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Summary record of the 2805th 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:-

2004, vol. I

part. The Special Rapporteur seemed to have submitted the draft principles in order to prompt reactions from the Commission, possibly with a view to improving them, going into them in greater detail or even recasting them. Spreading the debate over both parts of the session would be a way of meeting those expectations.

24. Mr. Sreenivasa RAO (Special Rapporteur) said that the conclusions that he was submitting in his second report were not significantly different from those that he had reached in the first report.[4] The Commission had therefore already had a chance to discuss some of them and, in the text under consideration, he was only repeating them or trying to shed further light on them. As far as the form of the draft principles was concerned, he personally had no objection to them being referred to as draft articles. It would, of course, be wise to discuss the general principles—the conclusions—before going on to form. He invited members to put forward any comments that they might wish to make, in a productive manner.

25. The CHAIRPERSON said that he believed that there was general agreement on considering the report as a whole, without splitting up or fragmenting the discussion too much. In their statements, the members could refer to the report as a whole. Nevertheless, in order to facilitate and focus the discussion, he suggested that it should be divided into two parts, the first on the Special Rapporteur's general conclusions and the second on recommendations concerning the draft principles that he proposed. Any members who so wished could, during the first part of the general debate, express their views on the form of the draft text and on the chapter relating to the comments of States on the main issues concerning allocation of loss. The Secretariat had informed him that the Commission had plenty of time to complete the debate and then refer some principles to the Drafting Committee in accordance with its usual practice. If he heard no objections, he would take it that the members of the Commission agreed to follow the procedure that he had just outlined.

It was so decided.

The meeting rose at 11.35 a.m.

2805th MEETING

Thursday, 27 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

[4] *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/531, p. 71.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/537, sect. C, A/CN.4/540,[1] A/CN.4/543,[2] A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to comment on the Special Rapporteur's second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540).

2. Mr. BROWNLIE said that, given the unusual subject matter and the form proposed—namely, draft principles—the question as to whether the Commission should refer the text to the Drafting Committee was a much more complex one than it would normally be. Moreover, the report in general, and in particular the draft principles, posed structural questions, and it would be very difficult and perhaps pointless to try to divorce the two.

3. His first point was a general policy concern. The topic had an economic background, and the Commission was probably in need of some expert input in that area. Even affluent States based on the rule of law were reluctant to provide substantial legal aid in ordinary cases, and much less so in relation to inter-State or other international claims. Thus, the likelihood of States producing a State-supported supplementary compensation fund of the type envisaged in draft principle 5 seemed negligible. Hence the need for some kind of background social policy and economics expertise in that context.

4. His second general point was that the relationship between such State-provided compensation and the availability of recourse procedures, provided for in principle 8, was difficult to understand. There was an obvious analogy between the availability of recourse procedures and the concept of provision of local remedies. The question arose as to whether such State-supported compensation would be conditional on exhaustion of the recourse procedures. Local remedies were a two-sided coin; on the one hand, the territorial sovereign should provide claimants with adequate procedural justice; on the other, recourse to the court system might be a prior condition to any sort of supplementary compensation, or indeed to any compensation at all.

5. Similarly, he was uncomfortable about the role of the operator. It was currently fashionable to fix responsibility on the operator, who might conceivably have a long purse, and was thus an attractive scapegoat. However, from the point of view of international law and, indeed, even from that of public law, it was the Government which had a broad duty to control and restrain activities which might cause transboundary damage on its territory, and that duty

[1] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

[2] *Ibid.*

included controlling operators. Fixing responsibility on the operator as a first step might act as a shield for the Government, which had a duty to control operations on its territory.

6. A related question had to do with the awkward distinction between recourse procedures within the States concerned—the analogy with the local remedies rule—and dispute settlement, which was assumed to be a classical inter-State procedure, as set forth in draft principle 10. He had no objection to that; the problem was the relationship between the recourse procedures, which involved internal recourse within the States concerned, and the classical international dispute-settlement regime envisaged in draft principle 10.

