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Summary record of the 2530th meeting

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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).

of significant harm, raised by Mr. Economides (2529th meeting). On that point, he shared the views expressed by Mr. Hafner (*ibid.*): the Commission must qualify the concept of harm by establishing a threshold of tolerance. As Mr. Al-Khasawneh had recalled (*ibid.*), the Commission had debated that point extensively when formulating the draft articles on the law of the non-navigational uses of international watercourses. During negotiation of the Convention on the Law of the Non-navigational Uses of International Watercourses in the Sixth Committee convening as the Working Group of the Whole, some delegations had objected to the concept of significant harm.³ Finally, however, article 7 on the obligation not to cause significant harm had been widely accepted. Clearly, significant harm was the criterion that currently commanded the widest acceptance in the international community. Paragraphs (2) to (7) of the commentary to article 2 formulated by the Working Group at the forty-eighth session of the Commission,⁴ which virtually reproduced the commentaries, on significant harm, to the draft articles on the law of the non-navigational uses of international watercourses,⁵ would also serve to clarify the concept.

6. From Part Two of the report, he gained the impression that some of its contents fell outside the scope of the Special Rapporteur's mandate. However, he was satisfied with the Special Rapporteur's assurances that he was abiding strictly by that mandate, and took it that the intention was to draw the Commission's attention to the fact that its work on prevention would inevitably have a bearing on other matters outside the scope of the current mandate.

7. He had no quarrel with the contents of chapter VI, section C, on the principles of equity, capacity-building and good governance. However, those principles had highly political, social and economic aspects, and he shared Mr. Rosenstock's apprehensions (*ibid.*) that to take account of those factors might unduly complicate the Commission's task.

8. Paragraph 225, on the standard of due diligence, had provoked some comment. As defended by the Special Rapporteur, that paragraph reflected the true state of affairs. It would be difficult to define an objective standard, and an abstract definition might be useless. Members would recall that draft article 7 of the draft convention on the law of the non-navigational uses of international watercourses had incorporated the concept of due diligence, a concept that had run up against strong resistance during the negotiations in the Sixth Committee convening as the Working Group of the Whole, particularly from some European countries. Consequently, that concept had had to be replaced by the concept of taking "all appropriate measures" to prevent significant harm to other watercourse States. He personally saw no great difference between the two concepts, and preferred "due diligence", which was the established legal concept. However, the Special Rapporteur should take that recent experience into account when formulating the draft articles.

³ See *Official Records of the General Assembly, Fifty-first Session, Sixth Committee*, 51st to 62nd meetings.

⁴ See 2527th meeting, footnote 16.

⁵ For the draft articles and commentaries thereto, see *Yearbook . . . 1994*, vol. II (Part Two), p. 89, para. 222.

9. Paragraph 226, on the question of non-compliance, had also provoked various comments. Non-compliance with duties of prevention would of course entail some consequences. However, the question whether it should be dealt with under the general regime of State responsibility, under the international liability regime or by means of *lex specialis*, could be set aside until the Commission completed its work on prevention.

10. He took it that the Special Rapporteur wished the Commission to approve the general orientation of his first report and his analysis of the content of the concept of prevention. It would be easier for the Commission to do so on the basis of concrete proposals for draft articles on the principles of procedure and the contents of prevention. Accordingly, he would ask the Special Rapporteur to provide the Commission with draft articles as quickly as possible, on the basis of the articles in chapters I and II of the draft proposed by the Working Group at the forty-eighth session of the Commission, possibly with assistance from other members in the context of the Working Group. In any case, it was to be hoped that the draft articles at the current time could be referred to the Drafting Committee in Geneva, so that they could be subsequently further developed when the Drafting Committee met in New York in July 1998.

11. Mr. PAMBOU-TCHIVOUNDA expressed his consternation at the fact that, in an attempt to escape from the impasse into which its study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law had led it, the Commission had decided to adopt the strategy of focusing on the question of prevention of transboundary damage from hazardous activities. Its work had thus taken a new turn that was tantamount to a complete reorientation. It would be necessary to find a new framework for the content and the consequences of the duty of prevention that the regime to be formulated would impose upon States.

