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A/CN.4/SR.2226

Summary record of the 2226th 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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when it would be unnecessary to provide such data to accompany the notification because the risk would be quite obvious. Although the Special Rapporteur was emphasizing that the proposed provisions reflected the wording of some specific agreements, he personally thought that less detailed rules were called for in a framework agreement. He also thought that article 17 could be simplified and placed in an annex, as the Special Rapporteur proposed in his report, and he supported the view that no sanctions should attach to the procedural obligations; compliance or non-compliance with them should instead be a factor to be taken into account in negotiations for compensation once harm had occurred. On the other hand, due diligence and the adoption of measures of prevention should be strict obligations.

64. With regard to the obligation of reparation, he would prefer the choice of regime to be left open instead of having a system of civil liability and residual State liability. If such a regime was to be developed, the draft articles would have to require States to make provision to that effect in their internal law. However, domestic legal systems differed as to grounds of action and he wondered how feasible, or even desirable, it would be to insist on that kind of harmonization. It would be better to leave it to States to make what provision they considered appropriate to impose liability on the operator for transboundary harm if it occurred, whether the operator compensated the injured party directly or contributed to the compensation paid by the State of origin.

65. As to the "global commons", he agreed that, if there were no applicable rules, some ought to be framed, but not without first studying the many aspects of the subject. The Commission should make clear that its task was to develop that area of law and should seek a mandate to do so.

66. In connection with the negotiations which the Special Rapporteur had said States would be starting on the topic at some stage, he understood that the Special Rapporteur had meant something other than the inter-State negotiations which always took place in the Sixth Committee when it considered drafts submitted by the Commission or in a diplomatic conference with a view to the adoption of an instrument. The Special Rapporteur had spoken of putting forward several alternative drafts for some articles. His own view was that that would be premature. The Commission should await the General Assembly's reaction to its report on the status of the topic before considering such an unusual procedure, even if the topic itself was an unusual one.

67. Lastly, he thought it would be useful for the Commission to inform UNCED that it was doing work which had a bearing on the environment. For that purpose, it could, as recommended by the Special Rapporteur, ask a working group to prepare a paper to be approved by the Commission and sent to the Conference. The paper should also report on the progress of the Commission's work on the law of the non-navigational uses of international watercourses.

The meeting rose at 1.10 p.m.

2226th MEETING

Wednesday, 19 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/437,[1] A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR[2] (*continued*)

1. Mr. PAWLAK thanked the Special Rapporteur for his seventh report and his useful and inspiring introduction. The opinions expressed by the Special Rapporteur and his request for the views of the members on the topic deserved careful consideration. Like many other members, he was deeply concerned that, despite 14 years of determined effort, the draft articles on the topic were not even ready to be sent to the Drafting Committee. One reason was that the Commission had allowed the topic to grow from a relatively limited one covering State liability for non-prohibited activities into a quasi-omnipotent and uncontrollable monster encompassing virtually the whole of international environmental law. Of course, that growth had been fuelled by long-standing concerns about the degradation of the global environment and environmental accidents.

2. In order to achieve what should be its basic objective, namely, fulfilling its obligation to the General Assembly, the Commission should be working not towards the elaboration in the distant future of an overall convention, but towards the drafting in the near future of a relatively narrow and practical legal instrument, which could meet the international community's basic concerns and be accepted by States as a useful tool to combat any abuses arising from the use of new technologies. In other words, the monster topic had to be controlled and contained.

3. The Commission would do best to limit itself to one basic objective: laying a firm and scientifically sound foundation for the topic. There were a number of exist-

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[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook ... 1990*, vol. II (Part Two), chap. VII.

ing legal principles which could contribute to the achievement of that objective. At the same time, the Commission could not begin its work by simply elaborating politically acceptable articles. No builder or architect would begin construction on a building without having some idea of its nature. He therefore did not agree with the Special Rapporteur that a decision on the nature of the instrument could be taken at a later stage. In that connection, he shared Mr. Ogiso's view (2225th meeting) that the Commission might prepare a short draft of a binding legal instrument that might take the form of a convention or a treaty and would set forth the principles under which reparation would be made for actual and appreciable transboundary injury or harm.

