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Summary record of the 2529th meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

Extract from the Yearbook of the International Law Commission:-
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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.

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)

1. Mr. HAFNER said that if, as the philosopher Albert Camus had suggested, the twentieth century was the century of fear, and that such fear could result from the likelihood of harm beyond one's own control, that demonstrated beyond any doubt the importance of the prevention of transboundary harm. Mention had already been made of the political implications of the issue insofar as a duty of prevention could be more difficult for small countries to respect and could become an obstacle to development. There were, however, concrete issues involved as well and he wished to refer to some of them.

2. In dealing with the new topic, the Commission had before it various documents that it had already prepared, including the draft articles submitted by the Working Group on international liability for injurious consequences arising out of activities not prohibited by international law established at its forty-eighth session² and the Convention on the Law of the Non-navigational Uses of International Watercourses, certain provisions of which also dealt with prevention. The Commission could therefore ask itself how far those instruments coincided or differed, especially as the Convention had already been adopted by the international community.³ It might be useful to compare draft articles 4, 10, 11 and 12 proposed by the Working Group with articles 7, 21 and 28 of the Convention, but it must also not be forgotten that there were quite a number of other universal treaties and instruments dealing with various aspects of the topic.

3. As to substance, there was no doubt that existing international law placed an obligation on States to ensure that activities within their jurisdiction respected the environment of other States and the global commons, as stated by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. That obligation formed the basis of the duty of prevention which the Commission currently had to discuss. A consequence of that way of looking at the matter was that environment must be understood not just as environment in the narrow sense, but also as persons and property under the jurisdiction of other States. It did not seem plausible to base the duty not to damage property or persons under foreign jurisdiction on a different principle. Of course, the definition of territory, control and jurisdiction would be a separate issue.

4. Proceeding from that basis, it was clear that the Commission was dealing with primary rules of law, non-compliance with which would entail certain legal consequences in the field of responsibility. There was no need to embark on the question of liability, however, and

particularly not as had been done so far. If that was to be discussed, then it should be only in the sense of civil liability, which corresponded to actual practice. State liability in the strict sense was a way without exit, with only one example being found in international treaty practice. The priority of the concept of State responsibility was made very clear in article 7, paragraph 1, of the Convention on the Law of the Non-navigational Uses of International Watercourses, which imposed on States the obligation to take all appropriate measures to prevent significant harm to other watercourse States. Article 7, paragraph 2, indicated that, only where significant harm was nevertheless caused, the State should provide compensation, even if it had fully respected its obligations. If the State had not respected its obligations, it had to assume responsibility within the usual meaning of the term.

5. Of course, it could be discussed whether more emphasis should be placed on the regulation of preventive measures than on the consequences of damage. That two-fold approach corresponded to the divergences of national legal systems, some of which relied more on the obligation to provide compensation, and others on regulation. At the international level, the regulatory approach was better equipped to conform to the particular features of international law, where no universally competent institution to decide on the cases yet existed and the different sizes and powers of States had a significant impact on the enforcement of the law. Clear rules on preventive measures would help to establish responsibility when damage occurred. The Commission would therefore have to formulate more concrete rules on preventive measures which States would have to respect: it could not expect that a vague principle would satisfy the needs of the modern-day world.

6. The question had been raised by Mr. Mikulka (2528th meeting) as to the need to distinguish between the general duty to protect the environment and the particular one of preventing transboundary damage. That distinction was interesting in connection with what was sometimes called "differentiated responsibility". Article 194 of the United Nations Convention on the Law of the Sea made a clear distinction between the duty to take measures to reduce pollution of the marine environment and the duty to take measures to ensure that activities did not cause damage to other States and their environment. A similar distinction could be found in principles 2 and 7 of the Rio Declaration.⁴ In both cases some sort of differentiated responsibility applied only to the first kind of duty. However, that differentiation did not save the Commission from discussing the scope and nature of due diligence, one of the core issues in the duty of prevention. The problem could be envisaged in two ways: either the duty of prevention had a specific scope so that the primary rule already included some differentiation; or such differentiation could be left to the secondary rules concerning the general determination of an obligation, such as the *ultra posse nemo tenetur* principle.