7. There seemed to be an underlying structural problem in the draft principles, especially in draft principle 3, paragraph 1, and in principles 4, 8 and 10, in respect of a situation in which one of the States concerned was the victim or one of the victims. That included damage to the environment and forms of damage which, *prima facie*, would affect the State and its assets.

8. He had no firm view on whether the time had come to refer the material to the Drafting Committee. However, the Commission should do so only if there had been a full debate with sufficient contributors to provide adequate guidance to the Drafting Committee. Otherwise, the Commission might need to ask the Special Rapporteur to redraft the report in the light of members' criticism.

9. On the question of form, he agreed that the product, if any, should be a residual regime of some kind; that pointed the way to a framework convention. However, until the Commission had shown its hand on a number of key questions, it was difficult to decide what form should be adopted.

10. The CHAIRPERSON, speaking in his capacity as member of the Commission, said that Mr. Brownlie's comments highlighted the difficulties facing the Commission. The time had come either to agree on the basic approach and underlying principles, whether by reaching a consensus or holding an indicative vote, or else to conclude that the discussion was deadlocked and that the topic should be abandoned.

11. It was his understanding that, in adopting the Special Rapporteur's first proposals, the Commission had endorsed the idea that the operator and the State were under an obligation to exercise due diligence; the next question was what happened if due diligence failed to avert harm. The Commission must decide whether, in such a situation, the innocent victim was or was not to receive compensation. If it was decided that the victim should be compensated, it must then be decided who was to provide compensation. He personally was convinced that the operator and the State would have to take upon themselves the obligation to provide some kind of compensation to the innocent victim, who was fully entitled to such compensation. However, the operator could not be made to bear the entire burden: its liability must be limited, because no insurance company would insure a risk the potential dimensions of which were unclear. The Commission needed to agree that the liability of the operator must be limited; thereafter, the extent to which the State also incurred liability could be discussed.

12. Unless the Commission could agree on the two basic principles to which he had referred, he saw no point in a referral to the Drafting Committee, which would merely repeat the discussions already held in plenary. The second report contained all the material, all the views of members were known, and the Commission must take decisions in plenary before referring the proposals to the Drafting Committee. At some point, he intended, in his capacity as Chairperson of the Commission, to consult with the membership on what course of action should be taken if no agreement could be reached on the basic principles.

13. Mr. PAMBOU-TCHIVOUNDA welcomed the Special Rapporteur's incisive and informative second report, in which he had rightly drawn upon the Sixth Committee's comments on his first report.[3] Convinced that the law must be an instrument at the service of justice, the Special Rapporteur had argued in favour of an equitable balance of interests, one of the key principles of the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001,[4] which in the second report acquired a new face as the principle of allocation of loss. Nor had the second report neglected the immaterial dimension, that of the common heritage of humanity, namely the environment, which was made one of the beneficiaries of the principle of allocation of loss.

14. That was the spirit, and indeed the essence, of the second report. He would now focus on a number of specific points, starting with the phrase in the title, "the legal regime for the allocation of loss". The concept of "loss" had already been used in the Special Rapporteur's first report. For his part, he had expressed his dislike of the term at the previous session, and he was now more than ever convinced that it was inappropriate, for at least two reasons.

15. Firstly, in draft principle 2, paragraphs (*a*), (*b*) and (*d*) to (*k*), "loss" was just one of the forms that transboundary harm might take, and there was thus a danger of confusing species and genus. If "loss" went hand in hand with "allocation", then "harm" went hand in hand with "compensation", of which allocation of loss was nothing more than a modality.

16. Secondly, draft principles 3, 4, 7 and 8 assigned another function to the concept of loss: as the consequence of harm, rather than its cause. The relationship between cause and consequence must be borne in mind at all times, even if in everyday usage "loss" and "harm" were sometimes used interchangeably. Accordingly, the title could be reworded to read simply: "Legal regime of compensation for transboundary harm arising out of hazardous activities".

