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SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

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The meeting was called to order at 10.30 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries - Denmark, Finland, Iceland, Norway and Sweden - said that those countries attached great importance to the issue of international liability for injurious consequences arising out of acts not prohibited by international law. They were convinced that there was a growing realization of the need to draft a legal instrument in the field of international liability, most specifically with regard to transboundary environmental and ecological harm. The main cause for that harm was unsustainable patterns of production and consumption, particularly in the industrialized countries. Developments clearly demonstrated the need for appropriate global and regional legal instruments to cope with that situation. For that reason, the current work of the International Law Commission should be linked to other efforts to protect the environment and should be seen in that context. With the United Nations Conference on Environment and Development scheduled for 1992, it would be most desirable if the work of the Commission could be, if not finished, at least brought to an advanced stage so that it could be presented at that Conference.

2. The complete set of rules that had now been drafted took into account many of the comments and proposals put forward the previous year and reflected the practices that had evolved in recent years in the field of environmental protection, especially the articles on preventive measures. The Nordic countries noted that the draft articles contained elements, structures and terminology from pre-existing agreements or draft agreements. In their opinion, that approach was commendable and would certainly facilitate further discussions.

3. In addition to the primary objective of prevention and restoration, another common goal should be a general framework convention based on the need to protect the innocent victim, whatever his legal status, and to guarantee prompt and adequate compensation for damages. They understood, however, that the sights should not be set too high. In that regard, the words of the Special Rapporteur in paragraph 48 of his report (A/CN.4/428) were worth remembering.

4. They welcomed article 10 of the proposed draft articles, which reflected the principle sic utere tuo ut alienum non laedas. The preventive measures in the new chapter III were, in general, acceptable. With respect to article 17, it would be useful for the convention to include certain factors that States should take into account. They were somewhat hesitant about article 20 because of its mandatory language, which should be examined in greater depth.

5. There was merit in the view expressed by some members of the Commission that chapter VI should begin with a clear provision on the obligation to pay

(Mr. Corell, Sweden)

compensation. In that regard, the Nordic countries welcomed article 24, which established the obligation to pay compensation for harm to the environment. However, the article raised questions as to the scope of that obligation. The criteria for compensation needed further elaboration. Also, the relationship to civil liability régimes was not clear.

6. As they had stated the previous year, the Nordic countries would like to see the relationship between State liability and civil liability clarified in the draft text. The draft articles should establish a régime for cases in which civil liability proved inadequate. That meant that the State liability established would be residual in nature. It also meant that, in the case of a civil liability régime, the injured party - whether a State, a physical person or a legal person - would be entitled to bring action before the courts of the State of origin. When the régime provided for in the draft articles was invoked, the affected State would act in its own capacity to protect itself and its territory from transboundary harm and to protect the interests of its inhabitants. However, that did not prevent private persons within that territory from taking such remedial actions as they saw fit. It was evident that damages paid under a civil liability régime would have to be deducted if damages were paid in accordance with the State liability régime. He mentioned the observations made in that connection by the representatives of Canada, Italy and Australia in their statements the previous day.

7. The foregoing brought out the question of whether the State of origin had primary liability. Some members of the Commission thought that the operator should be held liable, an approach compatible with contemporary State practice. However, reference to State practice could not be decisive in the context of the draft articles, since, as the Nordic countries had previously mentioned, those articles dealt with a new area in which the classical legal view was not applicable. The present approach was to try to protect the interests of the victim.

8. The question of global commons, which was also dealt with in principle 21 of the Stockholm Declaration of 1972, was an important and most difficult issue. It was necessary to bring its legal aspects into focus, especially in an era of creeping pollution and global warming. The Special Rapporteur had presented some of those issues in his report.

9. The Commission was seeking the views of the Sixth Committee on two specific points (A/45/10, para. 531). With respect to point (a), the five Nordic countries would prefer general objective criteria to a list of dangerous substances. If such a list were compiled, it should not be exhaustive. As for point (b), the Nordic countries had spoken in favour of a régime of State liability the previous year. In their view, it was important to establish civil liability régimes. The present trend was towards a system that would make it possible to provide adequate compensation to victims in situations in which the harm caused was of considerable magnitude and civil liability régimes would perhaps prove inadequate. For that reason, they did not think that it was necessary for the Commission to formulate rules on civil liability except so as to indicate the relationship between State liability and civil liability under the convention. Such provisions might also indicate that the State of origin should have primary liability.