12. In such a regime, would not the duty of prevention change in nature, ceasing to be an obligation of conduct and becoming instead an obligation of result? In such a regime, could one avoid the need for a definition or a non-restrictive enumeration of "hazardous activities"? Would such a regime leave open the questions of the inherent consequences of a breach of the obligation of prevention and of the extent of their determination and thus of their cessation? He would be highly gratified if those questions were to find their place in the logic of the subject bequeathed to the Commission by the previous Special Rapporteurs, Mr. Quentin-Baxter and Mr. Barboza, for otherwise the Special Rapporteur would be unable to ignore the calls by Mr. Ferrari Bravo and Mr. Simma for a strict *ex ante* notion of prevention, and by Mr. Economides for a global approach to damage.

13. Alas, the Special Rapporteur's task was far from being completed, for he had treated what was, regrettably, an entirely different topic in the spirit of the previous topic. The Special Rapporteur must go back to the basic sources if his treatment of prevention in the wake of the work of the previous Special Rapporteur, Mr. Barboza, was to receive the endorsement that he sought from the Commission, more particularly in paragraphs 112 and 113 of the report.

14. His own reservations concerned not only the interpretation of the subject matter and the method of approaching it, but also its very substance. There was nothing to prevent the Commission from distancing itself from its work with a view to detecting ways of improving it, albeit without striving obsessively for perfection. In that spirit, he expressed doubts as to the possibility of formulating a homogeneous approach that would not conceal the disparities that existed between States—disparities in their levels of development, of access to and application of scientific know-how. If it proved possible to formulate a homogeneous system, he feared that it would exhibit all the charm of the abstractions and generalities that had characterized international law more than two centuries ago but which had no bearing on modern-day realities and could not assuage the hunger for international law that those realities inspired. In any case, such an approach would do little to enhance the value of the “principle of equity” set forth in chapter VI, section C, of the report. Rather, if the regime were to acquire a lustre of originality, it would derive from the topicality and plurality of the rules of which it was composed.

15. The system still taking shape bizarrely viewed the impact assessment regime as totally outside the sphere of international law, whether general or regional. Yet, if one could conceive that determination of the type of impact assessment appropriate for the activity that might lead to damage was to be left to the discretion of States, it seemed not unreasonable to subject the validity of such impact assessments to international law. Development of a minimum standard for States in the framework of the regime to be elaborated by the Commission would enhance the credibility of that regime in the eyes of the international community, and would have a knock-on effect on internal law.

16. The Special Rapporteur had conferred an ambiguous role on damage in his report. Damage appeared in a twofold guise. The first was that of “unreality”, which should serve as the basis for the construction of a regime of prevention. In that guise, damage was perceived as being so terrifying as not to bear contemplating, and everything possible must be done to prevent it. Could such damage be subject to gradation a priori? Could one limit a priori the number of States committed to combatting it *ex ante*?

17. The second guise in which damage appeared was that of “quantifiability” in terms of the critical threshold. There was no longer any question of preventing such damage, as its victims could be numbered in the thousands. Yet he was struck to read in paragraph 87 that it was admitted that a certain level of harm was inevitable in the normal course of pursuing various developmental and other beneficial activities where such activities had a risk of causing transboundary harm. However, it was equally admitted that substantial transboundary harm was to be avoided or prevented by taking all measures practicable and reasonable under the circumstances. Under such circumstances, prevention would play a daunting role: to identify the “normal course” of an activity, for by definition an activity could be carried out only if it fulfilled the prevention requirements. Prevention and harm were thus mutually exclusive: the normal course of an activity obviated the need for prevention, just as prevention had the

power to “purify” harm. The situation would be deemed never to have occurred, even though the number of victims was in the thousands. If the harm did not exist, that was true not only for the State but also for the operator, as long as the activity was carried out in conformity with the prevention requirements. Was that the kind of system the Commission wished to establish? If so, what would be the consequences of a prevention regime based on the notion of “significant harm” if the regime was to serve the cause of the victims, the most vulnerable? That was the question that needed to be kept in mind in writing the law of liability.

18. Mr. Sreenivasa RAO (Special Rapporteur) said Mr. Yamada had pointed out a way of expediting the work on the topic and, if the Commission approved, he would try to prepare draft articles for submission to the Working Group. Given the extensive discussion that had already taken place, it should be possible to finalize as many articles as possible on the content of prevention. He was also of the impression from members’ comments that there would be no difficulty in reaching agreement on the two articles proposed on scope. The exact number of articles that could be approved by the Commission would depend on its work schedule.

19. As to Mr. Pambou-Tchivounda’s excellent analysis, he shared the concern about the new turn taken by the topic. The orientation that had guided the Commission’s work for 20 years had been narrowed, but that had been done by a considered decision and after extensive debate. There was little to be gained by revisiting the question. By eliminating certain matters from his analysis, he was in no way precluding the possibility that they might be taken up separately, as appropriate, and in accordance with the Commission’s wishes.

