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Summary record of the 2528th meeting

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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.

and what their results had been; to propose additional or different investigations; and to verify for themselves the results. Such an assessment must precede any decision to go ahead with the activity in question and it obligated parties to conduct a prior investigation of risks and not an evaluation of the effects of an activity after an event. In respect of shared resources, States were encouraged to undertake joint action or to make simultaneous efforts to provide the necessary inputs for finalizing the EIA.

8. Cases in which an EIA was required could not always be predetermined by objective criteria: an element of judgement was always present. A list of activities subject to an EIA could be prepared by using criteria like location and size of the activity, the nature of its impact, the degree of risk, public interest and environmental values. Certain substances were cited in some conventions as dangerous or hazardous, and their use in any activity could itself be an indication that the activity might cause significant transboundary harm and hence require an EIA. The content of the risk assessment could vary, depending on a number of factors, some of which were noted in paragraphs 131 and 132.

9. Paragraph 133 noted several issues relating to implementation of the risk assessment requirement by an EIA statement and the duty to notify the States concerned: time limits for notification and submission of information; content of the notification; responsibility for the procedural steps aimed at participation of the public, particularly that of the affected State, in the EIA procedures of the State of origin; and responsibility for the cost involved. Experience with EIA in a transboundary context was diverse and so far no uniform approach to transboundary information exchange had been followed. According to one observer who had reviewed the Antarctic Treaty system and general rules of environmental law, adoption of environmental assessment at the current time could not be considered to be more than a progressive trend of international law.

10. Chapter V, section C, dealt with the principles of cooperation, exchange of information, notification, consultation and negotiation in good faith, all of which had been studied extensively by the Commission before, including in its work on the topic of the law of the non-navigational uses of international watercourses.

11. Greater reliance on the principle of cooperation was significant in emphasizing, positive and more integrated interaction among States to achieve common ends, while imposing on States positive obligations of commission. Cooperation could involve standard-setting and institution-building as well as action undertaken in a spirit of reasonable consideration of the interests of other States and for the achievement of common goals. At the procedural level, cooperation included a duty to notify potentially affected States and to engage such States in consultation. Other elements of the duty of cooperation were noted in paragraphs 141 to 145. Paragraph 146 pointed out, however, that at the normative level it was difficult to conclude that there was an obligation in customary international law to cooperate generally.

12. The objective of consultation was to reconcile conflicting interests and to arrive at solutions that were mutu-

ally beneficial or satisfactory, a point that had been stressed in the *Lake Lanoux* case³ and the case concerning *Territorial Jurisdiction of the International Commission of the River Oder*.⁴ It was well established, however, that the obligation to negotiate did not include an obligation to reach an agreement. Paragraphs 150 to 151 stated that the obligation to consult and negotiate in good faith did not amount to prior consent from or a right of veto of the State with which consultations were to be held.

13. The principle of dispute avoidance or prevention was also suggested as one of the components of prevention, with emphasis on the need to anticipate and prevent environmental problems. Unlike other illegal acts, environmental damage had to be prevented as far as possible *ab initio*. Dispute avoidance comprised techniques like seeking good offices, mediation and conciliation, as well as fact-finding missions and the preventive diplomacy recently deployed by the Secretary-General. Those techniques were outlined in paragraphs 157 to 164.

14. Paragraph 166 referred to a number of recommendations made by an expert group on enhancing compliance with and implementation of international obligations, including reporting on a broad range of activities.

