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Summary record of the 2872nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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should take the form of international conventions, since the two subjects were complementary.

115. Mr. ADDO said he fully agreed with the changes the Special Rapporteur had made to a number of the draft articles. However, he was troubled by the proposed draft article 20. He endorsed the right of the injured national to receive compensation, so that a duty should be imposed on the State to hand over the compensation to the injured individual.

116. Where injury was suffered by a natural person or other legal entity recognized by domestic law, the general rule was that the right to bring a claim in respect of the wrong lay with the State of the victim's nationality. There was thus a presumption that nationals were indispensable elements of a State's territorial attributes, so that a wrong done to the national invariably affected the rights of the State.

117. Since the exercise of diplomatic protection was generally viewed as the right of the State, it had been consistently argued, for example in the *Barcelona Traction* case, that the State had absolute discretion in exercising that right. It was further accepted that the decision whether to exercise diplomatic protection was invariably influenced by political considerations rather than the legal merits of the claim. That point was made succinctly in paragraph 79 of the judgment in the *Barcelona Traction* case, in which the Court had found that:

> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.

118. As a corollary, the State was under no obligation to transmit the compensation obtained to any of the individuals concerned. Moreover, as the right of protection was that of the State, a State might therefore choose to lodge a claim even in the face of opposition from the injured person.

119. Although the discretionary nature of diplomatic protection had been sharply criticized in recent years as being incompatible with international human rights mechanisms, there was insufficient evidence to support the thesis that general international law already imposed an obligation on States to exercise diplomatic protection, even though that might be desirable as part of the progressive development of the law.

120. In closing, he said that all the draft articles with the exception of the proposed draft article 20 should be referred to the Drafting Committee.

121. The CHAIRPERSON invited the Special Rapporteur to address some general remarks to the Commission to assist it in the process of referring the seventh report to the Drafting Committee.

122. Mr. DUGARD (Special Rapporteur) said that two provisions still raised difficulties. First, there was the proposal by the Government of Italy to impose, in draft article 2, an obligation on States to exercise diplomatic protection. That proposal had met with the approval of a few members of the Commission, and he was to some extent in favour of it himself. However, the majority of members had either been silent on the subject—implying support for the status quo, which vested discretion in the State—or else had spoken against it. He therefore suggested that the proposal should not be referred to the Drafting Committee, and that instead it could perhaps be pointed out in the commentary that international law was developing in that direction. As for his proposed new draft article 20, according to his own count, 12 members had spoken in favour of its inclusion, while six had been against. Of the 12 in favour, many had expressed the view that the Commission should adopt a cautious and moderate position. Of the six who had spoken against it, four had said that it was unwise or premature to engage in such an exercise. He therefore suggested that all 19 draft articles contained in the seventh report, which had been adopted on first reading,[52] together with his proposed draft article 20, should be referred to the Drafting Committee for consideration in the light of comments by members of the Commission and by Governments, with the caveat that the latter should not engage in too radical an exercise on the subject, since the majority of the Commission favoured a cautious approach.

123. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to refer all the proposals to the Drafting Committee for consideration on second reading.

It was so decided.

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

[Agenda item 1]

124. Mr. KOLODKIN (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of diplomatic protection was currently composed of Mr. Brownlie, Mr. Chee, Mr. Candioti, Mr. Economides, Ms. Escarameia, Mr. Gaja, Mr. Kemicha, Mr. Mansfield, Mr. Matheson, Mr. Momtaz and Mr. Yamada, together with Mr. Dugard (Special Rapporteur) and Ms. Xue (Rapporteur), *ex officio*.

The meeting rose at 1.10 p.m.

2872nd MEETING

Tuesday, 9 May 2006, at 10.02 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi,

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* Resumed from the 2868th meeting.

[52] See footnote 7 above.

Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Organization of work of the session (*continued*)

[Agenda item 1]

1. The CHAIRPERSON welcomed Mr. Valencia-Ospina and said that the Commission was pleased that such an eminent practitioner of international law had become one of its members.