(Mr. Corell, Sweden)

10. According to present international practice, the operator, owner, courier, etc., was the primary subject of obligations, and States sometimes bore residual liability for amounts not covered by the private entity. However, unless a decision was reached as to whether it was possible to establish a system in which the State of origin had primary liability, the draft articles would not be very far-sighted. It should not be forgotten that private entities were often limited in their ability to pay damages, since they were dependent on the extent to which insurance companies were prepared to accept responsibility for the activities in question.

11. Mr. WINKLER (Austria), speaking on the topic of the jurisdictional immunities of States and their property (A/45/10, chap. III), said that, firstly, in response to the question of whether the draft articles should include a special provision relating to State enterprises with segregated State property, his delegation continued to believe that it should be included. It had noted with interest the new wording suggested by the Special Rapporteur, which in its view would improve the text and should be adopted by the Commission. It also welcomed the statement on the subject by the representative of Australia at a previous meeting.

12. Secondly, with respect to draft articles 12 through 28, it was surprised by the view expressed by some members of the Commission that there was a scarcity of judicial practice or evidence of State practice concerning the labour law disputes provided for in article 12. While that might have been true some 10 years ago, it was not now. Article 12 would be considerably improved if paragraphs 2 (a) and 2 (b) were deleted. His delegation also questioned the reference in paragraph 1 to "social security provisions which may be in force in that other State", which was why it supported the suggestion of the Special Rapporteur, as stated in paragraph 182 of the report of the Commission.

13. His delegation believed that it was essential to retain article 13; the arguments put forward in favour of its deletion were unfounded. Furthermore, the European Convention on State Immunity contained a similar provision. While article 16 did not pose any particular problems, his delegation still considered its inclusion unnecessary. There had been widespread support for article 17; it would, however, be preferable to delete the expression "or is controlled from" in paragraph 1 (b). A clearer criterion was provided by the two other references in that subparagraph, which were sufficient.

14. With regard to article 19 and the three issues which required clarification, his delegation preferred the expression "civil or commercial matter", to the bracketed terms in the chapeau of the article; it regarded as unnecessary the addition of a new subparagraph (d); and it concurred with the opinion of the Special Rapporteur (A/45/10, para. 210) that for the last part of the chapeau, the formula used in the European Convention on State Immunity was preferable, given its broader scope.

15. In the view of his delegation, article 20 should be deleted. Measures of nationalization, as sovereign acts, were sovereign acts not subject to the

(Mr. Winkler, Austria)

jurisdiction of the courts of another State, and could not be considered as representing an exception to the principle of State immunity. As for part IV of the draft, the criterion adopted by the Special Rapporteur seemed reasonable, and the amendments which he had suggested represented improvements to the text. It would be sensible to merge the original texts of draft articles 21 and 22 and also to delete the phrase "or property in which it has a legally protected interest". So far as article 24 was concerned, Austria remained opposed to the hierarchy of the various forms of service of process. The competent court should be free to choose the most suitable procedure for each particular case. His delegation also continued to have doubts regarding the transmission of documents by mail to the head of the Ministry of Foreign Affairs, since, in the case of transmission through diplomatic channels, it would be sufficient to address the relevant documents to the Ministry. Finally, his delegation favoured the deletion of the words "if necessary" from paragraph 3.

16. Austria had no difficulties in accepting the Special Rapporteur's proposed addition to paragraph 1 of draft article 25 (A/45/10, para. 232). The Austrian courts were obliged to inquire ex officio into the question of jurisdiction. With regard to article 27, its provisions still did not clearly stipulate the obligation of the foreign State to assume the judicial costs, which would be the necessary corollary of the exemption from the requirement to provide any security, bond or deposit.

17. In conclusion, he expressed his delegation's satisfaction with the approach taken by the Commission and reaffirmed his hope that the rules of international law relating to State immunity which the Commission was elaborating would substantially facilitate international trade relations.

18. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said that the growing interest shown by countries, including his own, in international liability for injurious consequences arising out of acts not prohibited by international law reflected the desire to build a new world based on law and order in which people could live in peace and harmony. In addition to placing a juridical obligation on States to answer for their own actions, the term "liability" meant both that there was an objective necessity for States to act in a responsible manner, in accordance with international law, and that they must be capable of such action.

