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Summary record of the 2527th meeting

Topic:
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72. Mr. YAMADA said his comment had been intended to draw attention to the need for consideration of the procedures and circumstances which might justify the revocation or amendment by States of their unilateral acts.

73. Mr. GOCO, taking up Mr. Hafner's comment, questioned whether the expression of an intention had to be considered as a decisive factor in determining the existence of a unilateral act. If so, then the State would in all instances be bound by a declaration of intention. In the *Nuclear Tests* cases, France had had no intention, when making its declaration, of engaging in a unilateral act. But the declaration had been made publicly and ICJ had interpreted it as being binding upon France. No intention had existed at the outset, yet because of the act's effects in international law, a unilateral act had been deemed to have been performed.

74. Mr. HAFNER said that any act not accompanied by the intention that it should be binding would produce such a legal effect only under certain circumstances that had to be spelled out in international law. It could be done by estoppel.

75. Mr. GOCO pointed out that a declaration made unilaterally could not be unilaterally revoked because of the consequences of such revocation for third States. On the other hand, a State might argue that it had not intended to make a unilateral declaration and wished to revoke what had subsequently been construed as one because of the consequences of such a declaration for third States.

76. Mr. PAMBOU-TCHIVOUNDA said he agreed that the fundamental issue of when and how revocation was possible would have to be taken up by the Special Rapporteur as it was an integral part of the regime to be established. He believed revocation was indeed possible: what a political entity did, it could also undo. But what was the minimal threshold for acceptance of the discretionary use of the State's capacity to undo an act? The notion of reasonableness found in the law of treaties should come into play in the regime to be established for withdrawal of unilateral acts.

77. Mr. HERDOCIA SACASA said the judgments of PCIJ and ICJ showed that it was indeed possible for States to amend or revoke unilateral acts, but he agreed with Mr. Pambou-Tchivounda that certain limits had to be established. In the *Nuclear Tests* cases, ICJ had indicated that a unilateral undertaking could not be interpreted as being based on an arbitrary—in other words, unlimited—power of reconsideration (see paragraph 51).

78. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ had stated that, although the United States had the right inherent in any unilateral act of a State to modify the contents of a declaration it had made in 1946 or to terminate it, it had nevertheless assumed an inescapable obligation to carry out the terms and conditions of the declaration, including the six months' notice proviso.²⁴ Nicaragua could therefore oppose the actions of the United States because the six

months' notice period was an undertaking that was an integral part of the instrument that contained it.

79. Mr. MIKULKA urged the Commission to reflect on the difficulty of engaging in an abstract discussion of forms and procedures in isolation from the specific legal environment and content of specific unilateral acts. Acts were of differing effect, depending on whether they were performed as part of military activities or in the context of the law of the sea, for example. Declarations and protests were entirely different actions, and revoking them had entirely different legal consequences—yet they were both unilateral acts.

80. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said it was true that the discussion of revocation and amendment was premature so long as a definition of unilateral acts themselves had not yet been developed. It was the legal act, whether formal or substantive, that should be analysed, not the expressed or implicit intention, although the act was, of course, grounded in the intention of the State.

81. Mr. GOCO, recalling the Special Rapporteur's suggestion that a working group be established, pointed out that the Working Group established at the forty-ninth session could perhaps be reconstituted.

82. Mr. CANDIOTI said that the Working Group established at the forty-ninth session could indeed be used as the basis for the one to be established at the current session. It was important, however, to ensure that all three schools of thought outlined by Mr. Economides were represented. He would also suggest that the Special Rapporteur should produce an outline of the conclusions that could be drawn from the Commission's initial discussion of the topic.

The meeting rose at 1.05 p.m.

2527th MEETING

Friday, 8 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

²⁴ *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 392 et seq., at p. 419.

Unilateral acts of States (*continued*) (A/CN.4/483, sect. F, A/CN.4/486,¹ A/CN.4/L.558)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ELARABY said that two main questions had arisen in the debate. Concerning the question whether a category of such unilateral acts existed in international law, he thought that all members who had taken the floor had replied that it could and had referred to a number of judgments by ICJ. In that connection, a compilation of all international judgements would be useful. On the question of a possible codification of the rules governing such acts, he was of the view that such an exercise "in some form" would bring more certainty, predictability and stability to international relations. On a general point, he said that simply clarifying the distinction between the category of declarations of principle and that of declarations with legal consequences and attempting to define the rules regulating the latter category would unquestionably be an important contribution to the progressive development of international law.