2. Mr. VALENCIA-OSPINA said that he looked forward to contributing to the work of the Commission. He looked back to the day, 40 years earlier, when as a young lawyer he had realized his dream of attending one of the Commission's annual sessions. He recalled his meeting with Mr. Sepúlveda, whose place he was honoured to take and who had just been appointed judge of the ICJ where he himself had served as Registrar in the past. He was most grateful to the members of the Commission for allowing him to join them, as membership of the highest United Nations body active in the field of the codification and progressive development of law was the crowning achievement of a lifetime devoted to the legal activities of the United Nations.

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) (A/CN.4/562 and Add.1,[53] A/CN.4/566,[54] A/CN.4/L.686 and Corr.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

3. The CHAIRPERSON invited the Special Rapporteur, Mr. Sreenivasa Rao, to introduce his third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/566).

4. Mr. Sreenivasa RAO (Special Rapporteur) explained that he first analysed (in paragraphs 3 and 4) the comments and observations received from Governments (A/CN.4/562 and Add.1) on the draft principles of the allocation of loss, which had been adopted on first reading in 2004.[55] In general, Governments had supported the policy decisions underlying the draft principles, namely, that their scope should be coterminous with that of the draft principles on prevention of transboundary harm from hazardous activities,[56] on which a General Assembly decision had been pending since 2001, and that the draft should be general and residual to allow States the necessary flexibility for constructing liability regimes suited to their needs and to the special features of the sector concerned.

5. More importantly, States had strongly endorsed the obligation to ensure, through the establishment of an efficient system of remedies, prompt and adequate compensation for victims of transboundary damage arising from hazardous activities. That obligation was reflected in draft principle 4, which defined the measures to be taken to that end. It provided for the operator's strict but limited liability, subject to a minimum of exceptions. The operator should take out insurance to cover possible compensation. Moreover, States were increasingly in favour of widening the base of funds, especially when the operator was exempt from liability, when his limited liability could not fully meet the claims or when he was unable to meet his obligations.

6. States likewise deemed it essential that provision should be made for appropriate procedures to ensure that the compensation provided for in draft principle 4 was effective. That was the purpose of draft principle 6, which dealt with international and domestic remedies. The procedures envisaged included the establishment of international claims commissions and lump sum payments. The right to information, non-discriminatory access to administrative and judicial forums, and expeditious and inexpensive access to justice were also necessary ingredients of an efficacious mechanism. Draft principle 6 noted that such remedies must not be any less effective, prompt and adequate than those available to nationals for the same purpose. States had acknowledged the importance of those various measures in their comments, but essentially they felt that no one standard model could combine all the ingredients and that a flexible approach was therefore preferable.

7. There was broad support for the definition of the term "damage" in draft principle 2. Opinions had diverged, however, on the questions of damage to the environment *per se*, standing to sue and the type of claims considered admissible. States had also generally endorsed draft principles 5, 7 and 8, concerning response measures, the need to develop more specific regimes for transboundary damage ("development of specific international regimes") and the utility of incorporating the draft principles into domestic legislation ("implementation"). Some Governments had thought it would be useful for the Commission to identify ways and means of making the basic obligation to provide prompt and adequate compensation more effective, but others had cautioned that any attempt to go into too much detail would compromise the general and residual nature of the scheme and lead to excessive legislation. Opinions had also diverged on the form the draft principles should take.

8. In the next section of the report, the Special Rapporteur addressed Governments' requests for clarification on various points raised under different principles. Paragraphs 11 to 22 dealt with claims concerning damage to the environment and non-use values, management of a multiplicity of claims and the legal status of the draft principles. He submitted that although some people might find the definition of the environment too broad,

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[53] Reproduced in *Yearbook … 2006*, vol. II (Part One).

[54] *Idem*.

[55] *Yearbook ... 2004*, vol. II (Part Two), p. 65, para. 175.