19. In the view of his delegation, States had successfully combined their efforts on numerous occasions. To be sure, it was impossible for States to cope in isolation with the consequences of disasters like that of the Chernobyl nuclear power plant, and for that reason he trusted that States would show good will when considering the draft resolution to be introduced by the Byelorussian and other delegations during the forty-fifth session. In his delegation's opinion, if the concept of liability for acts not prohibited by international law was based on that of activities involving risk, it would eventually be possible to resolve the question of objective liability arising from lawful actions, to clarify the scope of the draft articles under consideration, to distinguish between that concept and the concept of the liability of States that failed to fulfil their international

(Mr. Astapenko, Byelorussian SSR)

obligations in good faith and to create conditions conducive to its universal acceptance. To that end, it would be helpful to compile a list of dangerous substances, since that may give more precise meaning to the concept of "significant risk". He compared that concept with the notion of "harm" and agreed with those members of the Commission who had favoured assigning to it the epithet "significant", rather than "appreciable".

20. Byelorussia believed that articles 21, 22 and 23 were consistent with the concept of objective liability. In the case of article 23, however, he proposed that the words "to share certain costs among the States concerned" should be replaced by the words "to take into account the costs borne by the State of origin with respect to an activity referred to in article 1".

21. So far as the wording of article 25 was concerned, he considered alternative B more realistic. While a case of joint liability could be imagined in theory, it was precisely in such cases that the countries concerned could resolve the problem by applying the framework agreement, with due regard for the specific circumstances, and for the purposes of the draft articles it was necessary to apply the principle of separate liability of subjects.

22. The Byelorussian SSR advocated introducing the notion of "liability of the operator", since, in order to ensure the effective and uniform implementation of the provisions of the draft articles, it was necessary to take into account not only the activities of States which had injurious consequences, but also those of the operator.

23. Mr. AL-BAHARNA (Bahrain) agreed with the Special Rapporteur that the activities involving harm and those involving risks had more similarities than differences, rendering it preferable to consider them in conjunction. He urged the Commission not to limit the scope of the topic, and to ensure the formulation of effective regulations covering the transboundary activities which caused "injury" or "harm".

24. Bahrain agreed that a global convention should list, not activities, but substances which were inherently dangerous. The problem was the manner in which such a list was to be formulated. He believed that the topic was too important to be covered by the general provision on the use of terms, and that consideration should be given to the possibility of an additional article which would include the relevant information.

25. His delegation supported the idea of extending the definition of "transboundary harm" to include the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1. On the other hand, Bahrain did not accept the definition of "appreciable harm" in article 2 (h), because it could not be determined precisely at what point harm ceased to be a mere nuisance or which category of harm was considered insignificant.

(Mr. Al-Baharna, Bahrain)

26. With regard to the new article 10 proposed by the Special Rapporteur, he was not convinced that it would be acceptable; the Commission should reflect further on the viability of provisions covering non-discrimination.

27. Turning to the procedural provisions, he said that Bahrain welcomed articles 11 and 12, and in particular the idea that the relevant international organizations should participate in the work of assessing transboundary harm, although it regarded as unfortunate the use of the term "intervenes" in article 12. Article 12 apparently contained an error, and the words "of the preceding article" should read "of article 11". Bahrain agreed with articles 14 and 15 but felt that article 16 was both excessively complex and unnecessary. If the Commission considered its retention essential, it should perhaps indicate the different functions and objects of articles 8 and 16, which both referred to preventive measures. Although the factors enumerated in the new article 17 could merely serve as guidelines, there was no reason why they should not be included in the draft articles since they assisted the States concerned in monitoring the pernicious effects of transboundary harm.

28. He believed that article 18 should be revised, since, in its current form, it considerably reduced the obligation of prevention established by article 8. With regard to article 19, his delegation doubted whether non-reply by the notified State should amount to acquiescence in the measures, and he also suggested that the words "a period of six months" be replaced by the words "a reasonable time". In article 20, he suggested that the phrase "or cannot be adequately compensated" should be deleted.

29. Some of the provisions of the new chapters IV and V, which constituted the core of the topic, were controversial. Of course, article 21 was wanting in form and substance and the words "in principle" weakened the obligation to pay compensation. It was open to argument whether the principle contained in article 23 should be limited to claims made through diplomatic channels. If the purpose was to reduce the amount of compensation in certain circumstances, it would be better to make the rule applicable to claims made through diplomatic channels or by other means. His delegation would also prefer the part of the text in brackets to be omitted and its content explained in the commentary to article 23.

30. In article 24, the requirement that the claim should be made through the diplomatic channel was unreasonable because a right did not depend upon the means by which it was pursued, whether by diplomatic claims or by other means. His delegation suggested the deletion of subparagraph (c) of article 24.