7. The starting point of the discussion must be the definition of what was to be understood as harm. In most international instruments, the concept had three main

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

² See 2527th meeting, footnote 16.

³ See General Assembly resolution 51/229.

⁴ See 2527th meeting, footnote 8.

components: damage to individuals (impairment of health, injury or loss of life); damage to property; and alteration of the environment. A definition of the environment was therefore required in order to lay out the scope of a prevention regime. Some documents, particularly European texts, expressly included the effect on landscape, historical monuments, cultural heritage or socio-economic conditions. It would also be necessary to clarify the concept of threshold, on which the Commission had already held extensive discussions and which it would have to discuss still further. As to the definition of activities covered by the regime, it had been argued that it would be necessary to include those covered in article 1, subparagraph (b), of the draft articles proposed by the Working Group at the forty-eighth session of the Commission, namely, other activities not prohibited by international law which did not involve a risk referred to in subparagraph (a), but nonetheless caused significant transboundary harm through their physical consequences. However, that category of activities seemed not to fall within the topic of prevention. The Commission should, therefore, include activities that were risky, but not other activities.

8. The Special Rapporteur seemed not to have dealt sufficiently with a problem that was closely connected with the principle of equality of States: when taking preventive measures, was a State of origin required to respect the standard adopted by the possibly affected State or was it obliged to respect only its own standards with regard to the other State as well? That was the problem of different standards of protection granted by States to their populations. It could be argued that it was the affected State that decided the threshold by which the State of origin would have to abide, since the State decided the amount of protection of its population. In contrast, it could be argued that no State could be obliged to provide a higher standard of protection for the population of a foreign State than that which it applied to its own population. A number of other principles of international law—equality, territorial integrity, sovereignty—could be invoked to support one or the other view. Since a clear-cut solution to the problem by a substantive provision seemed unachievable, emphasis had to be placed on the procedure through which the States concerned could reach a solution acceptable to them.

9. Instead of reiterating what had been stated many times in the Commission, members should work to formulate relevant rules as expeditiously as possible. That could best be achieved by taking the draft articles proposed by the Working Group at the forty-eighth session of the Commission and examining them for their relevance to the topic. They could then be analysed as to whether they still corresponded to the existing views on the subject and whether they needed any amendment or addition. That analysis should be done in the light of other instruments, particularly the Convention on the Law of the Non-navigational Uses of International Watercourses, in order to avoid adding to the existing fragmentation of international law.

10. Mr. Sreenivasa RAO (Special Rapporteur) said that he had wanted to give an account in his first report (A/CN.4/487 and Add.1) of the progress made in the Commission's work, without necessarily sharing the theoretic

cal positions which it had adopted. For example, he did not think that the failure to respect due diligence should not have legal consequences. It was with a view to moving ahead with the question that he had suggested, in paragraph 229, that the Commission should shift the matter of consequences into the field of State responsibility. As pointed out by Mr. Hafner, the work could focus either on the area of international liability, a topic for which case law offered only a single precedent, or on State responsibility.

11. With regard to delimiting the scope and nature of due diligence, the principles referred to in the report (precaution, environmental impact assessment, prior authorization, legislative framework and ensuring that violations were detected early) helped provide a much broader definition by taking account of developments brought about by the adoption of various conventions. It might also be necessary to include in the debate the notion of tort or quasi-delict, which had been considered in depth at the domestic level and might also shed light on similar examples in international law.