20. There was truth to the argument that the threshold for damage—significant harm—was too high, and that at the prevention stage the emphasis should be on avoiding any and all damage that might arise out of the activities of States. When significant harm had occurred, it might be too late to deal with some of the disastrous effects. He disagreed with Mr. Pambou-Tchivounda’s reading of paragraph 87 of his report, however. He had been trying to show that a legal obligation could give rise to considerable contention and a number of claims if the threshold of significant harm was exceeded. At the prevention stage, the only thing happening was that certain steps were being taken. Attempts must be made to keep activities, particularly hazardous activities like the operation of an atomic reactor or chemical plant, as “clean” as possible. That was the thrust of the Rules on Water Pollution in an International Drainage Basin (Montreal Rules), adopted by ILA in 1982.⁶

21. Mr. Al-Khasawneh had mentioned the possibility of reducing the threshold from “significant” to “appreciable” harm. Mr. Yamada, drawing on his intimate knowledge of the elaboration of the Convention on the Law of the Non-navigational Uses of International Watercourses, had recalled that much of the field had already been ploughed, and any deviation from those lines would send

⁶ ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 13 and 535 et seq.

the wrong signals. His own response was that, where lawful activities were concerned, lowering the threshold to the level of avoidance of every possible type of harm would be unacceptable to a broad spectrum of public opinion.

22. Mr. Pambou-Tchivounda's comment that including the concept of equity would militate against a homogeneous construct recalled statements by other members, but it had also been pointed out that a variety of considerations were relevant and many were interconnected. He would look into all the comments made and attempt to take them into account at the next stage in the drafting.

23. He would also try to respond to the concerns expressed by both Mr. Pambou-Tchivounda and Mr. Simma concerning the *ex ante* as opposed to the *ex post* approach. That the emphasis was on *ex ante* was not open to doubt; perhaps Mr. Simma, as Chairman of the Drafting Committee, would be able to find a better formulation than *ex post*. The term was meant to refer to contingency measures to be put in place by States and operators as part of prevention techniques, but which were to be used only after the event. An example could be taken from the fire prevention technique of installing sprinklers, which operated only after the damage occurred, not before. The previous Special Rapporteur, Mr. Barboza, had proposed measures designed to contain damage after the fact, which could be defined as remedial measures.

24. Mr. PAMBOU-TCHIVOUNDA said that in keeping with the Commission's current practice, he had not addressed compliments to the Special Rapporteur on the report. He nonetheless found it impressive for its sharp analysis and audacious proposals, though the sheer size of the document was something of a disadvantage. The Special Rapporteur's proposals on the principle of equity were welcome. He himself did not advocate exclusion of that principle, which took account of the range of differences between countries in levels of development, access to scientific know-how and ability to put it to use. Rather, he wondered what method could be used to incorporate it into the draft articles, so as to ensure that all countries were equally served by them.

25. Mr. ECONOMIDES thanked the Special Rapporteur for a first report, that was brilliant on every count. Paragraph 28 indicated that principle 21 of the Stockholm Declaration⁷ had become a rule of customary international law. ICJ had made that clear in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which said that States had the general obligation to ensure that activities within their jurisdiction and control respected the environment of other States. Hence there was a legal requirement of vigilance to prevent environmental harm at the international level. In view of the similarities between transboundary damage and environmental harm, the same requirement of vigilance should apply to transboundary damage, in line with the reasoning from the *Corfu Channel* case (see page 23), cited in paragraph 43, that every State had an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. It was up to the Commission to ana-

lyse the rule of vigilance and adapt it to the problem of transboundary harm.

26. He agreed with the Special Rapporteur that the Commission should deal only with the prevention of transboundary damage, not with liability for it. Mr. Mikulka (2528th meeting) had clearly stated the reasons: an offence against a system of prevention directly entailed the international responsibility of States, a topic being treated separately by the Commission. In his view, the practical usefulness of the concept of liability was extremely limited, not to say nil. Harm done to another State was nearly always a result of gross negligence or of a major failure to fulfil the obligation of vigilance, and that once again led back to the domain of international responsibility. He therefore concurred with Mr. Yamada that conceptual aspects should be left aside and prevention should be dealt with only in practical and specific terms.