15. The principle of non-discrimination or equal right of access, recognized by OECD⁵ and allowing recourse to the same administrative or legal procedures as were available in the country of origin of the pollution, afforded an opportunity for persons affected by transboundary pollution, irrespective of their place of residence or nationality, to avail themselves of such procedures and to defend their interests at both the preventive stage, before the pollution had occurred, and at the curative stage thereafter. The principle was intended primarily to deal with environmental problems among neighbouring States, as opposed to long-distance pollution. Successful operation of the principle required similarities in the legal systems of the neighbouring States and in their policies for the protection of the rights of persons, property and the environment. Problems regarding application arose where there were drastic differences between the substantive remedies provided in different States. The differences between the environmental laws of the United States of America and Mexico and between the western and eastern European States were cases in point. One difficulty experienced within the OECD countries was attributable to the fact that in some of them administrative courts had no jurisdiction to hear cases concerning the extraterritorial effects of administrative decisions. A second difficulty arose when sole jurisdiction was conferred on the courts of the place where the damage had occurred.

16. The situation of potential victims could be distinguished from that of actual victims in the application of

³ Award of 16 November 1957, original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

⁴ *Judgment No. 16, 1929, P.C.I.J., Series A, No. 23.*

⁵ See OECD Council Recommendation C(77)28(Final) on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution, adopted on 17 May 1977 (OECD, *OECD and the Environment* (Paris, 1986), p. 150).

the principle of non-discrimination. The first situation fell into the category of prevention: potential victims were first protected by their own State, the affected State, to which the State of origin owed a duty of notification, consultation and negotiation. Under the evolving EIA requirement public participation could be extended to participation by potential foreign victims.

17. The principle of non-discrimination had been incorporated in article 29 (Jurisdiction of national courts) of the draft articles proposed by the previous Special Rapporteur, Mr. Julio Barboza in his sixth report.⁶ At the forty-eighth session, the Working Group had included an article on non-discrimination, namely article 20, in chapter III, concerning compensation or other relief.

18. As to the principles of content, the principle of precaution (paras. 174-185) stated that a lack of full scientific certainty about the causes and effects of environmental harm should not be used as a reason for postponing prevention measures. The traditional approach had required the party wishing to adopt a measure to prove a case for action based on sufficient scientific evidence, which might be difficult to obtain. The more modern approach reversed the situation and urged action to prevent, mitigate or eliminate grave and imminent harm.

19. The 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region⁷ had been the first international instrument to treat the principle as one of general application and link it to sustainable development. The UNEP Governing Council had recommended the principle in connection with marine pollution and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (Bamako Convention) had adopted it as a means of preventing pollution by the use of clean production methods. The Bamako Convention had also lowered the threshold at which scientific evidence might require action, by not applying such terms as "serious" or "irreversible" to the harm in question. The Convention on Biological Diversity referred to the principle only in its preamble and the United Nations Framework Convention on Climate Change had established the limits of its application by requiring a threat of "serious or irreversible damage" and referring to measures which were cost-effective. Thus, the various international instruments did not yield a uniform content or understanding of the principle of precaution. According to one commentator, its legal status was still evolving and the consequences of its application would be influenced by the specific circumstances.

20. The polluter-pays principle⁸ had first been enunciated by the OECD Council as an economic principle and the most efficient means of allocating the costs of pollution prevention and control measures; its application would involve both preventive and remedial measures. The principle was adopted as principle 16 of the Rio Dec-

laration,⁹ which dealt with both pollution costs and environmental costs; other costs to be taken into account were noted in paragraph 192 of the report.

21. Application of the principle had not been easy, for States had found ways of justifying subsidy schemes by interpreting the principle according to their convenience. The OECD dispute settlement mechanism was mentioned in paragraph 194, but no case of excessive subsidy had been brought to the attention of OECD or the European Court of Justice. The application of the principle in a transboundary context could also give rise to problems. The OECD practice showed that States rarely paid for transboundary damage because it was the responsibility of the polluter to compensate the victims. With some exceptions, States generally implemented pollution control measures without financial support from other countries. The principle had been introduced in many international agreements as a guiding or a binding principle, but even in the latter case its content had been left vague. Commentators had variously described it as a principle of economic guidance and not a legal principle, as failing to achieve the broad support accorded to the principle of preventive action, or as difficult to translate easily into the principle of liability between States.