12. Mr. MELESCANU said he thought that the Special Rapporteur was right to ask whether the topic under consideration must be addressed in the framework of State responsibility or whether the Commission must invent a State civil liability of sorts. In any case, the Commission must try to understand that, first, there could be State responsibility even if the State did not commit a wrongful act because it failed to comply with the fundamental obligation of prevention and, secondly, that there was an obligation of solidarity between States, which must ensure the protection of their citizens. Just as the civil code provided for the case of no-fault liability (for example, in Roman law, the liability of parents for the acts of their children and the liability of the owners of buildings), the Commission must attempt to define State liability for very dangerous or high-risk activities or ones which might cause damage beyond the State's borders. That notion of liability was already accepted in certain very special areas, for example, in the nuclear field. Almost all the conventions in force at the European (Euratom) or international (IAEA) level provided for limited liability in three categories: liability of the plant operator, with a fixed ceiling; liability of the State, which stood in for the operator over and above the amount in question; and liability of all States parties, which were bound to compensate any damage.

13. In his view, it was in that direction that the Commission should seek a solution to the problem of the regime of the prevention of transboundary damage from hazardous activities; that would entail defining the specific conditions in which the State could be held liable for damage originating in its territory.

14. Mr. BROWNIE said that he was concerned that the work of codifying the topic under consideration failed to give enough attention to the progressive development of what might be called environmental law. It was well known that the Special Rapporteur had been put in charge of a rescue operation because the topic of international liability for injurious consequences arising out of acts not prohibited by international law had run aground and the

Commission had not wished to lose the draft articles already formulated.

15. In his view, it was essential to remove the question of transboundary damage from the topic of international liability. At issue was, rather, an aspect of State responsibility, which had never been confined to the injurious consequences of acts which were per se prohibited by international law. If the Commission codified the principles of prevention on the basis that they were separate from those governing State responsibility, it risked derogating from the existing principles in the latter area. It was also well known that the principles of State responsibility were very versatile and changeable and could not be codified in detail; the perfect example of that was due diligence.

16. If the Commission were to venture into the area of environmental law as such, it might start putting into print the principle that the State did not have to seek prior authorization from its neighbour before engaging in a particular economic activity. But that had nothing to do with State responsibility. However, he was pleased to address the subject which the Special Rapporteur had just presented as an example of the progressive development of a certain area of State responsibility, namely, that of transboundary damage, rather than separating it from international liability while continuing to discuss it on a theoretical level as though it were still a part thereof.

17. In closing, he said that he had never understood very well the distinction which was being made between State responsibility and international liability.

18. Mr. PAMBOU-TCHIVOUNDA said that he endorsed the idea of taking a concrete approach to the problem by relying on the existing draft articles, which must be the basis of work. He agreed with the appeal that sight should not be lost of the fact that the topic under consideration and the topic of State responsibility were closely related; that might justify inserting at some point—either at the beginning of the draft articles or at the junction between the regime of prevention and its consequences—a set of provisions to “bridge” the two topics. That would make the Commission’s overall approach to the question of responsibility more credible. Lastly, regardless of how the Commission decided to deal with prevention, it would have to come up with an idea right away to see, at the level of consequences, how to reflect the distinctive nature of the topic; the example of other areas, such as that of the law of the sea, might help it move ahead in that regard.

19. Mr. HE said that, unlike liability in the strict sense, the topic of prevention was already ripe for codification and the Commission had therefore done well to decide to consider it separately on the basis of the complete set of draft articles proposed by the Working Group at the forty-eighth session of the Commission and contained in its report to the General Assembly on the work of its forty-eighth session. However, in the view of a number of delegations to the Sixth Committee, prevention was only an introduction to the crux of the topic, namely, the consequences of the acts in question. Where there was harm, there must be compensation. Moreover, State responsibility could arise if the State failed to implement the obliga-

tions resulting from the draft articles on prevention, as could international civil liability, if the State fulfilled its obligations and harm still occurred. Therefore, as soon as the Commission completed its work on prevention, it should begin its consideration of liability.

20. The scope of the topic of prevention was properly defined in article 1, subparagraph (a), of the draft articles proposed by the Working Group at the forty-eighth session of the Commission, whereas article 1, subparagraph (b), should be deleted.