4. There were strong moral and legal grounds for establishing such principles, the main argument being that the victim should not be left without legal protection. The procedures for obtaining compensation should be practical: civil liability should be assigned to the operator; if that obligation could not be fulfilled, responsibility would then be assumed by the State. The State would also be liable when the authors of the harm could not be identified, when liability could not be assigned fairly among operators or when transboundary harm was the result of cumulative effects.

5. He had great sympathy for the particular problems which might arise in developing countries; that situation had been eloquently described by Mr. Sreenivasa Rao at the preceding meeting. Those problems might be solved through the assistance of existing or specially established international agencies or by setting up special funds.

6. The Commission also needed to consider some kind of arrangement for multinational corporations, which were playing an increasingly important role in almost all activities that gave rise to transboundary harm. States had to find a way of reconciling the commercial needs of multinational corporations with the need to assign liability for the injurious consequences of activities that were not prohibited by international law. In that context, it would be best to focus on easily definable consequences, such as the effects of nuclear disasters, oil contamination, deforestation, and the like.

7. As he had stated at earlier sessions, the main purpose of the Commission's work on the topic was to elaborate a binding system of rules governing compensation for transboundary harm arising out of activities not prohibited by international law. Such transboundary harm should be based not on the concept of risk, but on the concept of real, sustainable and appreciable harm. The Commission should not be concerned that some States were not yet prepared to accept obligations relating to such harm. In fact, there was growing awareness among States of their interdependence and of the collective responsibility to prevent further degradation of the environment. Most States, by sheer necessity and out of their own interests, would accept realistic rules. For example, Principle 21 of the Stockholm Declaration[3] was almost universally accepted: it gave States freedom to do as they wished within their own territory and, at the same time, it ensured the inviolability of the territory of States with respect to effects originating in other States. In addition to that principle, there were a number of other principles that provided grounds for the obligation to make reparation, *inter alia*, the duty to cooperate in preventing and minimizing transboundary harm or its consequences and the principle of non-discrimination. Those principles seemed to be acceptable to the Commission and had already been endorsed in part under other topics, including international watercourses.

8. The Commission should pay particular attention to the problem of prevention. The need to draft a set of provisions on that issue had been emphasized at the outset. Although the obligation to take all reasonable measures to prevent or minimize harm was firmly established in international practice, prevention was still considered to be a "soft" area of general international law. He agreed with the Special Rapporteur that article 8 should be modified in order to reflect the real obligations of States; the procedural measures contained in articles 11 to 15 and the unilateral measures provided for in article 16 should also be further refined. The issue of prevention could serve as the basis for a draft document of a general, non-binding character which would contain recommendations for States. The Commission could thus emphasize the concept of risk as a fundamental factor in all prevention activities. Accordingly, risk should be covered neither by the articles pertaining to scope nor by those concerning reparations; rather, risk should be limited to the articles relating to prevention.

9. In his opinion, there was no need to include the issue of the "global commons" under the topic of international liability. That matter could be treated as a separate topic by future members of the Commission.

10. He shared the views of the members who wanted the English title of the topic to be amended by replacing the word "acts" by the word "activities". The word "activities" would better reflect the type of endeavours with which the Commission was dealing.

11. He endorsed the proposal to create a working group to draft basic principles for the topic. That group should concentrate on principles to be included in the first draft of a binding instrument to be submitted to the General Assembly and, in outline form, to UNCED in 1992.

12. Mr. AL-KHASAWNEH expressed gratitude to the Special Rapporteur for his seventh report, which he had introduced in such an able fashion.

13. In the introduction, the Special Rapporteur reiterated his view that the Commission should not be concerned about the eventual form of the draft articles. Yet, later, in arguing against including a list of dangerous activities in the draft articles, he warned that such inclusion would change the nature of the draft articles, so that instead of being a framework agreement encompassing all activities they would become an instrument intended to regulate specific activities. The Special Rapporteur had used similar language in his introduction to his sixth report.[4] In his seventh report, the Special Rapporteur, in discussing dangerous activities, made a distinction be-

[3] See 2221st meeting, footnote 6.

[4] Ibid., footnote 7.

tween the Council of Europe draft rules and existing conventions. He then concluded that:

> ... [those] rules instead deal with any dangerous activity; they would constitute a general convention just as the Commission's draft articles are intended to be.