17. Turning first to the general conclusions of the Special Rapporteur, which appeared in paragraph 36 of the report, he wondered how the residual regime envisaged

[3] See 2804th meeting, footnote 4.

[4] See 2797th meeting, footnote 3.

by the Special Rapporteur would operate in relation to provisions of an agreement, if its provisions did not have the same force as such an agreement. Could it or should it be less valid than the "relevant rules of State responsibility"? The Special Rapporteur did not answer that question, though he saw the scope of the draft principles as coterminous with the scope of the draft articles on prevention of transboundary harm from hazardous activities. Such an approach meant that the current exercise should be seen as the necessary practical complement to the draft articles on prevention, in the form of technical implementing provisions. Yet the Special Rapporteur seemed to wish to dissuade the Commission from opting for such an outcome, preferring to present the international community with a list of general principles. He was thus strongly tempted to dismiss the whole exercise as futile, particularly since the report made it clear that there was no point in reverting to questions already settled in the draft articles on prevention.

18. Secondly, the draft principles placed the duty of compensation first on the operator, requiring him or her to obtain insurance coverage and offer financial guarantees. That approach made possible a balanced appreciation of the scope and limits of his or her liability to compensate. In a period of technical innovation, when, with a view to maximizing profits, production centres could be relocated in any part of the globe, draft principle 4, alternative B, placed liability for prompt and adequate compensation squarely at the door of the operator. However, he would prefer to see the draft principle reformulated so as to combine elements of both alternative A and alternative B in order to reflect the primary liability of the operator and the residual liability of the State. Specific provision should be made for prompt and adequate compensation in cases in which the State might itself be the operator of an activity, in areas such as national defence, as a result of which innocent victims might suffer harm. Further thought should therefore be given to the principle of prompt and adequate compensation by the State itself.

19. His third point concerned cases in which the victim of harm was the environment itself; by devoting attention to the issue, the Special Rapporteur showed himself to be in tune with the times. The concept of the environment as victim was not to be confused with that of global commons under the jurisdiction of a State and was therefore difficult to define from the technical or legal point of view. The environment formed the very framework of life, ensuring global and planetary equilibrium. It was therefore only right that the United States should be concerned about the equatorial forests of Africa, or that France should be concerned about the drying up of the River Niger. Yet it was inconceivable that United States space exploration programmes could be called into question by pleas on behalf of the environment by African States or non-governmental organizations. The question therefore arose as to who could invoke the law in the case of environmental damage. One solution would be to authorize any entity that was capable of doing so to sue the operator; alternatively, only States should have the power to sue other States that had authorized the activity in question. In either case, however, the question remained: who would have the power to authorize such an entity or State to sue the wrongdoing operator or State, and before what courts? The Special Rapporteur, in that context, called on States to incorporate environmental concerns in their industrial, research and development policies. It was to be hoped that other States would follow the example of France, which had just adopted a 10-article Environmental Charter, in the form of a constitutional law. That was evidence of the extent to which the Commission's concerns were in tune with the times.

20. He reserved the right to revert to the topic at a later stage, particularly with regard to questions concerning the form and substance of the draft principles.

21. Ms. ESCARAMEIA said that while she welcomed the fact that the report reflected statements of position made by States in the Sixth Committee, which would greatly assist the Commission in its policy choices, she regretted that environmental or management experts and non-governmental organizations had not been consulted. Moreover, a number of the comments made within the Sixth Committee had not been brought out sufficiently in the report. Firstly, delegations had felt that the title of the study—"Allocation of loss"—was a departure from the "polluter pays" principle. Secondly, according to paragraph 145 of the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session (A/CN.4/537), some delegations had expressed the view that the most appropriate form for the work on liability was a convention. Thirdly, more should have been made of the insistence by several delegations that effective dispute settlement arrangements should be included. Fourthly, many delegations had said that if, as was desirable, the work on allocation of loss was to have the same scope as the draft articles on prevention, the threshold of significant harm should also be the same. If that position was accepted, it also followed that draft articles should be the natural form for the work to take. Fifthly, in view of paragraph 131 of the topical summary, she thought that the report did not adequately reflect the desire in the Sixth Committee to highlight the role of States. Several delegations had insisted on "absolute State liability".