21. He endorsed the proposals by the Special Rapporteur in Part Two of his report concerning the principles of procedure and the principles of content, with the exception of the “polluter-pays” principle, which should be better placed in the draft articles on liability.

22. He was pleased that the Special Rapporteur had remedied the omission of his predecessor concerning the developing countries and, in the spirit of the Rio Declaration, had stressed the importance of focusing on the needs, particularities and interests of those countries in the framework of a prevention regime. Stressing that the definition of article 1, subparagraph (a), must be understood as naturally covering harm to persons or property, as well as to the environment, he noted that compliance with international environmental obligations, in general, and obligations concerning the prevention of transboundary harm, in particular, presupposed the capacity of a State to develop appropriate standards to bring more environmentally friendly technologies into the production process, as well as to obtain the necessary financial, material and human resources to manage the process of the development, production and monitoring of activities. Hence the interest of a spirit of global cooperation which would enable developing countries and countries in transition to fulfil the obligations associated with the prevention of transboundary harm in their own interest and in that of the international community.

23. Mr. HAFNER pointed out that, pursuant to a number of instruments, for example in the European context, the polluter must bear the costs of prevention measures; that justified dealing with the “polluter-pays” principle in the framework of the prevention regime.

24. Mr. Sreenivasa RAO (Special Rapporteur) said that, as indicated in paragraphs 73 to 86 of his report, the two aspects of compensation and prevention clearly emerged from a study of the existing documentation on the “polluter-pays” principle.

25. Mr. ROSENSTOCK said that Part One of the report provided a wonderful basis for future progress. In the first place, he appreciated the recommendation in paragraph 112 to delete article 1, subparagraph (b), of the draft articles which had been proposed by the Working Group at the forty-eighth session of the Commission and which, in his view, was the key to moving the focus away from the very difficult topic of liability towards responsibility and prevention. On the other hand, the reference to the global commons per se in paragraph 111 (g) could complicate the task of the Commission; it would therefore be better advised to rely on paragraph 111 (h), which did not refer to the matter. With those reservations, his only regret was that the Special Rapporteur had not added a

detailed analysis to Part One of the 20 remaining principles in the draft articles proposed by the Working Group, together with proposals, as that would have provided the Commission with every opportunity to conclude its work at the fifty-first session.

26. In Part Two of the report, the principles of procedure set forth in chapter V seemed at first sight to be acceptable; they were very similar to chapter II of the draft articles and the commentaries thereto proposed by the Working Group at the forty-eighth session.

27. The principles of content, although no less interesting, were somewhat more problematical and some of them seemed excessive. The discussion of the principle of precaution was both thorough and well balanced and paragraphs 184 and 185 were substantially in accord with the relevant parts of the Working Group's draft. The discussion of the "polluter-pays" principle was useful and balanced. It was also encouraging to note that it ended with a quotation from Edith Brown Weiss to the effect that the polluter-pays principle "does not translate easily into a principle of liability between States",⁵ although, in the context of prevention, it was an entirely different matter.

28. In chapter VI, section C, the Special Rapporteur seemed to leave the province of law to grapple with material that was more appropriate for a political declaration and that came within the field of competence of other bodies. Even if it could be argued that there was an interconnection to all things, the Commission could not consider everything, particularly in view of the time allotted to it. In particular, the principle of good governance meant a great deal more than the capacity to implement a duty of prevention and, even if the Commission were to limit itself to telling Governments how to develop their national law in the fields of concern to it, it would be exceeding its mandate and lower the focus of the topic without any likelihood of results.

29. Commenting on the conclusions to the report, he said that those in paragraph 224 seemed to be generally acceptable. In paragraph 225, the Special Rapporteur correctly identified due diligence as the requisite standard for measuring the obligation to prevent—an obligation of conduct, not result. In that connection, if the Commission were to decide to look more deeply into the idea, then, despite the hesitation of some members, including himself, it should take account of 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, according to which due diligence was to be measured on the basis of objective standards.