22. The principles of equity, capacity-building and good governance were dealt with in chapter VI, section C, of the report. The priority to be attached to the interests and limitations of developing countries had been given specific consideration in the development of international environmental law at the United Nations Conference on Environment and Development. Barring miracles, the priority for the Governments of the developing countries would still be to meet the basic needs of their increasingly large and poor populations. Furthermore, the means of production and the technologies available to the developing countries would remain environmentally unfriendly. The first question in the promotion of sustainable development was how to bridge the gap between developed and developing countries and between rich and poor people within a country. The latter problem was a matter of good governance, while the former should be addressed in the context of equity, particularly intra-generational equity.

23. With regard to intra-generational equity, the important thing was to prevent economic development occurring on the environmental backs of the poor communities. One observer had noted that increased emphasis was being placed on the effects of the interconnected issues of economic development, human rights and environmental protection/resource management on sustainable development in the developing countries. There was also greater realization of the duty to assist the developing countries in meeting their international obligations and realizing higher standards of human rights.

24. The principle of inter-generational equity had originated in the Experts Group on Environmental Law of the World Commission on Environment and Development¹⁰ and had been stated as principle 3 of the Rio Declaration. Ways of clarifying the content of the principle were noted

⁶ See 2527th meeting, footnote 23.

⁷ Document A/CONF.151/PC/10, annex I.

⁸ See OECD Council Recommendation C(72)128 on guiding principles concerning international economic aspects of environmental policies, adopted on 26 May 1972 (OECD, *OECD and the Environment* (Paris, 1986), p. 23).

⁹ See 2527th meeting, footnote 8.

¹⁰ See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham and Trotman/Martinus Nijhoff, 1987).

in paragraph 210 of the report. The pollution prevention approach reflected a growing willingness to relate the present to the future in the formulation of legal norms.

25. Compliance with international environmental obligations meant that a State must develop appropriate standards, introduce environmentally friendly technologies and possess the resources to manage and monitor the activities in question. A spirit of global partnership including financial support, transfer of appropriate technology, and training and technical assistance was recommended to help developing countries and countries in transition to fulfil their environmental obligations. Paragraphs 213 and 214 of the report discussed that matter.

26. Several of the requirements for enhancing the capacity of States to fulfil their prevention obligations culminated in the need for good governance, which meant the need for a State to take the necessary measures of implementation, as was noted in the commentary to article 7 of the draft articles contained in the report of the Working Group at the forty-eighth session. Paragraphs 218 to 220 dealt with the legislative approaches available to States, while paragraphs 221 to 223 discussed the need to encourage public participation. Some conclusions on the entire topic were set out in paragraphs 224 to 233 for further consideration and guidance by the Commission.

27. Mr. LUKASHUK said he joined in the congratulations addressed by Mr. Rosenstock to the Special Rapporteur on an excellent first report. The topic was one of exceptional importance and adoption of the draft articles would represent a step towards the solution of a central issue of modern times which had implications for the very survival of mankind.

28. The obligation to prevent transboundary harm could not as yet be said to represent a standard of positive international law. The work of the Commission on the topic of prevention of transboundary damage from hazardous activities would seem to fall under the heading of progressive development, rather than codification, of international law.

29. The report reflected a number of novel aspects of contemporary international law, foremost among them the question of environmental protection. Referring in that connection to the statement in paragraph 15 of the report that implementation of the due diligence obligation should be made directly proportional to the scientific, technical and economic capacities of States, he said that the underlying idea echoed the concept of sustainable development, which formed the basis of modern law in the ecological sphere. Another novel aspect was the concept of prevention itself, arising as it did from the increasingly rapid rate of current-day historical development. Like the concept of preventive diplomacy, that of prevention of environmental damage deserved to be adopted by the United Nations.