[56] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 146, para. 97.

in a general and residual regime it should be cast in the broadest terms possible in order to "attenuate any limitation imposed under liability regimes on the remedial responses acceptable".[57] A broader definition was also needed in order to facilitate recovery of the costs of reasonable response measures to avoid or mitigate damage to the environment and to help the progressive development of law by building on the decisions reached by the United Nations Compensation Commission on claims concerning environmental damage *per se*.

9. Multiplicity of claims was admittedly a genuine problem that could arise in different scenarios in cases of transboundary damage. In dealing with such matters the tendency was to allow the victim to choose the forum, for example between the State in which the hazardous activity was located and the State in which the damage had occurred. With a single jurisdiction, the possibility of a multiplicity of claims was reduced. When several claims were lodged at the same time against the operator and the State of origin, the same cause of action might result in double recovery of compensation. The court could prevent that outcome by clubbing claims together or by apportioning the award of damages between the operator and the State of origin in proportion to their respective shares of liability and responsibility. However, other solutions were also possible. In any case, the presumption for the purposes of the draft principles was that State responsibility was not attracted, for it was assumed that the State had fully discharged its obligation of due diligence.

10. As far as the legal status of the draft principles was concerned, it was not the Commission's practice to specify which parts of a draft text constituted codification of customary law and which fell into the category of the progressive development of the law. Nevertheless there was undeniably legal value in the Commission's efforts "[to consolidate] developments in a particular area of law and [to make] them part of the *droit acquis*".

11. In response to the comments made by some States he pointed out that paragraphs 7 to 10 of the report reiterated the rationale behind the adoption of a threshold for the application of the draft principles. They likewise explained why there was no point in drawing up a list of activities that would be covered by the draft principles and why it would be difficult to expand the topic.

12. The next chapter reviewed developments in the basic norms on which the draft text rested, such as the precautionary principle, the "polluter pays" principle, the legal basis of liability, notable obligations of States to regulate hazardous activities and minimum standards guaranteeing equal access to justice and the award of prompt and adequate compensation.

13. The precautionary principle played a prominent role in the discharging by a State of its duty of prevention, particularly during the phase in which a hazardous activity was being authorized. Its role was equally noteworthy when transboundary damage was imminent or had already occurred, since a State's obligation to avoid transboundary damage or to mitigate its effects with the best available technology flowed from that very principle. Moreover, the fact that courts often decided to suspend or close down an activity that endangered the environment even when there was no scientific evidence to indicate a threat of serious and irreparable damage showed that the precautionary principle also came into play after the activity had been authorized.

14. The "polluter pays" principle, which had its genesis in customary law and which consisted in channelling strict but limited liability to the operator, however that term was defined, was gaining wide acceptance. If, however, strict liability was to be adopted as an international standard for hazardous activities entailing a risk of transboundary harm, the elements of such liability must be carefully defined. A proper definition was crucial to the realization of the core objective of the draft principles, which was to ensure the payment of prompt and adequate compensation to victims. In that connection, current practice reflected a trend towards liberalization of the concept of foreseeability, a downplaying of the defence of "natural use" and an increasing limitation of exceptions to operator liability (paras. 29–30 of the report).

15. Notable obligations of States had to do with the management of hazardous activities entailing a risk of transboundary harm, particularly after the occurrence of an incident giving rise to damage. States were obliged to monitor hazardous activities continuously, to draw up the best possible contingency plans based on the most up-to-date knowledge of risks and technical, technological and financial resources, and to employ state-of-the-art technology to avoid or mitigate transboundary damage. States were further obliged to notify all States concerned when an emergency arose. Once they had been notified, those States must in turn take all appropriate and reasonable measures to mitigate transboundary damage. The duty of due diligence was an obligation of good governance that every State must honour in accordance with its social and economic situation. The standards applicable to some countries might not be suitable for others, particularly developing countries, owing to their unwarranted economic and social costs (para. 32 of the report).

