the liability of private parties and perhaps, to make the draft more acceptable to States. It would also simplify the procedural aspects. Since only domestic courts would be competent and such thorny issues as that of a State appearing before a Court in a case involving a private party, particularly if it had to do so in the domestic courts of another State, would not arise. He submitted to the Commission an alternative formulation on State liability which is somewhere in between the two systems. The proposed draft article reads:

Alternative A :

"Residual liability for a breach by the State"

Harm which would not have occurred if the State of origin had fulfilled its obligations of prevention in respect of the activities referred to in article 1 shall entail the liability of the State of origin. Such liability shall be limited to that portion of the compensation which cannot be satisfied by applying the provisions on Civil liability set forth herein."

Alternative B :

"The State of origin shall in no case be liable for compensation in respect of harm caused by incidents arising from the activities referred to in article 1".

Having thus explored the relationship between a State and the injured persons the Special Rapporteur now addressed himself to the issue of State liability for wrongful acts i.e. relationship between States *inter se* resulting from the failure of a State to comply with its own obligations. Referring to the draft articles on State Responsibility currently before the Commission, he stated that while failure on the part of a State to comply with its obligations gave rise to a number of obligations such as compensation, satisfaction, assurance and guarantees of non-repetition, the wrongful act in question must, however, be duly proved to be such and that an affected State could not therefore veto a lawful activity of the other State. The State thus remains obligated for only failure to take preventive measures. Where a State were to allow an activity within the scope of the present draft articles to be carried out without prior authorization or notification it would not be complying with its obligations of due diligence. In such a case were transboundary harm to occur, while the operator would be strictly liable, the State (of origin) would only be responsible for the wrongful acts viz. the other consequences of the breach of its due diligence obligations. The formulation on international State liability proposed by the Special Rapporteur read as under:

"The consequences of a breach by the State of origin of the obligations of prevention laid down in these articles shall be those consequences established by international law for the breach of international obligations".

Addressing the question of civil liability, the Special Rapporteur pointed out that international watercourses have in general stipulated strict liability primarily on the ground that the victim must be promptly compensated. He then enumerated the features common to the existing civil liability regimes viz:—

(i) The operator bearing liability must be clearly identified, liability being joint and several when several operators bore liability;

(ii) The operator was invariably obliged to take out insurance or to provide some other financial guarantee;

(iii) Where possible, compensation funds were to be established;

(iv) In order for the system to function, the principle of non-discrimination must be respected; in other words, the courts of the State of origin should accord the same protection to nationals and to non-nationals, to residents and to non-residents;

(v) In all matters not directly covered by the Convention, the law of the competent court applied, provided it was consistent with the Convention;

(vi) Except where otherwise provided, judgments enforceable in one court were to be equally enforceable in courts of all States Parties to the Convention; and

(vii) Monetary compensations awarded could be transferred without restriction in the currency desired by the beneficiary.

The clear identification of the party bearing liability for any harm had the advantage not only of putting the potentially liable parties on notice and making them do their best to avoid causing harm, but also of facilitating redress of the injured party in case of harm. A review of civil liability regimes reveals *inter alia* that liability was channelled through the operator, on the grounds that the operator: (a) was in control of the activity; (b) was in the best position to avoid causing harm; and (c) was the primary beneficiary of the operation and should therefore bear the cost of the operation to others. Relying on the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, as adopted by the Council of Euorpe, owing to its general character Mr. Barboza proposed provisions for defining the operator and his liability, stipulating insubstance that "operator' meant the person who exercised

the control of an activity and that the operator bore liability for any significant transboundary harm caused by that activity during the period in which he exercised control over the activity; and that, if several operators were involved in an incident, they were jointly and severally liable, unless an operator proved that he was liable only for part of the harm, in which case he would be liable only for that part of the harm. Based on these premises he proposed the following provision for the consideration by the Commission:

Liability of the Operator

The operator of an activity referred to in article 1 shall be liable for all significant transboundary harm caused by such activity during the periods in which he exercises control of such activity.

(a) In the case of continuous occurrances, or a series of occurrance having the same origin, operators liable under the paragraph above shall be held jointly and severally liable.