22. With regard to the general conclusions, which appeared in paragraph 36 of the report, she said that, in discussing supplementary funding in conclusion 7, the Special Rapporteur made no mention of the possibility of direct provision of general funds by the State. There had been disagreement on the question in the Sixth Committee and the Commission should give it further thought. As for conclusion 8, she fully endorsed the Special Rapporteur's approach: damage to the global commons should be covered. She also endorsed the interpretation of the role of the State in conclusion 9, although she herself would favour more active supplementary funding on the part of the State. As to the format (conclusion 10), she reiterated that she was in favour of a convention containing articles, albeit of a general nature, rather than a soft-law approach involving the formulation of principles.

23. Turning to the principles themselves, she said that draft principle 1—or at least the commentary thereto—should contain an explanation of the term "significant" transboundary harm. In draft principle 2, the word "victim" should also be defined, as the suggestion was that a

victim could be a person, a State and also, possibly, the environment. Draft principle 3 seemed both too general and too full of caveats. For example, she did not see what purpose was served by the word "entirely" in the phrase "ensure that victims are not left entirely on their own", which implied that the victim must bear some part of the burden. Similarly, in draft principle 4, paragraph 3, States were effectively given carte blanche to act in any way they wanted. As for draft principle 5, it should be borne in mind that specific regimes already existed attributing strict liability to States, as in the case of space industries.

24. Draft principle 7 also gave cause for concern: the phrase "where appropriate", in paragraph 2, effectively gave States the option of absolving themselves of responsibility for arranging for response action to be taken. With regard to draft principle 8, she would like to learn more about the relationship between internal remedies and international dispute settlement mechanisms: the Commission might seem to be creating mechanisms that required people to go through the internal procedures of a foreign State. Lastly, with regard to draft principle 10, several delegations to the Sixth Committee had insisted that the principles should contain an effective dispute settlement mechanism. Settlement "by mutual agreement", as provided for in the draft principle, was already available. Provision of a proper dispute settlement mechanism was the only guarantee that States would address the problem.

25. The Commission should engage in a serious debate on the draft principles before they were referred to the Drafting Committee. Perhaps a working group could be set up to identify problems raised by each of the principles and to help determine policy choices.

26. Mr. PELLET said that the Commission's special rapporteurs inevitably had differing styles, methods and temperaments. The Commission was not a tea parlour or a diplomatic forum, and only if its members were frank in voicing their disagreements could its work progress. The Special Rapporteur had confessed to expectations that there would be strong resistance to his report from a certain quarter, and that was indeed the case. His reservations revolved around three points.

27. The first was that he retained very serious reservations about the topic itself. The second report had done nothing to dispel his conviction that it was not amenable to codification, even in a very broad sense and incorporating a strong dose of progressive development. The crux of the issue was what concrete commitments States were ready to make; yet the Special Rapporteur proposed absolutely no form of concrete, practicable, self-executing commitment by States. Such commitments could be entered into only through negotiations, something which the Commission was not empowered to perform: it was not a group of diplomats, whatever some of its members might think. In his introductory statement, the Special Rapporteur had himself conceded that the Commission would never arrive at fully satisfactory solutions, and that did not augur well for the future. However, he was aware that he was fighting a rearguard action, since the Commission had, rightly or wrongly, decided to include the topic on its agenda and the Sixth Committee had not objected. The Special Rapporteur had attacked the job with dynamism, competence and diplomacy.