16. The State also had an obligation to establish a suitable legal regime providing effective remedies that would enable its own nationals to obtain prompt and adequate compensation. That obligation should then be extended to the victims of transboundary damage without discrimination, a requirement that was gaining acceptance. At the very least, however, the State must ensure that the remedies available to victims of transboundary damage were no less prompt, adequate and effective than those available to its own citizens (para. 33 of the report).

17. On the question of prompt and adequate compensation, the report indicated that, at the international level, not all countries had welcomed proposals to establish international and domestic environmental courts to expedite procedures. Moreover, it was hard to define "adequate compensation" precisely. However, as long as compensation was neither arbitrary nor grossly disproportionate to the damage actually suffered, it might be regarded as "adequate", even if it was less than full.

[57] *Yearbook ... 2004*, vol. II (Part Two), p. 75, para. 176, draft principle 2, para. (16) of the commentary.

In other words, "adequate" was not synonymous with "sufficient" (para. 37 of the report).

18. The Commission had reserved its position on the final form of the draft principles when it had last considered the topic in 2004[58] (paras. 38–44). The report reiterated the recommendation that the format of principles should be retained and that the draft should not be turned into a convention. That was largely because it would take time for all the requirements associated with the basic obligation to secure prompt and adequate compensation to be recognized by the courts and uniformly affirmed in State practice. They were currently treated differently in different jurisdictions, depending on the type of activity (paras. 39–40). Draft principles on which there was wide consensus would be of far greater value for the development of the law than draft articles, which were likely to be adopted only by a qualified majority.

19. The final chapter of the report (paras. 45–46) dealt with the relationship between the draft principles and the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001. It was suggested that the General Assembly might consider the adoption of the draft articles on prevention in the form of a convention after a review of those articles in a working group of the Sixth Committee. As part of that review, some elements of liability might be considered for inclusion as an additional article to the convention, where it would be indicated that the obligation of offering prompt and adequate compensation to victims of transboundary damage could be fulfilled by States along the lines set out in the draft principles on allocation of loss, which could be annexed to that convention. Another solution would be for the General Assembly to adopt two separate resolutions, one adopting a draft convention on prevention and the other adopting the draft principles on allocation of loss.

20. He had done his best to respond to the various points raised by Governments and to address certain important issues which had been the subject of extensive comments in the Commission and elsewhere. While he had not attempted to duck any questions, he had to admit that he did not have full and final answers to all of them. In recommending the format of draft principles he had relied on his best judgement and intuition, and he could only hope that the other members would do likewise.

21. Mr. MANSFIELD said that the Special Rapporteur's third report was encouraging, for it revealed a very different picture of the topic from that which had prevailed during the very long time it had been on the Commission's agenda. The analysis of Governments' views on the draft principles on the allocation of loss in the event of transboundary harm arising from hazardous activities showed a convergence of views that was a far cry from the strongly oppositional positions of the past.

22. The Commission could reasonably expect to complete its consideration of the topic at the current session and submit a long-awaited product to the Sixth Committee. If it managed to do so, it would be a tribute to the Special Rapporteur and his tireless efforts. He had listened carefully and sympathetically to very different points of view, calmed a wide variety of fears and sought compromises and constructive solutions even when disagreements had seemed to block the way forward. He had also sought and obtained the involvement and assistance of all members of the Commission and had turned their skills and experience to good account. He personally wished to express his appreciation and admiration for the Special Rapporteur's legal and diplomatic skills.

23. After the introduction, the Special Rapporteur described what he called "significant trends" in Governments' comments and observations. Those trends showed how far the Commission had come on the topic. As the Special Rapporteur pointed out, they amounted to a general endorsement by States of the policy considerations forming the basis of the draft principles adopted by the Commission on first reading in 2004.