(b) Where the operator proves that during the period of the commission of the continuous occurrance in respect of which he is liable only a part of the damage was caused, he shall be liable for that part.

(c) Where the operator proves that the occurrance in a series of occurances having the same origin for which he is liable has caused only a part of the damage, he shall be held liable for that part.

Recourse against third parties

No provision of these articles shall restrict the right of recourse which the law of the competent jurisdiction grants to the operator against any third party.

Relying on the existing civil liability Conventions, Mr. Barboza took the view that the operator conducting activities under consideration had to provide a financial guarantee. To that end, it would be for the State to require the operator to take out insurance or to set up a financial security scheme in which operators would have to participate. Actions for compensation could be brought directly against the insurer or the financial guarantor. The proposed draft article on financial securities read:

Financial securities of insurance

In order to cover the liability provided for in these articles, States of origin shall, where appropriate, require operators engaged in dangerous activities in their territory or otherwise under their jurisdiction or control to participate in a financial security scheme or to provide other financial guarantees within such limits as shall be determined by the authorities of such States, in accordance with the assessment of the risk involved in the activity in question and the conditions established in their internal law.

Existing conventions had identified various courts as competent to hear claims. The list included courts having jurisdiction in the place: (a) where the harm had occurred; (b) where the operator resided; (c) where the injured party resided; or (d) where preventive measures were supposed to have been taken. Each of those courts offered advantages in terms of gathering evidence and by virtue of its link with the claimant or the defendant. He proposed that the first three possibilities should be adopted and suggested the following formulation on the competent court:—

Actions for compensation of damages attaching to the civil liability of the operator may be brought only in the competent courts of a State party that is either the affected State, the State of origin or the State where the liable operator has his domicile or residence or principal place of business.

For civil liability regimes to be effective, however, the competent courts must ensure equal treatment before the law for nationals and non-nationals, residents and non-residents. The draft articles should therefore include a provision to that effect. The Commission might decide that the principle set forth in article 10 on non-discrimination was sufficient; otherwise, a specific article with equivalent language should be included in the section under-consideration. The Rapporteur proposed the following provisions on Domestic remedies:—

The Parties shall provide in their domestic law for judicial remedies that allow for prompt and adequate compensation or other relief for the harm caused by the activities referred to in article 1.

In respect of casuality, the Special Rapporteur proposed, in keeping with a provision of the Council of Europe Convention, that in considering evidence of a casual link between acts and consequences, the court should take due account of the increased danger of damage inherent in the dangerous activities i.e. of the specific risks of certain dangerous activities

causing a given type of damage. The text of the proposed article did not, however, establish a presumptipn of casuality between incident and harm. The proposed text reads:

When considering evidence of the casual link between the incident and the harm, the court shall take due account of the increased danger of causing such harm inherent in the dangerous activity.

With regard to the enforceability of the judgment, it was noted that an effective civil liability regime must provide for the possibility of enforcing a judgment in the territory of a State other than the one where the judgment had been pronounced. Otherwise, any efforts made by a private party to seek redress before a domestic court might be in vain. It is for that reason that civil liability conventions usually not only contained provisions on the enforceability of judgments, but also provided for certain exceptions, such as fraud; non-respect for due process of the law; and cases where the judgment was contrary to the public policy of the State where enforcement was being sought or was irreconcilable with an earlier judgment. Consequently, the party seeking enforcement must comply with the procedural laws of the State where the judgment would be enforced. The Special Rapporteur proposed the following formulation for the consideration of the Commission:

Where the final judgments entered by the competent court are enforceable under the laws applied by such court, they shall be recognized in the territory of any other Contracting Party unless:

(a) The judgment was obtained by fraud;

(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

(c) The judgement was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

(d) The judgement was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject and between the same parties.

A judgement recognized under the paragraph above shall be enforced in any of the Member States as soon as the formalities required by the Member State in enforcement is being sought have been met. No further review of the merits of the case shall be permitted.