30. The shift of emphasis from liability to prevention would undoubtedly give rise to some difficult problems in connection with the monitoring of compliance by States with their obligations in that regard. Those problems would doubtless receive due attention at a future codification stage. One aspect of environmental law that was open

to doubt was the idea of the tradability of emission rights; the fact that one State had not used up its full quota of emissions should surely not enable another State to exceed its own quota.

31. The report served to confirm the necessity for the Commission to embark on an in-depth analysis of the subject of harm to the global commons, which, as stated in paragraph 111 of the report, was excluded from the scope of the current exercise. In conclusion, he welcomed the Special Rapporteur's intention to complete his work within the next two years, and wished him every success in that undertaking.

32. Mr. Sreenivasa RAO (Special Rapporteur), replying to the point raised in connection with tradable emission rights, referred to paragraph 192 of his report, where those rights were mentioned in connection with the costs of pollution charges or equivalent economic instruments. In view of the limited time available to him, he had felt it desirable, while keeping the broader concepts in mind, to focus as far as possible on the transboundary context, placing less emphasis on issues which related essentially to the global commons aspect. He was, of course, at the service of the Commission should it wish to study one or more of those concepts in their application to transboundary damage.

33. Mr. MIKULKA, after congratulating the Special Rapporteur on a brilliant first report and a clear introduction, said he wished to ask a preliminary question. It had been gratifying to hear in the presentation of Part One of the report that the conclusions being recommended for endorsement were in line with those of the Working Group at the forty-eighth session. Today, however, he had been somewhat surprised by the emphasis placed by the Special Rapporteur on the environmental protection aspect of the topic. The Working Group proposed that the draft articles should be limited to activities which involved a risk of causing significant transboundary harm through their physical consequences in general, not only in the environmental context. He would appreciate clarification of the relationship between the topic before the Commission and the issue of environmental protection as such.

34. Mr. Sreenivasa RAO (Special Rapporteur) said he was grateful to Mr. Mikulka for raising that point. In dealing with the scope of the articles in Part One of the report, he had concentrated on the transboundary context and had refrained from referring to the environment as such. In Part Two, which dealt with the content of the principle of prevention, he had tried to bring in a number of ideas which were currently circulating and which, in his opinion, would be helpful to members in defining the broad parameters of the principle of prevention. The subject the Commission was invited to consider remained that of transboundary damage from hazardous activities; it did not include such issues as creeping pollution or the global commons.

35. Mr. HAFNER, referring to Mr. Lukashuk's comment on tradable emission rights, said he agreed with the Special Rapporteur that the matter fell outside the scope

of the topic as defined by the Commission at its forty-ninth session.

36. Mr. FERRARI BRAVO recalled that, at the forty-ninth session, he had questioned the possibility of excluding environmental considerations from a study on the prevention of transboundary damage from hazardous activities. The problem was extremely serious, especially in the case of smaller countries where no point of the territory was far enough removed from the frontier to preclude the possibility of transboundary damage; for island countries or those with a very large territory, it might be less acute. He hoped that the articles to be drafted by the Special Rapporteur would come to grips with such matters, and reiterate the view that placing the question of the global commons outside the scope of the topic might prove injudicious.

37. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed that the point just raised was an important one. As stated in the conclusions of Part One (paras. 111-113) of the report, harm caused to the global commons per se was indeed excluded from the scope of the exercise, but to his own mind such harm was comparable to harm caused to the high seas that affected the enjoyment of the high seas by other States. Where cause and effect could not be linked, it was difficult to see how harm caused to the global commons could be considered within the current framework. However, other ways and means of dealing with the issue could no doubt be found and he looked to the Commission for guidance.

38. Mr. PELLET said he appreciated the point made by Mr. Ferrari Bravo that the Commission could not fail to take account of damage to the environment but also he agreed with Mr. Mikulka and thought that undue emphasis on the environmental aspect should be avoided. Referring, for example, to paragraph 153 of the report he remarked that the word "environmental", which occurred three times, could perfectly well have been omitted. For example, in the case of a dam which caused significant transboundary damage, the damage would also be economic and financial. It would not be exclusively environmental, which was but one element of transboundary damage from hazardous activities. It would be wise to keep that in mind in the Commission's discussions, in the drafting of the articles and, if he might venture to ask, in the Special Rapporteur's presentations, which were too environmentalist and gave in too much to fashion.