28. Nonetheless—and therein lay his second objection—special rapporteurs bore particular responsibility in the Commission's work, and they should not simply bend with the prevailing wind, especially on a topic as tempestuous as the present one, in which the wind threatened to blow in all directions. He was firmly convinced that the Special Rapporteur needed to chart a course for the Commission and hold closely to it. He strongly suspected that the Special Rapporteur had a better idea of the course he was steering than he was letting on.

29. His third objection was that the Special Rapporteur proposed a package of draft principles in his report which he asked the Commission to send, intact, to the Drafting Committee. That seemed to him to be an attempt to force the issue. Each and every one of the principles merited far more serious and thorough discussion based on detailed studies. It was good that the Commission should have an overview of what the Special Rapporteur had in mind, but once the principles had been accepted, or indeed rejected, precedents and practice and the formulation and practical implications of the principles must be explored. It would not be appropriate for the Drafting Committee to do all that work on its own.

30. Having made those remarks, he could now say that he had liked the second report and believed that it provided a good basis for a general discussion, including an objective review of positions taken by States and an outline of the problems that arose. On the other hand, he did not think that the report contained sufficient material for the Commission to take a properly founded position on each of the 12 principles contained therein. It had cleared the ground, but much more material was needed on each of the principles.

31. As to the form of the project, that was probably the only question to which the Commission could and should give a firm reply at the current session. The form that a project took frequently had a strong influence on its content. If it was to take the form of draft articles which would ultimately become a convention, the present project must be, firstly, detailed and specific—which was not yet the case—and, secondly, acceptable to States. Yet, as the Special Rapporteur repeatedly stressed in his report, it was impossible at the present stage for the Commission to go into detail, and he had accordingly proposed only very general principles. That, in his own view, was the right decision: the only thing that the Commission could come up with, without recourse to expert studies, was principles. It was for diplomats and governmental experts, not for independent legal experts, to find ways of implementing those principles.

32. He thus thoroughly approved of the Special Rapporteur's decision to couch his proposals in a form that was somewhat out of the ordinary, namely draft principles rather than draft articles. Some members had already objected, saying that the usual practice should be followed. It was clear that those members regarded any departure from the usual practice as the most heinous of crimes. Like a number of Governments, he personally hoped that

the Commission would eventually adopt a draft declaration of non-binding guiding principles, to assist States in their negotiations in specific cases.

33. If that was indeed the idea, it would certainly have very marked consequences for the wording of the proposals for principles. To take an example: some of his colleagues had said in informal discussions that if the draft was to be adopted as a declaration, it would be absurd to include in it a provision like draft principle 10 on settlement of disputes. He was not so sure of that. True, the version proposed by the Special Rapporteur was debatable: one could not impose on States binding means of settling disputes concerning the interpretation or application of a non-binding instrument. On the other hand, nothing prevented one from indicating that disputes arising in the application of the principles to be set out in the future declaration should be resolved through peaceful means. As to the substance of the provision, he had doubts about its usefulness in its current, very general form. Perhaps something less self-evident could be said; after all, the obligation to settle disputes peacefully was a generally accepted principle of international law.

34. As to the other principles proposed, he fully agreed with the Special Rapporteur that coherence was needed. The scope *ratione materiae* of the future declaration should be the same as that of the draft on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001. In that case, however, he saw no reason not to reproduce the definitions of terms used in the earlier draft. It might be necessary to depart from those definitions where there was good reason to do so, but no sufficiently good reasons had been provided so far. The same was true of draft principle 1 on the scope of application.

35. In his view, it was rash to embark on a definition of the environment in draft principle 2 (*c*). If such a definition was to be developed, it must be founded on a meticulous study of precedents. One of his students who had just defended an excellent thesis on responsibility for large-scale environmental damage had had to devote more than 50 pages solely to the question of a definition of the environment, and, even so, he was not sure that she had exhausted the topic.