24. The first reason it was essential that the Commission should tackle and complete its consideration of the topic was that its work on State responsibility was confined to internationally wrongful acts or omissions attributable to the State. The second was that, while the draft articles on prevention of transboundary harm from hazardous activities and response measures that had been drawn up by the Commission were very important, they could never entirely eliminate the risk of an accident, even if they were followed to the letter. Thirdly, if loss occurred even though the relevant State had fulfilled its prevention obligations, there was no internationally wrongful act on which a claim could be founded. Fourthly, unless that loss was to be borne by an innocent victim, there was an obvious gap in the Commission's work, given the current technological complexity of the world. The fact that States had generally supported the main policy considerations underlying the draft principles reflected their concern to see that gap filled in an appropriate and sophisticated manner that offered sufficient flexibility to take account of the specific requirements of various sectors of potentially hazardous activity and of the different mechanisms employed by different legal systems to ensure compensation for victims.

25. It also reflected a growing understanding and acceptance that compensation of victims of transboundary harm arising from hazardous activities was an inherent but controllable cost of doing business. As he had noted before, the costs occasioned by accidents were huge, irrespective of any liability to pay compensation. Accordingly, it did not matter whether the activity was carried out by the State or the private sector or in a developed or developing country, for the prevention of accidents must be the highest priority, if only from the standpoint of efficiency and profitability. It had come to be widely understood that the cost of prevention and the associated costs incurred if prevention failed were not some kind of extraneous, unnecessary or additional burden, and that prevention was an essential component of effectiveness and efficiency without which a business was unlikely to survive for long without costly subsidies that were not acceptable or sustainable in the current international environment.

[58] *Ibid.*, p. 68, para. 176, General commentary, para. (14).

26. In the next section (paras. 5–22), the Special Rapporteur commented on some of the issues that Governments had raised in connection with the draft principles. He himself could accept the application of the adjective "significant" to the question of the threshold, on the understanding that, as stated in paragraph 7 of the report, "that the threshold [was] designed to prevent the lodging of frivolous or vexatious claims and [was] defined so as to practically allow all claims [involving] more than a negligible amount of damage". He assumed that that explanation would appear in the commentary.

27. On the points in paragraphs 9 and 10 of the report, relating respectively to the suggestion of incorporating a list of activities falling within the scope of the draft principles and to the idea of expanding their scope, he concurred with the Special Rapporteur that there was no need to modify the text adopted on first reading in 2004.

28. With regard to point 4 ("damage to the environment per se and claims of compensation for damage to "non-use" values"), it was true that the exclusion of the global commons from the definition of the environment in draft principle 2 left a large gap, but that deliberate decision of the Working Group, of which he had been a member, did not represent any lack of interest in the question. On the contrary, as the Special Rapporteur had pointed out (para. 12), it reflected that fact that the global commons raised particular problems in relation to standing to sue, proper forum, applicable law and quantification of damage that needed to be examined in a separate exercise. On the other hand, he agreed with the view expressed by the Special Rapporteur in paragraph 13 that it was desirable to maintain a broad definition of "environment", and he supported the Special Rapporteur's comments in paragraph 14 that there was growing international recognition of the significance of the "non-commercial" value of the environment and that it was legitimate to bear that value in mind in claims relating to environmental damage.

29. As far as the next point was concerned, he was not persuaded that a risk of multiplicity of claims really existed. He was not aware of any situation in which a victim had received double compensation. Claims were always handled in such a way as to ensure that this did not occur. Admittedly, the possibility of presenting a claim for failure to fulfil a duty of prevention might not become apparent until damage had been caused and had given rise to a claim for that damage, but international and domestic courts could be relied upon to ensure that all such issues and claims were handled appropriately.