39. Mr. HAFNER, referring to Mr. Pellet's comments on the environment, said that transboundary damage could take at least three forms, namely: loss of life and impairment of health, damage to property, and damage to the environment of other States. Thus, the Commission must inevitably deal with the question of the environment, even though that was not the primary goal of its activity. In international doctrine, practice and even custom, the expression "environmental impact assessment" went beyond the narrower definition of the environment, to encompass questions such as prevention of loss of life. It was in that broader sense that he had understood the references to "the environment" in the Special Rapporteur's first report.

40. Mr. CRAWFORD said that, in paragraph 225 of the conclusions, the Special Rapporteur stated that the standard of due diligence could vary from State to State, from region to region and from one point in time to another. Due diligence standards were more flexible than obligations of result and it was reasonable to take into account factors such as the facilities available to the State concerned. Nonetheless, that must not result in a system of double standards, or rather, in an absence of standards. Having regard to the damage that could arise from some of those situations, to the costs of constructing major projects and the amount of scientific work they required, compliance with the due diligence standard was not unreasonable. Thus, while the Commission could accept that the notion of due diligence involved some level of flexibility, he hoped it did not accept that that notion involved any form of regional or particularist exemption.

41. In paragraph 226, the Special Rapporteur stated that failure to perform the duties of prevention would not give rise to any legal consequences. The Commission had, of course, agreed to consider the question of prevention separately from that of liability. It would be somewhat odd, however, to emphasize the importance of prevention with a view to separating it from liability and then to state in the context of a study on prevention that obligations of prevention carried no legal consequences. He could accept that a mere failure—perhaps a failure to notify, or to provide certain information—did not of itself entail liability for consequences which might flow from the project in respect of which that failure occurred. The failure to notify or provide information might in any case have no special causal link with the damage which had in fact occurred, or it might be that the damage would have occurred anyway. However, it was a contradiction to say that an obligation existed, while at the same time saying that that obligation carried no legal consequences. It was possible to create a *lex specialis*. But that *lex specialis* must at the very least entail some obligation of cessation; otherwise there was no obligation at all. While he understood the concern that the various procedural obligations being developed in that field should not entail such drastic consequences in terms of substantive liability that States would reject them, the Commission should guard against going to the opposite extreme.

42. Mr. MIKULKA, referring to Mr. Hafner's comment that it would be unjustifiable to exclude damage caused to the environment from the scope of the Commission's study, said that no one had proposed any such course of action. The danger was that the Commission would go to the opposite extreme, by concentrating on damage to the environment to the exclusion of other types of damage.

43. As to the remarks by Mr. Ferrari Bravo and Mr. Crawford, the Special Rapporteur had discharged his mandate, which was to produce a report, not on liability, but on prevention. The long process whereby the original topic had been transformed was familiar to all. Prevention fell within the sphere of primary rules, and there would of course be consequences if States failed to abide by those rules. But those consequences led the Commission into the sphere of State responsibility for acts prohibited by international law, and away from the sphere of international liability originally envisaged when Mr. Quentin

Baxter had been appointed Special Rapporteur for the topic at its thirtieth session, in 1978.¹¹ In contrast, the current Special Rapporteur had no mandate to deal with that topic.

44. There was also another scenario: that all the rules of prevention were observed, the State discharged all its obligations, and significant damage nonetheless occurred. In such cases the State would have discharged all its obligations in compliance with international law, and hence one could not say that elimination of the damage was a question of State responsibility. There, once again, one entered the sphere of liability. That question remained to be considered at some time in the future, but, he again stressed, it did not form part of the mandate of the current Special Rapporteur.