14. Those statements revealed two things. First, although the Special Rapporteur had asked the Commission not to prejudge the final outcome of the draft articles, he seemed to be referring to a framework convention as if it were the natural outcome of the Commission's work. He would appreciate clarification in that regard from the Special Rapporteur. Secondly, the terms "framework convention" and "general convention" were used interchangeably in the report. For the Special Rapporteur, a general convention was one in which the subject-matter was not confined to one activity, but which included general principles applicable to liability in all fields, or at least in those fields which had not been expressly excluded from the scope. In his own opinion, the two terms were not synonymous. A framework convention contained general residual rules that would encourage the negotiation of more specific regimes and would apply in the absence of those specific regimes. A general convention contained more detailed rules which would apply directly and not residually. He would appreciate clarification from the Special Rapporteur on that point as well. In particular, he wished to know whether the specific regimes varied according to the subject-matter of the activity in question or according to the negotiating States in each individual case.

15. Although he would not reiterate his criticism of the framework convention approach, he drew the Special Rapporteur's attention to the statement he had made on that issue in 1987.[5] Such an approach might give rise to a mosaic of rules, which represented the very antithesis of codification and was dependent on such non-principled solutions as using the results of negotiations.

16. Mr. Shi had referred at the preceding meeting to the propensity for drafting conventions that had taken hold in the 1960s as a result of the successful codification efforts undertaken by the Commission. He had also spoken of the less than optimal results achieved in the succeeding decades. He was not sure whether those facts argued for abandoning the traditional form of a binding general convention. He believed that the Commission should prepare its draft articles on the assumption that they would constitute a universally applicable general yardstick against which acts could be measured with certainty and clarity.

17. With regard to the title of the topic, the issue was probably more complex than simply harmonizing the various language versions. He did not endorse the suggestion that the word "acts" should be replaced by the word "activities". In fact, he would argue the opposite, namely, that the Commission should confine its topic and scope to acts, not only because the word "activities" was a dangerous one for lawyers, but also because the failure to distinguish between acts and activities had been at the heart of the confusion regarding what constituted liability *sine delicto*. Writing in the *Netherlands Yearbook of International Law*, Mr. Akehurst had stated:

> Because a certain activity, e.g., the operation of a smelting plant, is not prohibited by international law, the Commission has assumed that any liability incurred in the course of that activity must be liability *sine delicto*. This is a *non sequitur*. The fact that operating a smelting plant is permitted by international law does not necessarily mean that all acts committed in the course of that activity are permitted by international law.[6]

18. The Commission's focus on the environment during its discussions of the present topic was somewhat puzzling, since most rules on the environment were expressed in terms of prohibitions whose boundaries were shifting all the time as man's freedom to deal with nature as he chose was being regulated or curtailed in the interests of survival, civic responsibility or intergenerational equity. It was also puzzling in view of the historical development of the topic as an offshoot of the topic of State responsibility governed not by responsibility for wrongfulness, but by the only other active principle of obligation of which legal reasoning admitted, namely, causal responsibility. By widening the scope of the topic to include lawful activities and introducing duties of prevention, the topic had begun to encroach on the domain of State responsibility. It was time to consider going back to a limited, but manageable and focused scope of the topic, namely, the provision of compensation once harm had occurred. The topic was based on a fundamental principle of equity: the innocent victim should not be left to bear his loss alone. In following such logic, the Commission might end up with a rather short draft. Indeed, in one of his earlier reports, the Special Rapporteur had warned that the entire draft could consist of a single article requiring compensation when harm occurred. That was no doubt an exaggeration intended to show the absurdity of the course which he himself was now advocating. Nevertheless, the draft articles might well be limited to a number of articles defining harm; the definition of the threshold beyond which harm must be compensated; and principles governing that compensation and exonerations therefrom.

19. With regard to the question of risk, he agreed with Mr. Hayes (2225th meeting) that defining the activities that should be included in the topic either through the use of the term ultra-hazardous or through a list would unjustifiably narrow the scope of the draft articles. While an attempt to introduce the concept of the foreseeability of risk would not cause confusion, it would miss the point: the essence of the obligation under the current topic was a causal one based on the notion of equitable justice, which was triggered by the occurrence of harm. Even where risk was imperceptible, harm could occur and it would be unjust to leave the innocent victim to bear his loss alone. He was not at all convinced that such logic would give rise to an unrealistically wide scope under which the occurrence of harm automatically led to compensation.

[5] *Yearbook ... 1987*, vol. I, 2020th meeting, para. 12.