With regard to exceptions to liability, the grounds set forth in civil liability conventions included armed conflict; unforeseeable natural

phenomenon of an exceptional and irresistible character; wrongful intentional conduct of a third party; and gross negligence of the injured party. Those were reasonable grounds for exceptions to liability in respect of damages resulting from the activities considered in the report. With regard to State Responsibility for wrongful acts, such as failure to comply with preventive provisions, the grounds for exception were those provided for in Part One of that topic. The Special Rapporteur proposed the following articles on exemptions:

1. The operator shall not be liable:

(a) if the harm was directly attributable to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm was wholly caused by an act or omission done with the intent to cause harm by a third party.

2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person.

Chapter V of the tenth report dealt with the statute of limitations in respect of liability. Under civil liability conventions, the time-limit varied from one year, as in the Convention on International Liability for Damage Caused by Space Objects, to 10 years, in the case of the 1963 Vienna Convention on Civil Liability for Nuclear Damage. Time-limits were determined on the basis of various considerations, such as the time within which harm might become visible and identifiable or the time that might be necessary to establish a casual relationship between harm and a particular activity. Since the activities covered in the report were similar to those dealt within the Council of Europe Convention, the three-year statute of limitations provided therein seemed appropriate for civil liability claims, on the understanding that no procedure could be instituted after 30 years from the date on which the incident resulting in harm had occurred. The proposed article on time limits reads :

Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once thirty years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous

occurrance, the periods in question shall run from the date on which the incident began and where it consisted of a series of occurrances having the same origin. The periods in question shall run from the date of the last occurrance.

The last chapter of the report dealt with procedures to enforce civil liability. In the event that a State was objectively responsible for failing to comply with its obligations of prevention, the procedural channel available was State to State and, consequently, the normal diplomatic procedures and the usual methods of settling disputes were applicable. However, where a State had to face a private party or another State before a domestic court, the situation could become more complicated and some of the possibilities referred to in the report could consequently be set aside. Thus, where a State was subsidiarily responsible for a wrongful act for amounts not covered by the operator or his insurer, it might have to appear before a domestic court. That possibility alone was sufficient reason to discard that type of State responsibility. Other situations also gave rise to serious difficulties, for instance where an affected State suffered *immediate* damage, as in the case of damage to its environment. Under such circumstances, the affected State might have to bring an action before a national court, which could be the competent domestic court of that same State. That might pose problems for the defendants. That type of difficulty was one reason to consider solutions such as that proposed by the Netherlands in the IAEA Standing Committee for considering the amendment of the Paris and Vienna Conventions on Nuclear Damage, namely, the creation of a single forum such as a mixed claims commission, which would be competent to hear claims between States, between private parties and States, and between private parties.

In the course of the forty-sixth session the Commission *inter alia* considered and adopted twelve articles referred to it by the Drafting Committee at the Forty-fifth Session in 1993 and at the present session. The draft articles adopted at the current session are Article 1 (Scope of the present Articles); paragraphs (a), (b) and (c) of article 2 (Use of Terms); Article 11 (Prior Authorization); Article 12 (Risk Assessment); Article 13 (Unauthorized Activities); Article 14 (Measures to Prevent or Minimise the Risk); Article 14 *bis* (earlier 20 Bis) (Non-transference of Risk); Article 15 (Notification and information); Article 16 (Exchange of Information); Article 16 *bis* (Information to the Public); Article 17 (National Security and Industrial Secrets); Article 18 (Consultations on Preventive Measures); Article 19 (Rights of the State Likely to be Affected); and Article 20 (Factors Involved in an Equitable Balance of Interests). It may be recalled that of the aforementioned draft Articles 1, 2, 11, 12 and 14

were adopted by the Drafting Committee at the Forty-firth Session in 1993. Some notes and comments on these draft articles may be found hereunder.

Draft Article 1 *Scope of the present articles* defines the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State and which involve a risk of causing significant transboundary harm through their physical consequences. The definition of the scope of the proposed articles introduces four criteria viz: (i) that the articles apply to *activities not prohibited by international law*; (ii) that the activities to which preventive measures are applicable are carried out in the territory or otherwise under the jurisdiction or control of States; (iii) that the activities proposed to be covered by these articles must involve a risk of causing significant transboundary harm; and (iv) that the significant transboundary harm must have been caused by the physical consequenes of such activities.