30. The Special Rapporteur's comments concerning the legal status of the draft principles were well founded (paras. 19–22). There might not be much to be gained from further analysis. He had no doubt that the principles would have value and weight at both the political and the legal levels. Moreover, as the Special Rapporteur had stated in the chapter of his report reviewing some of the salient features of the draft principles, some principles might already have the status of general rules of international law. In general, he supported the Special Rapporteur's comments on the five aspects of the principles discussed in these paragraphs (23–37). One of the chapter's features was that the Special Rapporteur had included additional references to recent practice, decisions and writings that strengthened the principles themselves. There was, however, an error in the English version of the footnote to paragraph 30, which should read "could not have been reasonably foreseen" rather than "could have been reasonably foreseen".

31. On the basis of the Special Rapporteur's third report, he was in favour of referring the draft principles to the Drafting Committee. In doing so he acknowledged that a consensus on that sensitive subject, which had long eluded the Commission, had emerged around the form of a set of draft principles and, for the additional reasons given by the Special Rapporteur, it was appropriate that the end product should remain in that form. Nevertheless, he would certainly support any efforts on the part of the Drafting Committee to consider more prescriptive formulations in some places, in keeping with the status of the principles, at least to ensure that casting the principles in non-binding wording did not call into question the fact that at least some of them might have obtained a higher status.

32. He did not have very strong views on the relationship between the draft principles and the draft articles on prevention. Both the possibilities outlined by the Special Rapporteur seemed workable, but once the Drafting Committee concluded its work, that Committee or a working group might be better placed to issue some more specific and nuanced recommendations.

33. Ms. ESCARAMEIA thanked the Special Rapporteur for his availability, his patience and his hard work in seeking to strike a balance between very different points of view in a field that was evolving rapidly.

34. Beginning with the final form of the document, she noted that the Commission had reserved the right to reconsider that question during the second reading[59] in the light of comments by Governments. Of the three States that had commented in writing, two—Mexico and the Netherlands—had been in favour of a framework convention, whereas the United States preferred principles because they were "more likely to gain widespread acceptance in their current form than they would be were they not recommendatory". That argument had been constantly put forward, but she was not at all convinced by it. Actually, the opposite conclusion seemed more plausible. Both the comments of Governments and the debates in the Sixth Committee showed that most States were either in favour of a convention or were open to the idea. That was why the General Assembly, in paragraph 3 of its resolution 56/82 of 12 December 2001, had indicated that prevention and allocation of loss was a single topic and had stated that the Commission should bear in mind "the interrelationship between prevention and liability". It necessarily followed from that mandate that it was not possible to have a convention for prevention and a set of principles for allocation of loss. In its written comments, Mexico stated that not having a set of draft articles went against legal certainty and did not serve the ultimate aim

[59] *Ibid.*

of protecting the global environment and ensuring that the "polluter pays" (A/CN.4/562). Moreover, the innocent victim should not have to bear the loss. If obligations were to be legal, a set of prescriptive rules, and not just a few general principles, was needed. The topical discussion in the Sixth Committee of the General Assembly at its fifty-ninth session in 2005 seemed to suggest that States favoured that approach.[60] Moreover, the need for a set of prescriptive rules was almost universally recognized by non-governmental organizations and academic scholars such as Alan E. Boyle, so often cited by the Special Rapporteur.

35. In view of the above, it was regrettable that in paragraph 44 of his report the Special Rapporteur seemed to favour the form of draft principles, thereby endorsing the view of only a few Governments.

36. With regard to general comments, she noted that the draft principles did not in any way make compensation compulsory. Even if they were framed as draft articles, they would not give victims a right to compensation, but would merely provide for having a compensation mechanism in place—and as they were only draft principles, the guarantee of compensation was very tenuous. Such mechanisms were not even set up in a way that afforded easy access to remedies to victims who needed considerable time and energy, knowledge and financial resources to be able to use the procedures contemplated in the principles.