[6] M. B. Akehurst, "International liability for injurious consequences arising out of acts not prohibited by international law", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, p. 8.

20. In the first place, compensation should be due only in respect of harm that crossed the threshold of what could be regarded as significant: in that sense, it was the weakest reflection of the maxim *sic utere tuo ut alienum non laedas*; secondly, such harm must be confined to physical activities; and, thirdly, the amount and form of compensation must be decided through a process of negotiation whose parameters should be laid down, in general terms, under the topic. In his view, such negotiation should be governed by a principle referred to by Mr. Riphagen, a former member of the Commission, according to which a delicate balance should be maintained between the need for permanent negotiations between States and respect for the normative content of international law. The question of the foreseeability of risk could have an effect on the amount and form of compensation—a term he preferred to reparation, which was to be avoided, as it evoked images of State responsibility. The remedies available should not be confined to pecuniary compensation: a decision to let a smelting plant continue to operate at a reduced level was a case in point.

21. He had no strong views on the primacy of civil liability or international liability; indeed, that part of the report caused him the least difficulty.

22. In short, the inherent complexity of the topic had been compounded by its intrusion into the realm of State responsibility. The fact that the topic was so broad in scope, because of the preventive aspects introduced by the reference to activities rather than to acts, made it difficult to manage. As if those difficulties were not enough, a stronger infusion of the progressive development of international law than the Commission and the Sixth Committee had been accustomed to had not made for consistency. The prospects of acceptability by States were therefore as difficult to evaluate as ever. The topic should not be seen as one primarily concerned with the environment, something that would be unfair both to the topic itself and to the concept of environmental protection. The latter was best achieved through prohibitions and positive obligations with respect to prevention, which were part of State responsibility. The aim of the topic should be to lay down the general principles governing the conditions for the existence of no-fault harm and the consequences of such harm.

23. Mr. DÍAZ GONZÁLEZ said that the Commission should be grateful to the Special Rapporteur for laying the foundations on which the scope of the topic could be developed. It was apparent from the many lengthy statements made over the years, however, that opinions among members regarding the fundamental principles were sharply divided.

24. In introducing his seventh report at the 2221st meeting, the Special Rapporteur had asked the Commission not to reopen a general debate on the topic. In paragraph 1 of the report, he had indicated that it might be worthwhile for the Commission to prepare an overall review of the current status of topic and also that there was no consensus on several aspects of the topic—including some of the basic premises—and that it was not his task to arbitrate the differences. While he himself agreed entirely with those statements, he would none the less be grateful if the Special Rapporteur could shed some light on the reference he had made to negotiations. What kind of negotiations did the Special Rapporteur have in mind, for what purpose and among whom?

25. Although he was also grateful to the Special Rapporteur for the informal paper he had circulated seeking members' views on certain important issues,[7] it was regrettable that the Special Rapporteur had not proposed solutions to the Commission or drawn conclusions from the discussion. True, it was not the Special Rapporteur's task to arbitrate, but he was well versed in the subject and it would be extremely helpful if he could make some specific proposals in the light of the debate.

26. Much had been said about the nature of the instrument, but the importance of that question would depend on the instrument that was ultimately prepared. If it was a draft convention, it would have to contain a number of obligations. If it was just a code of conduct, however, the method and procedure would differ; and a framework agreement, too, would differ in form.

27. From the outset, he had favoured the use of the word "activities" rather than the word "acts" in the title of the topic. Indeed, in Spanish, it had always been stressed that the word *actividades* should be used, not the word *actos*. Acts did not give rise to harm or consequences; harm and consequences arose out of activities conducted pursuant to acts that were lawful and permitted by international law.

28. The topic was almost exclusively concerned with the progressive development of international law and, in fact, involved the creation of new law, which explained the confusion that persisted. Mr. Pellet (2223rd meeting), for instance, had raised the question whether the topic was concerned with general activities not prohibited by international law or with activities that gave rise to environmental harm. It was true that, thus far, the topic—like the topic of international watercourses—had been more concerned with issues of environmental law than with other areas of law. The Commission would therefore have to decide exactly what the topic involved and should, if necessary change the title to read "Activities causing harm to the environment".