The first criteria viz. "activities not prohibited by international law" has been incorporated because of its critical role in delimiting the parameters of the articles and because it is crucial in making the distinction between the scope of this topic and that of the topic of State Responsibility which deals with the wrongful acts.

The second criterion or element viz. "activities carried out in the territory or otherwise under the jurisdiction or control of a State" employs three concepts viz. "control", "jurisdiction" and "territory". Although the expression "jurisdiction or control of a State" is more commonly employed in many international instruments such as the United Nations Convention on the Law of the Sea, 1982; the Stockholm Declaration 1972; The Rio Declaration on Environment and Development, 1992; and the United Nations Convention on Biological Diversity 1992, the Commission deemed it useful to include the concept of territory so as to emphasize the significance of the territorial nexus between activities under these articles and a State. The commentaries clarify further that for the purpose of these articles the term "territory" refer to areas over which a State exercises its sovereign authority. The use of the term "territories" also stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extra territorial jurisdiction in respect of certain activities. The Commission by its own admission, is also aware that the concept of "territory" for the purposes of this article is somewhat narrow and that there were situations where, under international law a State exercises jurisdiction and control over places over which it has no territorial rights.

The third criterion is that of a risk of causing significant transboundary harm. Although the phrase "risk of causing transboundary harm" is to be taken as a single phrase, its first component viz. risk is intended to limit the scope of the topic, for the present to activities with risk and their consequences to exclude activities which in fact cause transboundary harm in their normal operation. The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken or those activities which harm the global commons but *without* any harm to any other State.

The fourth element is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. The Commission had agreed in the interest of maintaining this topic within a manageable scope to exclude monetary, socio-economic or similar fields. The most effective way of limiting the scope of the articles, it was felt by requiring that the activities in question should have transboundary physical consequences which result in significant harm.

Draft Article 2 aims to incorporate the definitions of terms for the purpose of the proposed draft articles. As indicated earlier the Commission at its forty-fifth session adopted the definitions of three terms viz. (a) risk of causing significant transboundary harm; (b) transboundary harm; and (c) State of origin.

Paragraph (a) of draft article 2 defines *risk of causing significant transboundary harm* as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. It alludes to the combined effect of the probability of occurrance of an accident and the magnitude of its injurious impact. It is the combined effect of risk and harm which sets the threshold. In the view of the Commission a definition based on the continued effect of risk and harm appropriate for the proposed article and that combined effect should reach a level that is deemed significant. The view prevalent in the Commission is that the obligations of prevention imposed on States should not only be reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually all activities because the activities under consideration are not prohibited by international law.

The definition allows for a spectrum of relationship between risk and harm all of which would reach the level of significant harm. It identifies two poles within which the activities proposed to be regulated, will fall. One pole is where there is a *low probability* of causing disastrous harm—the characteristic of ultra hazardous activities. The other pole is a high probability of causing harm which while not disastrous is still significant.

It is to be understood that significant is sometimes more than detectable but less than serious or substantial. The harm must lead to a real deterimental effect on such matters as human health, industry, property, environment or agriculture in other States and such detrimental effects must be susceptible of being measured by factual and objective standards.

Paragraph (b) defines transboundary harm as meaning a harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of orign whether not the States share a common border. This definition includes activities conducted under the jurisdiction or control of a State for example on the High Seas or within the Exclusive Economic Zone of a coastal State with effects on the territory of another State or in places under the other State's jurisdiction or control. The intention is to be able to clearly distinguish between a State to which an activity within the ambit and scope of the proposed articles is attributable from a State which has suffered the injurious impact. The separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries and therefore the term "transboundary harm" is to be understood in the context of the expression within its territory or otherwise under its jurisdiction or control as employed in draft article 1.

Paragraph (c) of draft article 2 defines the State of origin as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out. The definition is self-explanatory and when there is more than one State of origin they shall individually and jointly as appropriate comply with the provisions of the proposed article.