2. Four points deserved to be given attention by the Commission. The first, which had been raised in paragraphs 41 to 45 of the first report on unilateral acts of States (A/CN.4/486), was the difficulty of establishing a clear distinction between political acts and legal acts on the basis of the nature or scope or even the intent of the State alone. Mr. Simma had already referred (2525th meeting) to the question of declarations by nuclear-weapon States in connection with denuclearized zones outside agreements on the creation of such zones, which currently was more or less regulated by the fact that the five nuclear Powers were parties to the Treaty on the Non-Proliferation of Nuclear Weapons. A second example concerned the question, which the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council was examining, of the legal effect and possible revocability of the declaration which Germany might make with regard to the exercise of the right of veto if it became a permanent member of the Security Council. In the presence of that grey area of sorts between the political and the legal consequences of a unilateral declaration, the most pertinent criterion for measuring the degree of confidence to be given to such a declaration would be that of the nature, whether political or legal, of the mechanism to be implemented in the event of failure to comply with the commitment.

3. The second point which deserved the Commission's attention was whether a unilateral legal act could constitute a source of international law. It could be considered, in that context, that Article 38, paragraph 1 (b), of the Statute of ICJ by implication encompassed the legal consequences of unilateral legal acts because, in the past, the latter had contributed to the development of customary rules, notably in the area of the law of the sea; it was there-

fore possible to see in unilateral legal acts a subsidiary source of international law.

4. The third point related to the need to review, in the context of the topic, the principle of estoppel.

5. On the fourth point, concerning how the Commission should proceed, he endorsed the idea of undertaking an expository study in the initial stage.

6. The Declaration made by the Government of Egypt on the Suez Canal in 1957² which had been referred to a number of times in the course of the debate, had been made in conformity with Article 36 of the Statute of ICJ and deposited with the Secretary-General in accordance with the provisions of paragraph 4 of that Article. Its objective had been to accept the jurisdiction of the Court with regard to the application of the Constantinople Convention of 1888, exclusively to the extent that it related to the operation of the Suez Canal and solely with reference to the original parties to the Convention and the successor States.

7. Mr. GALICKI said that he agreed with the Special Rapporteur's approach of eliminating at the beginning such acts which did not fulfil the condition formulated in paragraph 57 of the first report; that led him, in paragraph 170, to a more elaborated definition of so-called strictly unilateral acts. In so doing, he more or less precisely established the limits of the Commission's future work. However, excluding certain categories of act from the scope of the study might give rise to a problem in relation, for example, to the formation of custom, since some unilateral acts originally conceived solely for the purpose of creating international obligations might, in the final analysis, contribute to the formation of customary law.

8. He expressed his appreciation to the Special Rapporteur for his efforts to identify criteria for determining the strictly unilateral nature of international legal acts of States and he endorsed the distinction made, in paragraph 168 of the first report, between substantive acts and formal unilateral acts in the context of an attempt at codification and progressive development.

9. However, the practical realization of the Special Rapporteur's proposed plan of action for the future might give rise to a number of problems and difficulties. First of all, the Special Rapporteur did not say anything about the final form of the work undertaken by the Commission. Secondly, it would be desirable to maintain greater continuity between the outline on the topic prepared by the Commission at its forty-ninth session³ and the Special Rapporteur's work, unless he was of the opinion that it was impossible or inappropriate to deal with certain points.

10. Moreover, despite the necessarily very general nature of the first report, various specific points had been raised in the course of the debate which, far from constituting criticism, might help the Special Rapporteur in his future work. One such point concerned the revocability of obligations which were created by unilateral acts of States

¹ Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

² See 2524th meeting, footnote 17.

³ See 2526th meeting, footnote 22.

and gave rise to corresponding rights for other States. Although, in the case of a purely unilateral act, acceptance by the beneficiary third State was not necessary for the formal establishment of the obligation, the subsequent direct or indirect acceptance of the corresponding right was probable; hence the question of a possible unilateral revocation of the initial obligation by the author State. Although he did not wish to challenge the distinction which the Special Rapporteur rightly drew between the domain of the law of treaties and that of unilateral acts, he thought that it should be possible to find a solution analogous to those provided for in articles 36 and 37 of the 1969 Vienna Convention for the problem of revocation in the case of unilateral acts. It was up to the Special Rapporteur and the working group that was to be re-established to study that question.