29. The doctrine of risk and of no-fault liability was known mainly to common law and those trained in that law. Consequently, most of the terminology used in the topic was borrowed from common law. An attempt should therefore be made to adopt certain norms which would preclude the need to reproduce the English terms exactly and to define the legal content of those terms. Many of the terms used in English had no exact equivalent in Spanish and, even when translated, did not have the same legal content. Great care was needed when dealing with topics involving the creation of new law and it was necessary to start by defining the terms used.

30. In considering the need for a list of substances, it was important first to decide what type of instrument was involved. If it was to be a framework agreement, such a list would merely complicate matters, for it would

[7] See 2222nd meeting, footnote 5.

have to be drawn up on the basis of the particular circumstances of States which entered into special agreements on specific substances. On the whole, therefore, he considered that a list of substances was not really necessary and that the matter should be set aside.

31. The Commission would have to decide whether it wished to prevent harm or risk, which was but one component of harm. He did not know whether it was possible to prevent risk, since it was, after all, a part of any human activity. It was, however, possible to prevent harm and activities involving a certain degree of risk. The crux of the matter was the magnitude of the harm caused and the scale of the risk. A State which carried out an activity should know whether it was running a risk and how great that risk was. International law was not so much concerned with acts as with their consequences.

32. The Special Rapporteur had suggested that a working group should be appointed to assess the work carried out thus far. If there was to be such a group—and he was not opposed to the idea—it would have to have a special mandate, for it could not just arrogate to itself the functions of the Commission and establish principles in its name. If, however, the purpose of the working group was connected with the forthcoming UNCED, he did not think that the Commission could be very helpful at that Conference, since it would be concerned with highly technical—not legal—matters. The Commission should, however, pay due attention to the work carried out at the Conference and he would therefore have no objection if it decided to send an observer, in line with its usual practice, but he did not think that someone should be appointed to establish principles or take decisions in the Commission's name.

33. The topic of international liability had been tossed back and forth between the Commission and Sixth Committee for 10 years and the time had come for principles to be established on the basis of the conclusions arrived at during the debate. The Special Rapporteur had made an understandable request that he should receive guidance on how to proceed and he supported him in that request.

34. Mr. BARSEGOV paid a tribute to the flexibility, openness and resourcefulness of the Special Rapporteur, who had investigated a variety of different approaches in his seventh report in an attempt to find generally acceptable solutions. He said that in choosing to present an overall review of the current status of the topic, instead of an article-by-article analysis, the Special Rapporteur had broadened the base of the subject. In particular, he had raised the question of the possibility of bringing together liability and responsibility for transboundary harm and of introducing the notion of absolute State liability. Those ideas must be discussed, for they were crucial to the draft articles and, in a wider sense, to the development of international law.

35. Perhaps the Special Rapporteur ought not to have raised key questions, such as the very title of the topic, at such a late stage. No doubt he had done so because a majority of the members of the Commission had insisted on a link between liability and transboundary harm. However, the new issues could have been more appropriately raised at the Commission's next session, when its new members would welcome an opportunity to express their views. Far from holding back progress on the topic, that would actually have advanced it.

36. While he agreed with the Special Rapporteur about the pace at which treaty norms on liability in specific fields of activities were being developed, he considered that the Commission should not compete with other international organizations and artificially speed up the work. However, there were sound reasons why the Commission was experiencing difficulty. The subject was a complex one and the process of the formulation of rules governing liability in specific areas of activities was in the process of development. However, the fundamental reason for the slow rate of progress was that the item within the Commission's mandate had been considerably extended. That was by no means the fault of the Special Rapporteur, who had reflected the view of the majority of the members in refusing to confine harm to inherently risky activities, which, according to their own words, would be an unduly narrow approach.

37. Inevitably, the Special Rapporteur had to link liability with transboundary harm which was the result of the breach of some obligation or norm of conduct. He personally did not object to tackling whatever legal issues might crop up, including the question of liability for transboundary harm occurring as a result of activities which were not inherently risky, but he could not endorse the confusion of different legal concepts or institutions. In particular, liability and responsibility differed as to their legal nature and had different legal sources and led to different consequences. Confusing them would merely delay the work and make it impossible to find a quick solution.

38. Furthermore, the Commission had agreed, in accordance with the General Assembly's decision, to consider liability and responsibility as separate concepts. If it now wished to treat them as indistinguishable, that was a new decision which would have to be approved by the Sixth Committee of the General Assembly.