36. Some secondary issues also merited attention. Thus, for instance, "cultural heritage" was a phrase used in article 2, paragraph 10, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; yet a resolution adopted in 1997 by the Institute of International Law[5] echoing its definition of the environment studiously avoided the phrase "cultural heritage". Hence it was by no means self-evident that the concept of "environment" included the notion of cultural heritage. He was currently neither for nor against including that notion, but thought that its inclusion required fuller justification.

37. He was perplexed about whether the draft was supposed to apply to the global commons. The arguments in conclusion 8 (*a*) (at paragraph 36 of the report) were convincing, and at the end of the paragraph the Special Rapporteur seemed to indicate that he had no intention of including provisions on that subject in the present draft. Yet paragraph (*b*) appeared to take the opposite position, and no synthesis of the two positions was to be found in the draft principles, although to judge by draft principle 3, paragraph 2, the Special Rapporteur seemed to have decided in favour of including the concept.

38. Unlike several other speakers, he thought that the idea of allocation of loss was a good one. In any case, it had the major advantage of avoiding the insoluble problem of the translation of the word "liability" into French and Spanish. The main problem was who would bear the burden of loss. The draft seemed to be vague with regard to the "polluter pays" principle, which in his view should be stated more forcefully in alternative B for draft principle 4. A former member of the Commission, Mr. Hafner, had written a note on that principle for the Working Group on long-term programme of work, in which he had concluded that while it was not certain that the principle was one of positive law, the principle itself merited in-depth study. He agreed with Mr. Hafner about the need for a study, but was convinced that the principle was one of positive law. It would be a shame if the "polluter pays" principle suffered the same unenviable fate in the declaration as that reserved for the principle of precaution in the draft on prevention. The "polluter pays" principle should be clearly enunciated in the draft as the foundation for allocation of loss.

39. The idea of liability of the operator as set out in draft principle 4, alternative B, was worthy of support, but he did not agree with the Special Rapporteur that that alternative amounted to the same thing as alternative A. It seemed to him that the two alternatives set out different and complementary principles. Alternative B enunciated, if not the "polluter pays" principle, at least that of the primary responsibility of the operator. Alternative A put forward the principle of the responsibility incumbent upon the State to ensure that compensation was provided. That principle should likewise be supported, given that such responsibility on the part of the State was merely secondary and in no way diminished the primary responsibility of the operator, namely an obligation to provide compensation. In addition, the principle in alternative A must not impose strict liability on the State, as it did now, since the obligation was one of behaviour: the State must take the necessary steps to make compensation possible, but was not directly placed under an obligation to pay compensation. He did not see how the majority of States, particularly small poor ones, could realistically cope with a primary obligation to pay compensation. In his view, the operator had a responsibility to pay compensation, whether or not it had shown due diligence, and that was strict liability. The State, for its part, had only the responsibility to show due diligence, and only if it failed to acquit itself of that responsibility did it have an obligation to provide compensation in conformity with the rules of international responsibility of the State for internationally wrongful acts. On the basis of those two positions, which he had always espoused, practical means of providing compensation must be developed. However, he did not see how the Commission could involve itself in ideas

[5] *Annuaire de l'Institut de droit international*, vol.67-II (1998), p. 476.

for the creation of funds or insurance schemes, although they were the logical consequence of the positions that he had just outlined.

40. Referring to the frequent use in the report of the phrase "innocent victim", he said that despite his initial protestations, the Special Rapporteur had now convinced him that a distinction must be drawn between victims uninvolved in the activity that had caused harm and those who might have contributed to it. That did seem to be a valid distinction, although it was difficult to see how factory workers, for example, could be anything other than innocent victims. Yet the phrase was banished from the text of the draft principles themselves, appearing only in the explanations. Since the concept was a useful one, why not use it in the draft? He agreed with Ms. Escarameia that a definition of victims should be provided. That might also be an opportunity to respond to the interesting question raised by Mr. Brownlie: could the State itself be a victim? He himself believed that it could.