11. Mr. THIAM said that he agreed with the approach taken by the Special Rapporteur, who, in dealing with a particularly difficult topic, had begun by clearing the ground, excluding from the scope of the study a number of acts and, for the time being, maintaining only the unilateral declaration, which was at the core of the subject. That wise attitude would not prevent him from subsequently considering whether other acts might also be regarded as unilateral legal acts.

12. Mr. HERDOCIA SACASA said that the first report opened an important chapter in the Commission's work because, in international law, which was accustomed to dialogue and a wide range of protagonists, it introduced the monologue of the unilateral act that produced legal effects. The Commission must work towards progressive development and codification in that area. In its judgments in the *Nuclear Tests*, *Frontier Dispute* and *Military and Paramilitary Activities in and against Nicaragua* cases, for example, ICJ had established criteria which were fundamental for the study of the subject, namely, the clearly expressed intention of producing legal effects and the expression of will by means of an oral or written declaration. There was, however, also the criterion of autonomy, which typified the "pure" unilateral act, without any compensation which guaranteed its validity, as well as that of publicity with respect to the addressees of the act or *erga omnes*. The Special Rapporteur had made the necessary delimitation effort by pruning away falsely unilateral acts, thereby enabling the Commission to do its work, which was to provide means of ensuring legal certainty and stability in international relations by leaving less room for interpretation and allowing States to know precisely under what circumstances their acts might commit them.

13. Unlike some members who favoured extending the scope of the study, the Special Rapporteur confined himself to purely unilateral acts, mainly on the basis of the criterion of autonomy and of the fact that the other acts were already the subject of regulation. In order to achieve the necessary balance, the real question to ask was not whether a unilateral act was autonomous or not, but whether such an act, autonomous or otherwise, already fell within an existing legal framework. There were non-autonomous acts which still had no such framework. Many unilateral acts derived from customary norms that had yet to be codified. If he approached the topic from that standpoint, the Special Rapporteur would take

account of the view of those who supported a broader study and would perhaps manage to achieve a general regime based not on autonomy alone, but also on the unilateral character and the lack of any framework that had already been codified.

14. A few comments were called for at the preliminary stage of the consideration of the topic. There was, first, the question of the relationship between unilateral acts and internal law. Treaty-based acts derived their great force from legislative approval, but, in the case of unilateral acts, which most often issued from the executive, there was often the obstacle of very strict limits in the matter of competence which derived from the principle of the separation of powers. There was also the question, which had been raised expressly in the Sixth Committee, whether unilateral acts were not only international obligations, but also sources of international law. Admittedly, Article 38 of the Statute of ICJ did not refer to unilateral acts, but, on a number of occasions, the Court itself had opined that that Article was not exhaustive so far as the bases for its judgments were concerned. Then there was the question of the dual function of a unilateral act, namely, as the creator of a legal obligation and, at the same time, as evidence of a fact or a situation. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court had taken the view that declarations issuing from high-ranking political persons had special probative value and bound those who made them (see paragraph 64). It had also concluded that it was up to the Court to form its own opinion on the meaning and scope which the author of a declaration had intended to give to it (see paragraph 65). The question which then arose was not only what was the author's intention, but also how the declaration was interpreted and by whom. Accordingly, the Special Rapporteur should analyse the latter aspect of a unilateral act more carefully and always with a view to limiting the margin of interpretation in the matter. Lastly, if a universal norm had to be found as the basis for the binding legal effect of all unilateral acts, then it must be sought in the area of State sovereignty.

15. Mr. BROWNIE said that the criterion of publicity to which Mr. Herdocia Sacasa had referred was certainly relevant in terms of evidence and of the identification of those to whom the act was addressed. It was not, however, a necessary condition for the act to produce legal effects. Many declarations, for instance, between ministers for foreign affairs, were made in camera, but were nonetheless binding on their authors.

16. Mr. KABATSI, noting that the Special Rapporteur had performed the task entrusted to him perfectly, said that his report, like any first report, called for a few preliminary comments. Although some members would prefer not to exclude an open approach to the topic completely, it would be more prudent to keep its scope within very strict even if not absolutely watertight limits. It was always difficult, of course, to isolate the strictly legal—as opposed to political—aspect of acts, but the task should not be impossible and the matter should be studied further. There was no question that the acts of international organizations should be excluded from the scope of the study, but care must be taken to detect acts of that kind which were in reality acts of States. As for the possibility that unilateral acts of States could be a source

of international law, the Special Rapporteur had already provided some information that clarified the matter. The question of the revocation of unilateral acts was linked to the criterion of the precise intention of the author State, but, even in the absence of intention, revocation must be possible in the event of change of circumstances or where the interests of the author State so required. It seemed a priori that silence should not come within the scope of the topic, but, insofar as it could nonetheless amount to a reaction to the position of another State, the question should be examined further. Lastly, regarding the form of the draft to be prepared, draft articles seemed to be the most useful solution and the one most likely to assist States.

17. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the discussion on his first report on unilateral acts of States, said that, given its preliminary nature, the report was bound to be of limited scope. The main point was to try to compile a list of the elements in the definition of a unilateral act. As a result of the discussion, the Commission was currently better able to make out the path it should follow in its further work.

18. Most members recognized, as did international jurisprudence and State practice, that there were unilateral acts of States which could give rise, under international law, to legal obligations. The most discussed question in that connection was the delimitation of the topic, namely, which unilateral acts of States could be the subject of specific rules. The topic had required some pruning and many helpful comments had been made in that respect. Thus, the general view was that unilateral acts of international organizations should not be studied in the context of the topic under consideration, in particular because of the differences between those acts, in terms of their formation and force, and unilateral acts of States. It had also been noted that their study did not come within the mandate which the General Assembly had given to the Commission and that the States which had made comments on the matter in the Sixth Committee had also not been in favour of it. On the other hand, it had been concluded that the acts in question could very well be the subject of a separate study.

19. With regard to political acts, most members had taken the view that they should be studied only insofar as they had legal elements. In that connection, it had been said that the intention of the State from which the act had issued was fundamental. Furthermore, the general view was that all unilateral acts linked to treaties or to pre-existing rules should also be excluded from the study, since, to a certain extent, they fell within the conventional field. As for estoppel, the Commission had apparently concluded that it should be studied not as a procedural mechanism, but from the standpoint of legal unilateral acts that could enable a State to rely on estoppel.

20. It had further been noted that certain unilateral acts of States could come within the field of international responsibility and that care should be taken not to encroach on that subject, which was already under consideration under the topics of State responsibility and of international liability for injurious consequences arising out of acts not prohibited by international law.

21. The majority of members appeared to favour the distinction made in the first report between substantive unilateral acts and formal unilateral acts and had agreed with the idea that only the latter could be studied since the former, given their extremely varied nature, were extremely difficult to make subject to standard rules. Each of them should be studied, but, for the purposes of a work of codification, the general view seemed to be that the work should focus mainly on formal legal acts, starting with unilateral declarations. He trusted, in that connection, that the definition he proposed in paragraph 170 of his report would provide a good basis for drafting a definitive definition of unilateral acts. Such a definition should be clear and not too broad. So far as the form the work could take, draft articles together with commentaries, which would not necessarily be designed to result in codification, would certainly help to facilitate the Commission's task. He therefore proposed that a working group representing the various doctrinal trends should be re-established with a view to achieving a balanced result and one that was also realistic from the political standpoint.

22. The CHAIRMAN said that, if he heard no objection, he would take it that the members agreed to re-establish a working group with the task of assisting the Special Rapporteur in the study of unilateral acts of States and that Mr. Candioti would be ready, as at the forty-ninth session, to act as chairman of an open-ended working group.

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,⁴ A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

23. Mr. Sreenivasa RAO (Special Rapporteur), after reminding members that at the forty-fourth session, in 1992, the Commission had taken a decision to deal with the topic of prevention first under the topic of international liability for injurious consequences arising out of acts not prohibited by international law and then proceed to remedial measures to be taken after damage had occurred,⁵ said he had thought it best to deal first with the scope and content of the topic, which, as had been noted by the Working Group on international liability for injurious consequences arising out of activities not prohibited by international law established by the Commission at its forty-ninth session,⁶ were not always clear.⁷ For that reason and in view of the questions raised during the debate that had taken place in the Sixth Committee on the report of the Commission on the work of its forty-ninth session,

⁴ Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

⁵ *Yearbook* . . . 1992, vol. II (Part Two), p. 51, document A/47/10, paras. 344-346.

⁶ See *Yearbook* . . . 1997, vol. II (Part Two), p. 59, para. 162.

⁷ *Ibid.*, para. 165.

he had decided that it would be profitable to review the work done thus far so as to be in a position to respond to those questions and at the same time clarify the scope and content of the topic. The review was essentially aimed at identifying the various elements of the concept of prevention hitherto developed by the Commission.

24. The Commission's work on the topic of prevention of transboundary damage from hazardous activities should first be placed in the context of sustainable development. It was in that broader context that the concept of prevention had recently assumed great significance and topicality. The objective of prevention of transboundary damage arising from hazardous activities had been emphasized in principle 2 of the Rio Declaration on Environment and Development (Rio Declaration),⁸ and confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* as forming a part of the corpus of international law (see paragraph 29).