45. Mr. SIMMA, taking up the remarks by Mr. Ferrari Bravo, said it was probably too much of a generalization to say that large States were in a better position than smaller States in the matter of prevention of transboundary damage. Much would depend on the concrete circumstances of each case. What could be asserted was that in small and large States alike there was a tendency to place industrial, nuclear and power-generating installations in border areas, for two reasons. First, rivers often formed national boundaries, and such installations required large quantities of water for cooling and other purposes. Secondly, areas close to national boundaries were often among a country's poorer regions and consequently benefited from special programmes to foster industrial development.

46. On the question of the distinction between damage to the environment on the one hand and damage to life, health and property on the other, he doubted that it was possible to distinguish between the various forms of damage that would result from a nuclear accident in a border area. Environmental damage would inevitably involve damage to life, health and property, and it would be wrong to give the impression that environmental damage was what remained once damage to life, health and property had been discounted.

47. As for the due diligence standard, as was stressed in article 3 of 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, the concept needed to be measured in accordance with objective standards relating to the conduct to be expected of a good Government. It was a concept whereby subjective notions of responsibility such as fault were objectivized. To state, as the Special Rapporteur did in paragraph 225, that the standard of due diligence could vary from State to State, from region to region and from one point in time to another, was to deprive the concept of about 99 per cent of its value as a means of assessing whether a duty of prevention had been implemented.

¹¹ At that session the Commission had established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group see *Yearbook . . . 1978*, vol. II (Part Two), pp. 150-152.

48. Lastly, with regard to obligations, if—as was his first impression—the Special Rapporteur was really claiming that failure to perform duties of prevention would not lead to legal consequences, he was establishing a new sort of soft law, by detaching a whole branch of international law from the apparatus of sanctions and responsibility that would otherwise attach to it. Of course, Mr. Crawford had rightly drawn the Commission's attention to the possibility that such regimes created their own machinery for implementation and their own legal consequences in the event of a breach. But if that was so, the Commission should pay attention to what specific legal consequences would arise if those duties of prevention were not performed.

49. Mr. PELLET said he was pleased to see Mr. Simma adopt a unitarist approach to international law, rather than seek to compartmentalize it according to subject matter.

50. With regard to the comments by Mr. Crawford concerning paragraph 226, he endorsed the essence of Mr. Mikulka's remarks but would add a further comment. Rules relating to prevention were indeed primary rules, and violations thereof gave rise to responsibility. Like Mr. Crawford, but for somewhat different reasons, he most emphatically could not subscribe to the Special Rapporteur's statement that failure to perform the duties of prevention would not give rise to any legal consequences. Violation of any rule of law necessarily led to a legal consequence, known as responsibility. Once responsibility was established, the question arose of what consequences flowed from that situation of responsibility resulting from the violation. There might or might not be consequences, depending on whether damage had or had not been caused.

51. Accordingly, as violation of the rules relating to duties of prevention always had a legal consequence, namely, the responsibility of the State that had violated the rules—including, *inter alia*, the requirement to notify—he therefore failed to understand what Mr. Crawford meant in claiming that failure to notify had no legal consequence: the consequence was that the State was responsible. If it subsequently transpired that damage had resulted from that violation, a State would have to make appropriate reparation. Probably the causal link between the non-notification and the damage would be hard to establish. Yet to claim, as did the Special Rapporteur in paragraph 226, that failure to perform the duties of prevention would not give rise to any legal consequences, was not right. It confused reparation with the legal consequences of the violation of a rule of law.

52. Mr. Sreenivasa RAO (Special Rapporteur) said he welcomed the important comments that had been made in the latter part of the debate. He wished, however, to correct one misapprehension. The conclusion set out in paragraph 225 did not represent his own view as Special Rapporteur, but the conclusion the Commission had itself reached over the years. Previous special rapporteurs on the topic had posited that obligations of conduct did not have legal consequences unless damage had actually occurred, and that only then would the consequences of non-compliance with duties of due diligence also come

into play. The schematic outline¹² mentioned that particular aspect of the matter in section 5, paragraph 4.