30. The statement in paragraph 226 that failure to perform the duties of prevention, as envisaged, and non-compliance with obligations of conduct would not give rise to any legal consequences seemed to be a complete misreading of the law of State responsibility. The problem of harm suffered in spite of compliance with the obligation

to exercise due diligence to prevent it would be quite another matter.

31. Paragraph 229 was not clear and made sense only if it referred to the case where, notwithstanding compliance with the duties of prevention, harm to another State occurred anyway. Paragraph 230, though not wrong, seemed to come out of the blue. Paragraph 232 called for the same comments as those on chapter VI, section C.

32. He could not endorse the approach the Special Rapporteur proposed to the Commission in paragraph 233, since it presupposed that the Commission would approve a general orientation and analysis of the report before it reviewed the recommendations made by the Working Group at the forty-eighth session of the Commission. Rather, given the time limit it had imposed on itself, the Commission should focus immediately on that review.

33. Mr. Sreenivasa RAO (Special Rapporteur) said that his intention, in paragraph 233 of the report, had been to obtain guidance from the Commission for the possible formulation of a few additional articles, having regard to his efforts to fill what he had perceived as gaps in his predecessor's work, particularly in chapter VI, section C, and to examine further certain notions such as the polluter-pays principle.

34. Mr. LUKASHUK said that Part Two of the first report appeared to be a charter of principles relating to environmental protection, but principles far removed from positive law—for example, good governance, good neighbourliness, prevention of disputes and equity. At the same time, in paragraph 146, the Special Rapporteur stated that at the normative level, it is difficult to conclude that there was an obligation in customary international law to cooperate generally. Yet that principle of cooperation was expressly stated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁶ It was, however, a principle that existed as a general idea, in other words, not as an obligation to cooperate, but as an obligation to settle disputes in a spirit of cooperation. The other principles, such as, information, notification and consultation, actually only went to explain the principle of cooperation. Furthermore, the attempts to codify the principle of peaceful coexistence made at the initiative of the former socialist countries showed that the principle of cooperation lay at the heart of the principle of coexistence and that there was therefore no contradiction between the two principles. Lastly, the charter of principles introduced different levels of legal obligation, for, as noted 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, setting both rules in the field of environment, international environmental law had evolved significantly and was composed of a considerable number and variety of principles, and rules with different degrees of legal value. The draft articles on the topic should therefore reflect the spirit of those principles without necessarily referring to them expressly.

⁵ "Environmental equity: The imperative for the 21st century", *Sustainable Development and International Law* (London/Dordrecht/Boston, Graham and Trotman/Martinus Nijhoff, 1995), p. 21.

⁶ General Assembly resolution 2625(XXV), annex.

35. Mr. Sreenivasa RAO (Special Rapporteur) said that, at the normative level, there was no duty on a State A to cooperate with a State B continually and in all areas, but, where State A and State B were engaged in a contentious relationship or were in any other way jointly responsible for achieving certain ends, there was a duty to cooperate. It was in that context that he had considered both the principle of cooperation and the way in which it worked in more detail. So far as the relationship between cooperation and peaceful coexistence was concerned, while it was true that they went hand in hand, the coexistence was that of sovereign States which could be brought together only by necessity. It was therefore simply a matter of replacing a certain passiveness on the part of the law by a more deliberate interdependence. Indeed, there was hardly any major disagreement in the Commission on all those points.

36. If the Commission was to complete its work on the topic by the next session, it must insofar as possible avoid a discussion on the liability/State responsibility duo. Then it must focus on the conclusions set out at the end of the report and, more specifically, on the consequences aspect, where the Commission had a duty to go further. While prevention could, of course, be isolated from liability for the time being, consideration of the question of consequences could no longer be deferred. If one opted for the solution of laying down a few primary principles and referring any difficulty to the field of State responsibility, one came up against the problem of State responsibility in the event that an operator incurred liability. There had already been very definite disagreement in the Commission on the question of when the responsibility of the latter would pass to the former. That was why he had concluded in his report that the responsibility or liability of the State must be separated from that of the operator. But he would, of course, take account of the majority view in the Commission.