37. With regard to the draft principles themselves, she endorsed the proposal by the Netherlands to delete the words "as far as possible" in the fifth preambular paragraph, because effective measures should be in place to ensure that natural and legal persons did not incur loss. Noting that she had already called for the deletion of the notion of "significant harm" in draft principle 1, she pointed out that in its written comment, the Netherlands, adopting a position already put forward by the Nordic countries in the Sixth Committee, had been opposed to the adjective "significant",[61] arguing that several conventions, including the Vienna Convention on civil liability for nuclear damage, did not require that threshold and that a much lower threshold was needed because the issue was not relations between States, as in the context of prevention, but the compensation paid to an individual for any damage. It was also important to avoid any discriminatory practice, yet victims who were nationals did not have to prove that they had suffered significant damage and could obtain compensation for any damage, whereas foreign victims had to prove that the damage was significant. In that connection, she had not fully understood what the Special Rapporteur had meant in paragraph 8 of the report when he wrote that "international law [tolerated] certain forms of discrimination in treatment between nationals and foreigners". If such discrimination existed, it was probably in favour of foreigners, whereas in the draft principles it was in favour of nationals. It would be useful to have some clarification in that regard.

38. On the issue of time, to which other members had already referred, she said that damage might not appear to be significant until 20 years had elapsed, but then issues such as obligations and prescription would arise. Moreover, individual cases of damage might not be significant in themselves but could become so through repetition. That raised the question of frequency, which must also be addressed to determine the threshold of "significant". Nor had the Special Rapporteur taken account of the fact that in the *Trail Smelter* case, which was perhaps the first to have considered questions relating to the environment, it had been sufficient to argue that harm, and not significant harm, had occurred, as a number of delegations had pointed out in the Sixth Committee.

39. In the context of draft principle 4 (Prompt and adequate compensation), she endorsed the suggestion by one State to insert the word "all" before "necessary measures" in paragraph 1. With regard to paragraph 3 (*c*), she was pleased that the Special Rapporteur agreed with the comment by Mexico that the burden of proof of a causal connection between the damage and the operator should not reside with the innocent victim. A presumption of causality must be established, and it was the defendant who must prove that no causal connection existed. That should be made clearer in draft principle 4, either by adding a sentence in paragraph 2 or by inserting a new paragraph to that effect. The words "where appropriate" should be deleted in the first part of paragraph 2 and the words "including the State" should be inserted after "other person or entity". That point had been the subject of a lively debate, but although it was established that the State must set up funds and mechanisms, the question of whether it must use its own funds still needed to be clarified. It was widely recognized that, as the United Kingdom had noted, "securing insurance and other financial guarantees is not an easy matter", and thus the State must also be held liable, as had been argued in the Sixth Committee by Mexico, Portugal, Sierra Leone and several other delegations (see paragraph 10 of the report).

40. In conclusion, she welcomed the progress that had been made in the sense that States had accepted the idea that resources should be allocated for such situations, although she considered the current proposals to be insufficient. The question of form was essential for guaranteeing compensation to the victim, whether an individual or the environment. In addition, she did not believe that there should be a threshold for harm, since it was not easily measured in an accurate way. Lastly, the State should make provision for funds to compensate victims when all other means failed, which was all the more probable when damage was extensive. The draft principles before the Commission were thus encouragements for the good intentions of States to set up compensation mechanisms, and they focused primarily on procedural issues. She would have preferred the Commission to have introduced obligations and for the principles to have focused more on securing the right of innocent victims to obtain compensation, and she hoped that the Drafting Committee would take her comments in that regard into account.

41. Mr. GAJA said that the Special Rapporteur's third report had enabled the Commission to make progress on a subject which had given rise to an exchange of many interesting views over the past 30 years, with no result

[60] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat (A/CN.4/549/Add.1), para. 98 (mimeographed; available on the Commission's website, documents of the fifty-seventh session).

[61] *Ibid.*, para. 72.

in sight. The report dealt with questions raised in the comments on the draft adopted on first reading in 2004 and for the most part gave convincing reasons for retaining the previously adopted solution, subject to a few drafting changes. One difficulty was that the Special Rapporteur sometimes covered new ground without saying whether he favoured additions or changes to the text; he took it that the Special Rapporteur did not want to prejudge certain issues and would like to have the views of the Commission before making any specific proposals thereon.