25. Prevention should be a preferred policy because, in the event of harm, compensation often could not restore the situation that had prevailed prior to the event or accident. Discharge of the duty of prevention or due diligence was all the more necessary as knowledge regarding the operation of hazardous activities, materials used, the process of managing them and the risks involved was growing steadily. From a legal angle, the enhanced ability to trace the chain of causation, that is to say, the physical link between the cause (the activity) and the effect (the harm), even when several intervening links existed in that chain, also made it imperative for operators of hazardous activities to take all necessary steps to prevent harm. It was well known that prevention was better than cure. It was particularly noteworthy that the European Commission, which had drawn up several sophisticated schemes for prevention of transboundary damage, had emphasized that a growing economy was a necessary precondition for sustainability, in that it created the resources needed for ecological development, the reparation of environmental damage and the prevention of future harm.

26. During the Commission's consideration of the topic of international liability for injurious consequences arising out of activities not prohibited by international law, repeated references had been made to the need to consider the duty of prevention as an obligation of conduct and to develop new rules concerning lawful acts of States that carried the risk of causing serious damage. Accordingly, it had been considered that obligations of reparation could not displace obligations of prevention. The debate on that issue was summarized in paragraphs 35 to 39 of the first report (A/CN.4/487 and Add.1).

27. The first Special Rapporteur on the topic of international liability for injurious consequences arising out of activities not prohibited by international law, Mr. Quentin-Baxter, had dealt with the concepts of prevention and reparation as a continuum rather than as two mutually exclusive options. He had projected liability as a system involving different shades of prohibition and as an appeal

to self-regulation by the source State.⁹ Distinguishing obligations that arose respectively from wrongful acts and from acts not prohibited by international law, Mr. Quentin-Baxter had intended to develop draft articles the primary aim of which was to promote the construction of regimes to regulate, without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects.¹⁰ Most of the principles he had intended to isolate in that regard would, in Mr. Quentin-Baxter's view, belong to the category of primary rules of international law, as, without them, there was no obligation of reparation in respect of harm arising from acts not expressly prohibited. As noted in paragraph 43 of the first report, the Commission had endorsed that approach. In addition, according to Mr. Quentin-Baxter, the duty of prevention would also involve the existence and reconciliation of legitimate interests and multiple factors.¹¹

28. Mr. Quentin-Baxter's main contribution to the study of the topic had of course been the presentation of a schematic outline, the main purpose of which had been

to reflect and encourage the growing practice of States to regulate these matters in advance, so that precise rules of prohibition tailored to the needs of particular situations—including, if appropriate, precise rules of strict liability—will take the place of the general obligations treated in this topic.¹²

Section 2, paragraphs 1, 5 and 6, of the schematic outline¹³ dealt with the obligation of prevention. They provided for the duty to inform and to cooperate in good faith to reach agreement, if necessary, upon the establishment of a non-binding fact-finding procedure. Section 6 dealt with various factors that States could take into consideration with a view to achieving mutual accommodation and balancing of interests. While the schematic outline proposed by Mr. Quentin-Baxter had found general acceptance in the Sixth Committee, some members of the Sixth Committee had felt that it should be reinforced to give better guarantees that the duties of prevention would be discharged. There had also been a few sceptics, as mentioned in paragraph 48 of the first report.

29. Mr. Barboza, who had followed Mr. Quentin-Baxter as Special Rapporteur, had retained the latter's basic approach, indicating that the duty of prevention should continue to be treated as an obligation of conduct and not as one of result. He had, however, recommended that the schematic outline should be slightly modified by deleting the first sentence of section 2, paragraph 8, and section 3, paragraph 4, in order to emphasize that failure to fulfil the obligations contained in those two paragraphs would entail certain adverse procedural consequences for the acting State. Mr. Barboza had also made it clear that, while a State had an obligation to notify, it was not

⁹ *Yearbook . . . 1983*, vol. II (Part One), p. 214, document A/CN.4/373, para. 44.

¹⁰ *Yearbook . . . 1980*, vol. II (Part One), p. 250, document A/CN.4/334 and Add.1 and 2, para. 9.

¹¹ *Ibid.*, p. 258, para. 38.

¹² *Yearbook . . . 1983*, vol. II (Part One), p. 216, document A/CN.4/373, para. 50.