37. Mr. SIMMA said that Part One of the first report afforded a useful tool in summarizing the work carried out by the Commission on the topic of liability, which had found expression in concrete and viable proposals at the forty-eighth session of the Commission. The Commission must currently follow up that work if it wished to complete the draft articles on prevention and he fully supported the proposals made in Part One. Part Two represented both a collection and a synthesis of everything that had been written, proposed and agreed in the field of prevention in the very wide meaning of the term. But Part Two went further than the draft articles proposed by the Working Group at the forty-eighth session of the Commission and introduced so much controversial material that the Commission might be prevented from completing its work on the topic on time. It might perhaps be advisable to leave that material aside and take it up at a later stage in the context of consideration of liability proper.

38. As for the content of Part Two of the report, it could be seen from the state of the law relating to environmental protection, including prevention, that there were certain principles which were undeniably binding in law (such as *sic utere tuo* or principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)),⁷ but, because of their universal

character, those principles were truly self-executing only if followed up by further more specific agreements. For example, the principle laid down in article 1, proposed by the Working Group at the forty-eighth session of the Commission, could be implemented in concrete terms only if there was agreement or a consensus on the precise meaning of the expression "significant harm". In environmental law, genuine progress could be achieved only via the conclusion of treaties in an ever-increasing number of fields. And within that body of treaties, the same dualism was to be found between framework treaties, which set forth primary principles and remained more or less the same over time, and instruments which set forth secondary rules, gave expression to general principles and changed more over time. Outside the treaty field, a huge body of normative statements and proclamations were to be found in environmental law, including prevention, ranging, at best, from soft law to, at worst, a tendency towards wishful thinking. In all those declarations and proclamations, legal arguments proper found themselves in an uneasy relationship with considerations of another kind. That kind of unstable balance was mirrored to some extent in Part Two of the report. In point of fact, it was prevention, in the modest, matter-of-fact technical sense of the term, that should constitute the hard core of international environmental law and the fundamental principles that should figure in that hard core had already been further developed in numerous bilateral treaties and instruments of soft law, which were nonetheless of considerable authority and had been drawn up in the context, *inter alia*, of OECD and UNEP.

39. From the legal point of view, the principles set forth in Part Two of the report fell into two categories. It was pertinent to ask in the case of the first category—information, notification, consultation and perhaps precaution—whether they belonged under the heading of customary international law and to note that the Commission was in a position to contribute to the law-making process in respect of those principles. The second category—dispute avoidance, equity, capacity-building, good governance—carried the concept of prevention into an area of political and legal controversy where it would find itself in an ambivalent relationship comparable to that which might be considered to exist between human rights and the right to development. To claim that principles such as those set forth in paragraphs 205 and 223 of the report had the status of customary international law or even legal obligations was in reality an attempt to confer juridical legitimacy on political arguments. In the case of the first category of principles, on the other hand, it was legitimate to ask whether the existence of a considerable number of more or less similar provisions justified the conclusion that a rule of customary international law existed. It was a question that could also legitimately be asked in the case of extradition treaties or air service agreements. At all events, by formulating solid draft articles on the subject, the Commission would make an important contribution to the establishment of an *opinio juris*.