53. In the subsequent paragraphs, he had begun to look into the difficult question of consequences. Should the opportunity be given to him at the fifty-first session, he was unsure whether it would be advisable for him to embark on a full-scale study of the legal consequences of failure to perform a duty whose content was not clearly established. The duty of prevention led to a variety of procedural steps. For example, a State was supposed to have national legislation in place prescribing prior authorization, procedures for environmental impact assessment, and so forth. However, few States had yet enacted comprehensive legislation in that regard, and such legislation as existed was not yet well established or uniform. That being so, what consequences were to be drawn from non-compliance? That was the problem that troubled him.

54. However, he readily agreed that if the Commission posited a legal duty, non-compliance therewith must have legal consequences. Those consequences could vary. As Mr. Crawford had pointed out, there could be no exemptions, but neither could one prescribe the same type of standards as one would for substantive violations, particularly when procedural violations had not yet yielded a situation in which two claimants were in contention. He sought the Commission's guidance in that very delicate area and hoped that, at the next session, he would have some further thoughts to contribute on the question of consequences, always provided that doing so would not divert the Commission from the completion of its task. The various draft articles that had already come before the Commission incorporated many of the ideas to which he had referred, but none of the drafts prepared by the various working groups contained an article on the consequences of failure to comply with a duty of prevention. A new article would therefore have to be formulated. The question was whether the Commission should study non-compliance from the broader standpoint of State responsibility or in the context of a special topic of liability. A choice could be made at a later stage.

55. To recapitulate, he had two clarifications to make at the outset. First, paragraph 225 was not his own comment, but his report on the situation that had arisen in the course of the Commission's work thus far. As was pointed out in paragraph 228, the Commission, having separated the regime of prevention from that of liability, no longer had an excuse not to consider the question of consequences. If the Commission decided that it did not wish to consider liability as an extension of the current topic at any stage, then it would be compelled to consider the consequences of non-compliance with duties of prevention. If, however, the current topic was subsequently to be linked with liability in some way, the opportunity would then arise to deal with consequences in that context.

56. Secondly, paragraphs 224 to 227 of the conclusions set out to describe developments thus far, and paragraphs 228 et seq. attempted to report on what currently needed to be done. In paragraphs 229 and 230 he had clearly pointed out that non-compliance with duties of

prevention could have consequences both at the State level and at the operator's level. It would be possible to elaborate on those ideas.

57. He was not emphatically claiming that duties of prevention, once posited properly, should have no legal consequences and should be left to the good judgement of the parties concerned. But he would welcome members' assistance in the task—a task he would hope to be able to undertake himself—of identifying what those consequences were.

58. Mr. ROSENSTOCK said that the Commission must be careful to keep the notions of responsibility and liability separate. In the other working languages that distinction was apparently somewhat artificial, but it was an important distinction, and he was not convinced that it was fully appreciated in the paragraphs under discussion. If there was a failure of an obligation of prevention it might be hard to measure the damage, but—unless the Commission was to undo what it had more or less achieved in the area of State responsibility—there was no doubt that there were indeed consequences. The much more difficult question of what happened if all possible steps were taken and harm occurred anyway need not be dealt with at the current stage in the Commission's work. Nevertheless, the Commission should be aware of its existence as a separate question.

59. Mr. PAMBOU-TCHIVOUNDA said he simply wished to pay tribute to Mr. Mikulka, whose comments had enabled the Commission to narrow down the scope of its proposed study of the topic of prevention of transboundary damage from hazardous activities.

The meeting rose at 1.05 p.m.

2529th MEETING

Wednesday, 13 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, 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.

¹² *Yearbook* . . . 1982, vol. II (Part One), pp. 62-63, document A/CN.4/360.