¹³ Reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. Subsequent changes are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

⁸ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

required to obtain the prior consent of the States likely to be affected by the hazardous activities it initiated in its territory. Six different requirements of prevention had been identified by Mr. Barboza¹⁴ and were set out in detail in paragraph 55 of the first report: prior authorization, risk assessment, information and notification, consultations, unilateral preventive measures and a standard of due diligence proportional to the degree of risk of transboundary harm in a particular case.

30. The first report went on to deal with the draft articles provisionally adopted by the Commission at its forty-sixth and forty-seventh sessions¹⁵ and the draft articles proposed by the Working Group at the forty-eighth session.¹⁶ An important question that had arisen in that context was whether measures aimed at preventing further harm—including any measures to be taken to restore the situation that had existed prior to the incidence of harm caused by an accident, that is to say, prevention *ex post*—should be regarded as a part of the duty of prevention. While there had been much disagreement and debate on that point, at the forty-eighth session, the Working Group had endorsed the earlier view of the Commission, taken at its forty-seventh session, that the concept of prevention should include measures of prevention *ex ante* and measures *ex post*.¹⁷ That view was also supported in the resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the Institute of International Law at the 1997 session, held at Strasbourg, which had recommended the adoption of additional mechanisms, such as contingency plans, emergency plans and restoration (safety) measures to prevent further damage and to control, reduce and eliminate damage once it had been caused, as part of the concept of prevention.

31. Articles 4 and 6 provided the basic foundation for the remaining articles on prevention, which would thus extend to taking appropriate measures to identify activities creating a risk of causing significant transboundary harm. That was an obligation of a continuing character. The obligation of prevention was further designed to oblige a State to take unilateral measures to prevent or minimize the risk of significant transboundary harm by having recourse to available scientific knowledge and technology, as well as its own economic capacity.

32. Turning to chapter III of his first report devoted to the scope of the draft articles, he said that the Commission had attacked that problem from the outset. Its members had been able to agree on certain broad criteria: the transboundary element, the element of physical consequence and the need for physical events to have social repercussions, thus excluding harm caused by State policies in

monetary, socio-economic or similar fields. Resisting attempts to expand the scope of the topic in that direction, Mr. Barboza had confined it to those activities with physical consequences where a cause-and-effect relationship between the activity and the injury could easily be established. The Commission had been unable to arrive at any final conclusion on the type of activities to be encompassed by the topic. At its forty-seventh session, the Commission had established a Working Group on the identification of dangerous activities.¹⁸ The Working Group had taken the view that the work of the Commission could proceed without a precise definition of the activities in question, but taking into consideration the activities listed in various conventions dealing with the protection of the environment. The Commission had accepted those conclusions.¹⁹

33. Another question that had engaged the Commission's attention was the question of a threshold, which was fundamental to the concept of significant harm. Mr. Barboza had generally agreed with Mr. Quentin-Baxter and had felt that, with respect to activities involving a risk of causing transboundary harm, injury was the consequence of lawful activities and had to be determined by reference to a number of factors. There was general agreement within the Commission and in the Sixth Committee that the concept of danger was relative and that it was for States to identify the levels at which it could be regarded as substantial. Others would have preferred a clearer indication of the threshold by reference to specific types of dangerous but lawful activities or substances. At its forty-sixth session, the Commission had defined "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and high probability of causing other significant harm.²⁰ That formulation treated threshold as the combined effect of risk and harm which must reach a level deemed significant. The Working Group had approved that formulation at the forty-eighth session.

34. As pointed out in paragraph 97 of the first report, the concept of significant harm had been further clarified to mean something more than detectable or appreciable, but not necessarily serious or substantial. According to that understanding, the harm must lead to real detrimental effects on human health, industry, property, environment or agriculture in other States which could be measured by factual and objective standards. It had also been suggested that, considering that the activities involved were not prohibited by international law, the threshold of intolerance of harm could not be placed below "significant". The term "significant" thus denoted factual and objective criteria and involved a value judgement which depended on the circumstances of a particular case and the period in which such determination was made. In other words, a deprivation which was considered to be significant at one time might not be so regarded later.

35. The criterion of transboundary harm involved the concepts of territory, control and jurisdiction. Those concepts had been defined in article 2, paragraph 1, proposed

¹⁴ J. Barboza, "International liability for the injurious consequences of acts not prohibited by international law and protection of the environment", *Collected Courses of the Hague Academy of International Law, 1994-III* (Dordrecht/Boston/London, Sijthoff, 1995), vol. 247, pp. 291-406.