40. He also had problems with some of the points made in the Special Rapporteur's conclusions (paras. 224 et

⁷ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

seq.). First, if the standard of due diligence was held to be variable from State to State, from region to region and from one point in time to another (para. 225), the standard was *ipso facto* rendered inoperative. Secondly, paragraphs 226 and 229 seemed to establish a sort of self-contained regime of prevention under which failure to perform a duty of prevention would not constitute a breach of the law. It was extremely important not to sever the connection between prevention and State responsibility, but instead to devise a convincing interface between the two, bearing in mind two main considerations. The first was that the principles governing prevention must be viewed as primary legal rules, the violation of which, where damage ensued, would entail all the consequences attached to internationally wrongful acts as defined in the draft articles on State responsibility.⁸ Secondly, as provision must also be made for cases in which no damage occurred, the legal consequences of internationally wrongful acts consisting in non-performance of duties of prevention must be further developed. Such an approach was in conformity with the spirit of the draft articles, that of objective liability, which meant that it was the internationally wrongful act itself that engaged responsibility even in the absence of damage, unless, of course, the element of damage was contained in the primary rule. In that connection, he noted that no thought had been given in the draft articles on State responsibility to the legal consequences of internationally wrongful acts consisting of omissions and suggested that the Special Rapporteur on that topic should bend his mind to the question.

41. With regard to terminology, the expression “prevention *ex post*” was logically unsound and ought to be replaced by another term, provided, of course, that it conveyed the same idea.

42. Noting that the Special Rapporteur’s task was facilitated by the considerable work already accomplished in the field under consideration by the Commission, he urged the Special Rapporteur to follow the course clearly mapped out from the forty-sixth to forty-eighth sessions of the Commission and to be guided by the draft articles that had already been prepared.

43. Mr. ECONOMIDES, referring to Mr. Simma’s comment on the use of the term “significant” to describe damage, said he felt that, while the term was necessary in the area of responsibility, it might no longer be necessary when dealing with prevention. Neither the Stockholm Declaration nor the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* qualified the idea of damage and the Commission might do well to be more ambitious and refer to the prevention of all kinds of damage.

44. With regard to the duty to cooperate, he regretted that the Special Rapporteur had not taken more account of the principles of good neighbourliness. Transboundary damage was almost by definition damage inflicted on neighbouring countries and the question arose whether, in the light of the principles of good neighbourliness, the duty to cooperate should not, in such cases, be a strict duty.

45. Mr. HAFNER said that neither principle 21 of the Stockholm Declaration nor the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* supported the idea that no harm whatsoever was acceptable. So long as the harm had not attained a certain threshold, it must be tolerated. Otherwise all forms of industrial development would become impossible, for either technical or financial reasons.

46. Mr. FERRARI BRAVO, referring to 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, said that a whole series of rules were applicable prior to the occurrence of damage, the idea being to prevent its occurrence because it would often prove unacceptable. One need only think of the harm that would be inflicted by the use of nuclear weapons. It was from that angle that the subject of prevention should be approached, from a standpoint upstream from the damage caused.

47. Mr. BROWNLIE, referring to a comment by Mr. Simma, cautioned against unduly detailed codification of certain concepts of international law which were flexible and very useful in their current form. The notions of due diligence, significant harm and threshold of harm were cases in point. The meaning of significant, for example, was related to the context in which the word was used. The concepts were liable to be impaired by any attempt to codify them.

48. Mr. PELLET said that the French version of reports containing the words “responsibility” and “liability” should translate the latter word as “*responsabilité* (liability)”; otherwise, a report such as the Special Rapporteur’s first report was virtually incomprehensible for a French-speaking reader.

49. A question that needed to be considered was the moment at which a State incurred responsibility for failure to fulfil its obligations of prevention. In that connection, he reminded the Commission that, in the draft articles on State responsibility, the obligation to prevent was dealt with in articles 23 and 26, but, contrary to the obligation of due diligence provided for in the context of prevention, the obligation related to a result, namely, prevention of a given event. The State’s responsibility was engaged only if the event occurred, but then almost “retroactively”, since article 26 stipulated that the breach of an international obligation requiring a State to prevent a given event occurred when the event began. While, in one case, the obligation related to the result and, in the other, to conduct, there were undoubtedly common features which might, on analysis, shed light on the question of the moment at which liability was engaged in the event of failure to fulfil the obligation to prevent in the context of prevention currently under consideration. Likewise, in the area of State responsibility, the Special Rapporteur could usefully reflect on particular situations in which there was an obligation in respect of conduct rather than result.