42. In paragraph 8 the Special Rapporteur considered whether prescribing a threshold might be in violation of the principle of non-discrimination and carry the risk that a State might discriminate against those who suffered transboundary damage that was not significant. It was clear, however, that discrimination would not be caused by limiting the general principles to be adopted to instances of significant damage. Other cases would not be covered, because they would be beyond the scope of the draft principles, for reasons that were given in paragraph 7. However, those reasons by no means excluded the application of the principle of non-discrimination in international law also to cases not covered in the draft principles; a provision to that effect should perhaps be added.

43. In paragraphs 17 and 18 the Special Rapporteur provided an analysis of certain issues relating to jurisdiction and applicable law. Some of the explanations he had given on the subject suggested that he had intended not to introduce new issues in the draft principles, but rather to take into account the fact that some States had criticized paragraph 3 of draft principle 6, which provided for access for victims of transboundary damage to "administrative and judicial mechanisms", for being insufficiently precise because it did not specify which courts would have jurisdiction or which law applied. Although trends existed in those areas, the Commission should be very careful and avoid suggesting, even in the commentary, that there were general rules by which States should abide with regard to jurisdiction and applicable law. Those questions were more complicated than they seemed at first glance, and the Commission did not have the necessary expertise to suggest appropriate solutions. The current discussions in the European Union relating to the law applicable to non-contractual obligations (the "Rome II Regulation") showed how controversial the question was: it was much more complicated than simply establishing a general rule that allowed the injured party to choose between the place where the damage occurred and the place where the damage was caused. Instead of proposing solutions that would inevitably give rise to criticism, it would be preferable not to go beyond the general statement contained in draft principle 6, paragraph 3.

44. The approach taken in paragraphs 27 to 30 was inconsistent with the adoption of specific rules on the applicable law, because in those paragraphs the Special Rapporteur was not suggesting that each State should adopt its own rules on conflict but was considering instead whether uniform rules on strict liability should be applied. It might be possible to go a step further than the phrase in draft principle 4 which read "liability should not require proof of fault" and to say that it was not absolute liability. It was even conceivable to exclude liability in case of an act of God or nature, as the Special Rapporteur had suggested in paragraph 30, although to go that far would be problematic: if there was a risk of earthquake, for example, the State would have an obligation of prevention and could not build a dam in an area at risk because of the predictable consequences. However, it would be difficult to assume that liability would be totally excluded just because the obligation of prevention was complied with. Thus, when a hazardous activity was carried out, it must be clear that there could be liability for the consequences even if they were not necessarily attributable to the conduct of a particular operator.

45. He had no firm views on the nature of the instrument that the Commission should suggest but believed, like Mr. Mansfield, that States could take the draft principles into consideration in various ways, such as when adopting treaties applicable to particular categories of hazardous activities—and it was clear that for many activities, specific provisions were needed. Some general principles devised by the Commission might help in defining the content of such instruments. General principles could also be taken into account and applied by an international arbitration tribunal when ruling on a dispute involving those matters, or a national court could draw on the draft principles and decide that they should be regarded as binding or could at least take them into consideration when applying the law. In any case, the nature of the instrument, whether a treaty or general principles, could not be regarded as decisive.

46. The fact that the Commission favoured the adoption of a treaty on prevention did not necessarily imply that it should opt for the same solution with regard to liability. It must be clear that infringement of an obligation under a treaty on prevention would give rise to international responsibility, and not to liability, which occurred when there was no breach of an obligation under international law. Thus two different areas were involved, and the Commission had been right to differentiate between the two in order to dispel any confusion. If the Commission tried to make a single instrument or to have the draft articles and the draft principles refer to each other, that might lead to further confusion. He was therefore in favour of keeping the two instruments separate and giving each its own form so as to make that distinction clear.

The meeting rose at 11.30 a.m.

2873rd MEETING

Wednesday, 10 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.