39. The Special Rapporteur had broadened the Commission's mandate by treating liability and responsibility interchangeably. However, the term "acts" was used not only in English, but in the Russian and Chinese texts as well. That substitution was not an accidental one, for there was a genuine difference between the two terms. A person who travelled by car or lit a stove in his house was performing acts which did not entail liability; if the entire country did so, activities were being performed which might well entail liability, if the consequences of those activities extended across the border. It then had to be decided to whom such liability should be attributed and on what basis. In his previous reports, the Special Rapporteur had been considering strict or objective liability as a distinct legal concept, but, now, he was presenting liability as a manifestation or as a consequence of responsibility. In so doing, he was relying on the approach followed by Mr. Quentin-Baxter at an earlier stage of the work on the topic, when no true distinction had been drawn between liability and responsibility. The Special Rapporteur, in his second report, seemed to agree with the view that

responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required.[8]

Furthermore, he stated in his seventh report that:

> Those undoubtedly were the meanings of the terms "responsibility" and "liability", at least in international practice and without venturing into the dangerous territory of the meanings of those terms in Anglo-Saxon law.

As now proposed by the Special Rapporteur, it became extremely difficult to decide on the nature and extent of the responsibility of States. What the Special Rapporteur appeared to be proposing was State responsibility for breach of the obligations of due diligence. In his own view, that would be to trespass on the topic of State responsibility, which had been entrusted to another Special Rapporteur.

40. Considering liability to be the result of State responsibility, the Special Rapporteur was actually introducing a concept of absolute State liability, which he regarded as the "middle way". He himself could, however, not help wondering whether States would really agree to assume financial responsibility *vis-à-vis* all non-nationals for all acts by private entities or individuals—not merely by large operators or factory owners, but also by owners of houses and cars. It was one thing to establish conditions under which harm was to be compensated by operators and quite another to pay for damage caused by operators who were themselves unable to pay or could not be traced. Nor could absolute liability be attributed by reference to the Convention on International Liability for Damage Caused by Space Objects. That instrument had been drafted and adopted on the assumption that all future space activities would be carried out by States, which must bear absolute liability for transboundary harm. The Special Rapporteur himself recognized that responsibility for damage caused by space objects was different, in principle, in legal terms, from the situations envisaged in the draft articles, which aimed to establish general principles of objective and strict liability. It was evident that absolute State liability could not be extended to all activities, in particular to private activities. The draft should be oriented towards the civil liability of operators, in accordance with the practice of States.

41. Turning to the concept of harm, he stressed that he in no way denied the role of harm in triggering liability. Liability derived not from risk itself, but only in case of actual harm resulting from activities involving risk. Harm could result both from innocent and from wrongful actions or activities. It might lead to different forms of responsibility, such as objective responsibility, namely, liability for harm resulting from lawful acts, responsibility for wrongful acts, namely, a result of the breach of an obligation, a violation of rules of conduct, including want of diligence, and so forth. The whole question was in the source and nature of the liability in question.

42. If harm was caused by an activity which was inherently risky, but which was in full compliance with the obligations of a State, it could be only the result of *force majeure*, such as an earthquake. In such cases, the State of origin of the transboundary harm and the State which suffered the transboundary harm were both victims and they must cooperate. Adequate principles must therefore be devised to compensate for transboundary damage taking into consideration the specifics of liability. Responsibility for transboundary harm caused by the breach of an obligation was a different matter and one which the Commission had not yet tackled properly. It must now remedy the omission, without confusing the different forms of responsibility. He hoped that, in the next quinquennium, both themes of liability and responsibility would be at the centre of the Commission's work. Its success in framing draft articles on those two subjects would depend on different conceptual approaches to the topics. The results of the work done so far could well be assessed in a working group, which would take account of all the views expressed. That would help to define what ground remained to be covered and would enable the Commission to complete its task. However, he could not go along with the proposal that the Commission should prepare a document for UNCED, since it had neither a clear concept on the matter nor a mandate from the General Assembly for that purpose.

43. Finally, with reference to the "global commons", he personally was wholly in favour of the international legal regulation of questions relating to the "global commons". However, the Commission must proceed with realism and caution. The subject of the "global commons" could not be included in the present topic and was more suitable for independent study, if the General Assembly so decided.

The meeting rose at 11.35 a.m.

2227th MEETING

Thursday, 20 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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[8] *Yearbook ... 1986*, vol. II (Part One), p. 146, document A/CN.4/402, para. 4.