Draft article 11 entitled "*Prior authorization*" sets out the first supervisory function and responsibility of a State in respect of activities involving a risk of causing significant transboundary harm and requires the prior authorization of the State within whose territory or jurisdiction or control they are conducted. Such prior authorization is also required to be obtained in the event that a major modification or change in the activity is planned and which may transform an activity into one involving a risk of causing significant transboundary harm.

This formulation is in effect a modified version of the opening sentence of the measures on preventive measures that the Special Rapporteur had proposed in his eighth report. It would have been observed that the stipulation relating to prior authorization, as formulated, does not provide or envisage the periodic renewal of the authorization or the possibility or even the obligation to withdraw it in certain cases. Consideration should

be given to the issue of expanding the scope of the provision to cover periodic review and renewal of authorization of activities involving risk.

Draft article 12 on Risk Assessment stipulates that a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm before taking a decision to authorize an activity which though not prohibited by international law creates a risk of causing transboundary harm. It is further provided such an assessment should include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

It may be recalled that the Special Rapporteur had last year explained that assessment did not require that there must be *certainty* that a particular activity would cause significant transboundary harm, but only certainty that a significant risk of such a harm existed. Opinion was divided concerning this provision with some members believing that it was the State itself which should make the assessment, and others arguing that it was the duty of the operator to undertake such assessment. The Commission, however, feels that as these articles are designed to have global application, they cannot be too detailed and that they should contain only what is necessary for clarity.

The subject matter of this draft article on assessment and, the requirements of exchange of information and consultation covered by articles 15, 16 and 18 are closely linked and must be read together. All are geared to an objective which is very important for the purposes of an effective prevention regime, namely encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at its own territory to prevent or minimize the transboundary impact.

The requirement of environmental impact assessment plays an important role, and is compatible with Principle of the Rio Declaration on Environment and Development which like-wise provides for impact assessment of activities that are likely to have a significant adverse impact on the environment. The draft article leaves open the question of who should conduct the assessment to the States. Neither does the draft article specify what should be the content of the risk assessment. In sum the specific of the authority (governmental, non-governmental or operator) who shall evaluate the risk assessment and accept responsibility therefore—as well as what ought to be the content of assessment is left to the domestic law of the State in which such assessment is conducted.

Draft article 13 on "*Pre-existing Activities*" provides that where a State having assumed its obligations under these articles, ascertain that

an activity with a risk of causing a transboundary harm is being conducted in its territory or otherwise under its jurisdiction or control without the required prior authorization it shall direct those responsible for carrying out the activity that they obtain the necessary authorization. Pending authorization the State may permit the continuation of the activity in question at its own risk.

It was pointed out during the discussions in the Commission that draft Article 13, extended the scope of international liability to pre-existing activities, which may have continued for several years without ever causing harm. This presupposed that they had not involved any significant risk at the outset. To subject pre-existing activities to the requirements envisaged might create differences in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertaking or as a modification.

Draft Article 14 entitled "*Measures to Prevent or Minimize the Risk*" requires States Parties to take all legislative, administrative or other actions to ensure that all necessary measures are adopted to prevent or minimize the risk of transboundary harm of activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences. It needs to be stated that the Drafting Committee had proposed that the expression "prevent and minimize the risk" of transboundary harm in the present and other draft articles is to be reconsidered in the light of the decision of Commission as to whether the concept or prevention includes, in addition to measures aimed at preventing or minimizing the occurrance of an accident, measures taken after the occurrance of an accident to prevent or minimize the harm caused.

Draft Article 14 *bis* (formerly 20 *bis*) on "*Non-transference of Risk*" stipulates that in taking measures to prevent, control or reduce the transboundary effects of dangerous activities States shall ensure that risk is not simply transferred directly or indirectly, from one area to another or that one risk is not transformed from one type into another. It reiterates a general principle of non-transference of risk and is inspired, *inter alia* by the provisions of Article 195 of the Convention on the Law of the Sea, 1982 and Principle 14 of the Rio Declaration on Environment and Development, 1992. It may be recalled that during the debate at the forty-fifth Session whilst some members of the Commission had deemed this provision logical to be included in the draft articles, others had taken the view that the proposed article only complicated the proposed provisions.