¹⁵ For the texts of the articles, see *Yearbook . . . 1994*, vol. II (Part Two), pp. 158 et seq. and *Yearbook . . . 1995*, vol. II (Part Two), pp. 89 et seq.

¹⁶ For the texts of the articles and the commentaries thereto, see the report of the Working Group (*Yearbook . . . 1996*, vol. II (Part Two), pp. 101 et seq., document A/51/10, annex I).

¹⁷ See *Yearbook . . . 1995*, vol. II (Part Two), p. 87, para. 389.

¹⁸ *Yearbook . . . 1995*, vol. II (Part Two), p. 89, paras. 405-406.

¹⁹ *Ibid.*, para. 408.

²⁰ *Yearbook . . . 1994*, vol. II (Part Two), p. 164, art. 2, subpara. (a).

by Mr. Quentin-Baxter in his fifth report.²¹ According to the former Special Rapporteur, territory included the land territory, the maritime zones, the airspace and the territorial sea over which a State enjoyed sovereignty, sovereign rights or exclusive jurisdiction. It also took into account the jurisdiction of a flag State over ships, aircraft and space objects when they operated on the high seas or in the airspace. Thus defined, the scope of the topic was concerned with effects felt within the territory or under the control of a State, but arising as a consequence of an activity or situation occurring, wholly or partly, within the territory or under the control of another State or States.

36. Mr. Barboza had adopted the same approach²² and had extended the concept of control to the situation referred to by ICJ in the *Namibia* case, when the Court had said that it was physical control of a territory, and not sovereignty or legitimacy of title, that was the basis of State liability for acts affecting other States (see paragraph 118).

37. Consequently, the draft articles provisionally adopted by the Commission at its forty-sixth session had limited the scope to activities carried out in the territory or otherwise under the jurisdiction or control of a State (art. 1) and had further defined transboundary harm as harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border (art. 2, subpara. (b)). Even though the expression “jurisdiction or control of a State” was more commonly used, the Commission had found it useful to mention also the concept of territory in order to emphasize the territorial link, when such a link existed between activities under the articles and a State.

38. In his sixth report,²³ Mr. Barboza had dealt as a separate matter with the question of extending the scope of the topic to activities which harmed the global commons per se. According to him, a review of State practice seemed to indicate that harm to the global commons had been dealt with through identification of certain harmful substances or areas of the commons. In his view, that trend indicated that the problem was better dealt with under the topic of State responsibility. Several members of the Commission had taken the view that the subject of harm to the global commons raised difficulties in determining the State or States of origin and in the assessment and determination of harm. In addition, the right to compensation and the obligation of prevention of harm were difficult to implement if no single State could be identified as the affected State or the source State. Some members had felt that the subject could be dealt with separately under the Commission’s long-term programme of work, while others had thought that the topic was not ripe enough to be considered. The first group had felt that the subject required priority consideration. According to them, the principles of common concern of mankind and of the protection of inter-generational equities being developed within the context of sustainable development

and environmental law provided the necessary content for the concept of harm to the global commons. As a result, article 2, subparagraph (b), provisionally adopted by the Commission at its forty-sixth session, excluded activities which caused harm only in the territory of the State within which they had been undertaken or activities which harmed the global commons per se without any harm to any other State.

39. Introducing chapter IV of the first report, which set out his recommendations for the scope of the draft articles, he noted that article 1, subparagraph (a), and article 2, as proposed by the Working Group at the forty-eighth session, could be endorsed without further amendment. Article 1, subparagraph (b), dealing with activities which actually caused harm, would have to be deleted, however. That provision had in any case been placed within square brackets and, as the review of the matter in the report appeared to indicate, those activities might be better dealt with under the regime of State responsibility and not within the scope of the current topic. His recommendations represented the opinion of a wide majority of members of the Commission and of delegations in the Sixth Committee. If the Commission adopted them, they offered a realistic chance of achieving consensus, if not complete agreement, on the scope of the topic.

40. Mr. ROSENSTOCK thanked the Special Rapporteur for his exceptionally lucid and concise introduction. He congratulated him on having placed a difficult topic in a historical perspective with the greatest possible precision. The members of the Commission were currently fully informed of the stage reached in the thinking on the topic.

41. Mr. PELLET, referring to paragraph 111 (d) of the first report, said that the statement that only (*seulement* in the French version) significant harm or damage was required to be prevented by States was most inappropriate. It was unlikely that it reflected what the Special Rapporteur had had in mind.

