sup>14</sup> General Assembly resolution 3071 (XXVIII) of 30 November 1973, para. 3 (c).

<sup>15</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 168 (a).

<sup>9</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 517.

<sup>10</sup> See 2763rd meeting, footnote 3.

<sup>11</sup> *Yearbook ... 1996*, vol. II (Part Two), annex I, p. 119 (paras. 4 and 5 of the commentary to art. 2).

the topic.<sup>16</sup> In 2001, the Commission had adopted the final text of the 19 draft articles on prevention proposed by the Special Rapporteur. In 2002, a new working group had begun studying the second part of the topic on liability and had submitted a report in which it had recommended that the scope of liability should continue to be restricted to the activities dealt with in the part on prevention. The Working Group had reaffirmed the importance of the role of the State and its obligation to ensure that there were regimes of international and national liability to guarantee equitable loss allocation.<sup>17</sup> In his first report on the legal regime of allocation of loss in case of transboundary harm arising out of hazardous activities, the Special Rapporteur adopted many of the Working Group's recommendations, such as those relating to the duties of the State and the need to ensure that the legal regime to be recommended was without prejudice to the law of State responsibility.

52. In part II of his report, the Special Rapporteur referred to a set of international instruments and sectoral and regional arrangements constituting models of allocation of loss. States had concluded a number of conventions and other international instruments which covered a wide range of environmental aspects and dealt generally with international liability arising out of transboundary harm caused by various types of activities, including nuclear and space activities, activities in Antarctica, and the transport of hydrocarbons and noxious and hazardous substances. He also referred to principle 13 of the Rio Declaration calling on States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage and to cooperate to develop further international law regarding liability and compensation.<sup>18</sup> He himself did not dispute the judgement by the Special Rapporteur in paragraph 114 of his report, but the list of instruments was not exhaustive. The Commission should give those instruments further consideration, preferably on the basis of a separate list which would serve as a reference, in order to come up with some common principles and factors that could constitute a legal regime on allocation of loss.

53. The summations and submissions contained in part III of the report showed that the purpose of the study of the topic should be to draft rules governing the allocation of loss that transboundary harm might have caused despite prevention efforts or when prevention had not been possible. Such loss should be allocated between the operator and those who authorized, managed or benefited from the activity, in accordance with the "polluter pays" principle. Those rules should be designed to ensure that innocent victims, whether natural or legal persons or States, were not left to bear the loss caused by transboundary harm. The principle that the innocent victim should be protected was no doubt generally acceptable, but, as the Special Rapporteur pointed out in paragraph 44 of his report, full compensation might not be possible in all cases. The regime to be established should therefore be designed to encourage all parties concerned to take preventive and protective measures in order to avoid damage. There were, of course, States which were unwilling to accept any form

of liability not arising out of the breach of an obligation under internal law or international law. However, the treatment of the subject from the viewpoint of the allocation of loss between the different players, including the State, might be a generally accepted solution to the problem of liability not involving a wrongful act.

54. With regard to the respective roles of the State and the operator, it was the operator, whether private or public, which must assume primary liability, but, in order to facilitate the compensation of innocent victims, loss should be shared by the different players responsible for the transboundary harm through the establishment of special compensation or insurance schemes. If harm in any way gave rise to the liability of the State, such liability could only be secondary or residual in relation to that of the operator, unless the State itself was the main operator of the activity. The residual liability of the State could, for example, be the result of its function of monitoring the activity or of the fact that the private operator concerned could not fully compensate the victims. In such a case, the State could assume that liability by contributing to a compensation fund or an insurance scheme.

55. The criterion of significant harm adopted in the draft articles on prevention should be used as the threshold of harm as of which the regime of allocation of loss would apply. "Ultrahazardous" activities, such as nuclear activities and the transport of oil, might require a more restrictive criterion, but for the time being there did not have to be a separate regime for those activities, which were in any event covered by their own sectoral regimes.

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

[Agenda item 2]

56. Mr. KATEKA (Chair of the Drafting Committee) announced that Mr. Economides would replace Mr. Baena Soares on the Drafting Committee for the topic of the responsibility of international organizations.

*The meeting rose at 1 p.m.*

### 2767th MEETING

*Wednesday, 4 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. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi,

<sup>16</sup> *Ibid.*, paras. 162 and 168 (a).

<sup>17</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 455.

<sup>18</sup> See footnote 5 above.

\* Resumed from the 2764th meeting.