50. Mr. ROSENSTOCK said he saw little benefit in drawing comparisons between the obligation of conduct and the obligation of result as set forth in the draft articles on State responsibility in order to determine the point of

⁸ See 2520th meeting, footnote 8.

time at which an obligation to exercise due diligence was breached. While the moment was difficult to determine in practice, it was not in theory: it was the moment when it could be established that due diligence had not been exercised so that another State was exposed to a risk that it should not have to tolerate.

51. Mr. ELARABY said that Mr. Pellet's comment on the use of the word "*responsabilité*" in French was also applicable to Arabic.

52. There had been major developments in environmental law during the past 30 years, a fact that should spur the Commission to engage in a process of progressive development with respect to prevention. On the subject of the legal consequences of failure to fulfil the obligation of prevention, it should be noted that the Special Rapporteur had not ruled out any solution and had actually solicited the views of the members of the Commission. Although the obligation of due diligence was an obligation of conduct, given the serious consequences that could sometimes result from non-fulfilment, it should perhaps be approached from a different angle, for example by associating it with a dispute settlement procedure. Lastly, he took the view that the principles embodied in chapter VI, section C, of the report did not belong under the heading of prevention.

53. Referring to Mr. Brownlie's comments on the use of the term "significant", Mr. AL-KHASAWNEH said he agreed that the threshold of harm must be assessed in context, but wondered whether it might not include an objective element, valid in all contexts, namely, the reparable or non-reparable character of the harm inflicted.

54. Mr. Sreenivasa RAO (Special Rapporteur), referring to Mr. Simma's criticism of the last sentence of paragraph 225 of his report, said that it could almost be described as a truism, since the threshold of harm to be taken into consideration would obviously be affected, *inter alia*, by experience and technical progress. He drew attention in that connection to the explanations contained in the footnote to paragraph 111 (e).

The meeting rose at 1.10 p.m.

2530th MEETING

Thursday, 14 May 1998, at 10.15 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. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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*)

1. Mr. YAMADA said that time constraints had prevented him from fully digesting the Special Rapporteur's first report on prevention of transboundary damage from hazardous activities (A/CN.4/487 and Add.1), which was thoroughly researched, rich in analysis and full of useful footnotes. However, he wished to offer a few comments, in the hope that they would encourage the Commission to make an early start on drafting articles on the topic.

2. Part One of the report provided an accurate account of the Commission's protracted struggle with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. After almost 20 years, at its forty-ninth session, in 1997, the Commission had decided, that for the time being it should limit the subject to prevention of transboundary damage from hazardous activities, without prejudging the question of its future work on other aspects of the broader topic of international liability for injurious consequences arising out of acts not prohibited by international law.² The Commission should thus refrain from engaging in conceptual debate outside the scope of the sub-topic mandated to the Special Rapporteur.

3. He fully endorsed the conclusions set out in paragraphs 111 to 113, on the matter of the scope of the draft articles. In accordance with its mandate, the Commission should deal only with transboundary damage and activities carrying a risk of causing such damage. The broader issue of creeping pollution and the global commons should be excluded, at least at the current stage.

4. In his opinion, as soon as the general debate was concluded, the Commission should take a procedural decision to take note of the two draft articles mentioned by the Special Rapporteur in paragraph 112 and to refer them to the Drafting Committee, which was eager to embark on its task. He hoped that the Drafting Committee would be allocated sufficient time to enable it to complete the work on those two articles at the current session in Geneva.

5. He did not expect the two articles to give rise to many difficulties. One question that might arise was the concept

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

² See *Yearbook . . . 1997*, vol. II (Part Two), p. 59, para. 168 (a).