42. Mr. SIMMA, Mr. ECONOMIDES and Mr. PAMBOU-TCHIVOUNDA said that the Commission’s work would be facilitated if the secretariat prepared a compendium of all the texts that had already been drafted on the topic, including the schematic outline and the articles already adopted, which were scattered throughout various reports. It would also be useful to have the text of the resolution of the Institute of International Law referred to by the Special Rapporteur (see paragraph 30 above).

43. Mr. Sreenivasa RAO (Special Rapporteur), replying to a request by Mr. SIMMA, explained that Part Two of his first report, which the Commission would consider shortly, dealt with the scope of the draft articles and with their content. It was those aspects that the Working Group at the forty-ninth session had thought required clarification. The discussion would therefore focus on the main principles which formed the basis of the duty of prevention, that is to say, good faith, consultation, non-discrimination, the obligation to carry out environmental impact assessments and the polluter-pays principle. All those aspects would be reviewed and placed in their proper context on the basis of writings of commentators. On reading those commentators, moreover, it could be concluded that

²¹ *Yearbook* . . . 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

²² *Yearbook* . . . 1987, vol. II (Part Two), p. 45, para. 163.

²³ *Yearbook* . . . 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

the subject matter offered an opportunity for the progressive development of the law rather than for codification.

The meeting rose at 12.55 p.m.

2528th MEETING

Tuesday, 12 May 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Tribute to the memory of Endre Ustor, former member of the Commission

1. The CHAIRMAN said it was his sad duty to inform the Commission that Mr. Endre Ustor, of Hungary, had passed away on 25 April 1998. Mr. Ustor had been a distinguished member of the Commission from 1967 to 1976 and had served as its Special Rapporteur on the most-favoured-nation clause. He was sure that he was expressing the feelings of all members of the Commission in conveying to Mr. Ustor's family their deepest condolences.

At the invitation of the Chairman, the members of the Commission observed a minute of silence.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (continued) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,¹ A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. The CHAIRMAN welcomed the participants in the International Law Seminar, a highly qualified group of young lawyers and he invited the Special Rapporteur to introduce Part Two of his first report on prevention of

transboundary damage from hazardous activities (A/CN.4/487 and Add.1)

3. Mr. LEE (Secretary of the Commission), responding to a comment by Mr. HAFNER, apologized for the late issuance of Part Two of the report.

4. Mr. Sreenivasa RAO (Special Rapporteur) said that, in view of the currency and complexity of the topic, he had sought in Part Two of his first report to raise ideas that would help the Commission focus on the content of the concept of prevention. The report accordingly identified principles of both procedure and substance which interacted and were essential in order to clarify the concept. Principles of procedure might include those of prior authorization, environmental impact assessment, notification, consultation and negotiation; dispute prevention or avoidance and settlement; and non-discrimination. All of them constituted means of achieving specific purposes. Principles of content might include those of precaution, the polluter pays, equity, capacity-building and good governance. An attempt had been made to identify the various sources of each of those principles and to indicate their constituent elements. In almost all cases, States were experimenting with their incorporation in national legislation and were exhibiting flexibility in implementing them.

5. The requirement of prior authorization of an activity that involved a risk of causing significant transboundary harm implied that the granting of such authorization was subject to the fulfilment of certain conditions to ensure that the risk was properly assessed, managed and contained. The requirement also obliged States to put in place appropriate monitoring machinery to make sure that the risk-bearing activity was conducted within the prescribed limits and conditions. It had been endorsed by the Working Group on international liability for injurious consequences arising out of activities not prohibited by international law established by the Commission at its forty-eighth session, in article 9 of the draft articles,² under which prior authorization would also be required in case a "major change" was planned, one which might transform an activity into one creating a significant risk of transboundary harm. The term "major change" had remained undefined, but some examples were given in paragraph 118 of his report.

6. States were tending more and more to fulfil their duty to prevent significant transboundary harm through the use of a statement on environmental impact assessment (EIA) to determine whether a particular activity actually had the potential to cause significant harm. Various aspects of national EIA legislation were noted in paragraph 123. National legislation had traditionally been weak in providing for follow-up to an EIA, but penalties for failure to follow up were nevertheless envisaged. Examples of typical actionable offences were noted in paragraph 125.

7. Once a significant risk of transboundary harm had been identified, it triggered an obligation for the State of origin to notify States likely to be affected and to provide them with all available information, including the results of any assessment made. States likely to be affected had the right to know what investigations had been carried out

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

² See 2527th meeting, footnote 16.