41. He had no objection to the general thrust of draft principles 5 to 7, even though they seemed to relate more to negotiations among States than to codification and progressive development. In any event, they could not be discussed properly without an exhaustive study of international precedents and State practice, particularly in the insurance field. Principle 8, on the other hand, seemed to be much more solidly substantiated. Principle 9 was absolutely necessary but the explanatory paragraph needed to be expanded. The same was undoubtedly true of draft principles 11 and 12. He had already covered draft principle 10.

42. All the draft principles proposed by the Special Rapporteur in his excellent and stimulating report deserved careful study with a view to their inclusion, in one form or another, in a draft declaration of principles by which States should be guided in their future negotiations on the risks of transboundary harm. Nevertheless, the time was not ripe for the draft principles to be referred en bloc to the Drafting Committee.

43. Mr. Sreenivasa RAO (Special Rapporteur) said that he would not respond to every comment that had been made, although he had found them all to be quite helpful. If he had not put forward some of the proposals that he might have, it was because he had had to prepare the report under severe time constraints. Moreover, the topic was complex, and he had had to limit the report in order to comply with the Secretariat's policies concerning documentation.

44. As to the debates in the Sixth Committee of the General Assembly, he knew from personal experience that it was not unknown for its members to speak off the cuff, since they had often not been properly briefed on the subject by their Governments; he himself had done precisely that on numerous occasions. He therefore questioned how seriously one could take many of the views expressed in that Committee. It was entirely possible for the representa-tives of 189 Member States to fail to agree on a single thing, a fact that made it almost impossible for a special rapporteur to formulate valid conclusions. In summarizing the debate on the current topic, he had had to make choices, since he could not simply cite the numbers of delegations that had supported each position.

45. Turning to members' observations regarding his report, he said that the points raised by Mr. Brownlie were worthy of consideration and that Mr. Pellet's comments had been very helpful. However, he had hoped that all members might have taken the approach adopted by Mr. Pellet towards the end of his statement. If the Commission chose to focus only on operator liability, that would be the end of the matter. Relief would be provided to victims quickly within the means available, and if certain legal claims were still pending, they could be pursued. Yet one could not simply demand quick payment of compensation to victims and still maintain that the requirement should not be couched in soft law. In order to avoid the complexities to which a hard law approach would give rise, he was prepared to say that, in the event of an injury, if the liable party did not want to get involved with insurance claims or to go to court, it simply needed to pay compensation. That model was consistent with reality. His understanding of allocation of loss was that it implied an effort to reduce the legal technicalities and complexities that a victim had to deal with before he or she could obtain any compensation whatsoever. It had been his hope that allocation of loss would lead to the development of a model that would prevent victims from simply rushing into a court of law and only later finding out where they stood. He was trying to develop that approach.

46. If the Commission wished to revert to the debate on the conflict between private international law and public international law, it would take a long time to reach any outcome. On that point he and Mr. Pellet were in agreement. If, on the other hand, the Commission wished to be provided with more supporting material on each principle, he could take the time to provide it. However, that would further delay the process, with no guarantee of a satisfactory outcome. To prolong that effort would only be to put off the final day of reckoning. If the Commission focused solely on the "polluter pays" principle, it would end up with operator liability and nothing more. A huge amount of material was available on that topic, and if that was the direction the Commission wanted him to take, he could draft a report on operator liability and submit it at the next session. However, he needed guidance from the Commission. Far from "bending with the prevailing wind", he had no preferences regarding the direction that the Commission's work on the topic should take. However, he was willing to approach the topic with an open mind, and was open to persuasion. He would not evade his responsibilities, but he needed more constructive, helpful suggestions as to how he should continue his work and where it should stop. Accordingly, he believed that the debate should concentrate on principles. If the Commission provided him with clear guidance, he would carry on with his work from there. The debate at the current meeting had clearly indicated the conceptual difficulties, the considerable amount of work that lay ahead and the consensus that needed to be built around the Commission's future work on the topic.

The meeting rose at 11.50 a.m.