31. In Bahrain's view, the new articles 28 to 33 were probably the most controversial. The basic idea was to enable States or individuals who had been victims of transboundary harm to have unrestricted access to the courts of the State of origin. Although his delegation would like to give effect to the principle that the State of origin should give its national courts jurisdiction in matters concerning transnational risk and harm, it doubted whether that was practicable. It was possible that, in general terms, the provisions of article 29

(Mr. Al-Baharna, Bahrain)

might not be acceptable in a universal instrument. In any event, the Commission should re-examine the question of access to the courts of the State of origin by nationals of the affected State in the light of developments in international law, especially concerning the environment. His delegation reserved for the present its comments on article 32 because it wished to study its implications in depth.

32. Bahrain approved in principle the idea of defining the scope of the topic by reference to substances which were inherently dangerous, provided that some thought was given to the possibility that some of the Special Rapporteur's proposals should be introduced as independent articles. It agreed that the State of origin should be held liable for transboundary risk or harm, but a way would have to be found to make the private party or operator responsible for his actions.

33. Mr. GODET (Switzerland) said that with regard to the topic of State responsibility the Commission should refer to pages 1 to 5 of the written report which his delegation had submitted and that its statement would be limited to the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

34. The sixth report of the Special Rapporteur (A/CN.4/428) and the Commission's report (A/45/10) dealt extensively with the question of whether activities involving risk and activities with harmful effects should be treated separately. The Special Rapporteur and most of the members of the Commission thought that both kinds of activity had more aspects in common than distinguishing features, so that it was preferable for their consequences to be examined in a similar manner under a single régime. His delegation shared that view and was even prepared to regard activities with harmful effects as activities involving risk, for both kinds of activity contained a risk of causing transboundary harm.

35. In the case of activities involving risk, preventive measures should be taken both to prevent an accident occurring and to contain or reduce the effects of an accident which had already occurred. In the case of activities with harmful effects, suitable measures should likewise be taken both to prevent the production of the harmful effects and to limit or mitigate them once they had been produced.

36. When, despite the preventive measures, transboundary harm of a certain magnitude ("important" or "substantial") was caused, the damage must be made good regardless of the type of activity from which it had resulted.

37. As to the question of whether it would be useful to clarify the concept of appreciable risk by establishing a list of dangerous substances, his delegation had already come out, in its 1988 statement, in favour of the establishment of a list of activities involving risk which entailed the obligation to pay compensation in the event of transboundary harm. It therefore supported the idea underlying the work on civil liability for dangerous activities carried out by the Committee of Experts for the European Committee on Legal Co-operation of the Council of Europe. The list should be illustrative rather than exhaustive and leave room for reasonable analogy, for it would thus be possible to include in the scope of the

(Mr. Godet, Switzerland)

convention activities which were regarded as dangerous although they did not appear in the list. The list should take the form of an annex to the convention and be accompanied by a suitable review mechanism.

38. The Swiss delegation noted with satisfaction that the draft articles proposed by the Special Rapporteur envisaged the extension of the concept of transboundary harm to cover harm to the environment. It also thought that, with regard to the cost of preventive measures, it should be made clear that account would be taken only of the cost of the measures actually needed to reduce or limit the harm.

39. According to the Special Rapporteur, the basic idea of the provisions on liability was to assign to the State of origin a primary obligation to pay compensation and to negotiate concerning the form of the compensation. His delegation supported the idea of establishing a régime of international liability based essentially on the existence of transboundary harm resulting from a dangerous activity. However, he thought that such a régime of causal (or objective) liability should not assign to the State of origin a primary obligation to compensate but only a subsidiary obligation, since the obligation to pay compensation for the harm rested primarily with the perpetrator of the harm.

40. It was not politically realistic to provide that the State of origin should bear primary responsibility for compensation for harm resulting from a dangerous activity on the sole ground that the risk involved in that activity had materialized and harm had been caused.

41. The Swiss delegation thought that the obligation to negotiate the compensation had no raison d'être except when the State of origin had a primary obligation to compensate. The obligation to determine the compensation by negotiation did not arise in the case of a merely subsidiary liability of the State of origin for the transboundary harm caused by dangerous activities carried out by individuals. In such a case, the liability of the State of origin arose only when the perpetrator of the harm was not able to fulfil his obligation to compensate.

42. The CHAIRMAN announced that Afghanistan had become a sponsor of draft resolution A/C.6/45/L.3.

The meeting rose at 11.45 a.m.