27. He did not agree with the conclusions set out in paragraph 111, subparagraphs (a) to (e), of the report. Because the Commission was dealing only with prevention, it could set lower goals and try to cover prevention of all transboundary damage, not just significant damage—damage arising from any type of activity whatsoever, lawful or unlawful, hazardous or not.

28. It had been contended that such an approach would do a disservice to States by obstructing their industrial development. It might well do so. However, clear priority must be given to environmental protection over industrial development. Money could always be found, but irreparable damage to the environment could not be reversed. He therefore believed that draft article 1, subparagraph (a), and draft article 2, subparagraph (a), should undergo a major revision. Indeed, as Mr. Pambou-Tchivounda had pointed out, the entire draft might have to be revisited and, perhaps, rewritten, in the light of the new and important emphasis on prevention and the advisory opinion by ICJ on the *Legality of the Threat or Use of Nuclear Weapons* that he had mentioned earlier.

29. With reference to Part Two of the report, he agreed with all the principles of procedure and of content, which were admirably described. Equity, capacity-building and good governance, however, though relevant, should be looked at from the standpoint of the long term. The principles should fully and seamlessly regulate prevention. But the draft must offer a solution where consultations and negotiation failed to result in an agreement between the parties and there was a corresponding risk of serious transboundary damage. It should therefore provide for compulsory recourse to impartial investigation, drawing on article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses. The draft should also expressly provide for a general obligation to cooperate, similar to that in article 8 of that Convention.

30. As to the conclusions to the first report, he thought with respect to paragraph 224 that it should not be possible to undertake the disputed activity until the preliminary investigation procedure was completed. A further stage should be added before unilateral action was allowed. With regard to paragraph 225, it should be made

⁷ See 2529th meeting, footnote 7.

clear that the State was acting unilaterally, but by virtue of an international obligation of diligence, which should be fulfilled in as uniform a manner as possible. That should be the Commission's goal. He had serious doubts about the correctness of paragraph 226 from the legal standpoint, but had no difficulty at all in rejecting it from the standpoint of its appropriateness. He fully agreed with the content of paragraph 228, but with respect to paragraph 229 he thought that responsibility and its consequences should not form part of the Commission's study.

31. Mr. HAFNER said that he was not sure what the principle of a duty to cooperate referred to by Mr. Economides would mean in practice. Might the principle impose on the affected State a duty involving costs when only the State originating the activity benefited from it? If so, the affected State would have to assume a financial burden without any counterbalancing benefit. Another possibility was that the principle should only be interpreted as reflecting something which could also be expressed in terms of good faith, that is to say, that the affected State also had to act in good faith. He doubted whether the principle as understood in a very broad sense should apply.

32. Mr. Sreenivasa RAO (Special Rapporteur) said that he had noted the points made by Mr. Economides and had already responded to his central theme of the reorientation of the concept of prevention. He would welcome comments from other members of the Commission on that question.

33. He agreed with Mr. Economides that ICJ had at the current time included the concept of security in the corpus of environmental law. But the Court had not gone into the details of what the concept meant. The various aspects of what was a very complex issue would need further discussion in the context of the Commission's draft articles. Many of the points currently being raised had been examined in the past, during the drafting of the articles on the law of the non-navigational uses of international watercourses, for example. The Commission had achieved a level of understanding as to ways of solving the problems. The question was whether it should go further than that. In connection with prevention, for example, why not consider all kinds of damage and not just transboundary damage?

34. He had clearly received the message that other members would have written Part Two of the report quite differently. He had proceeded by asking himself what the implications of the prevention principle and the polluter-pays principle were in practice for an operator—and he had given answers in terms of the broad concepts set out in the report. Prevention was a many-layered concept, and he did not claim that his report constituted a comprehensive analysis. However, it was an attempt to present the issues that would come up in practice in terms of legal situations and their consequences.

35. The optimum would be to prevent all damage, but that was impossible. Accordingly, the basis of the Commission's approach should consist of criteria triggering a legal engagement when something went wrong, that is to say, the point at which legal consequences came into play. The alternative approach was that legal consequences could be triggered even when no damage had yet

occurred. For example, sanctions might need to be imposed on a State which had not adopted national legislation on prevention. Or some States might need assistance or the "encouragement" of sanctions in order to improve their legislation.

36. Mr. ECONOMIDES said that he could not go as far as Mr. Hafner. The obligation to cooperate in good faith should be interpreted within the context of good neighbourly relations. The costs of any action were a matter for the two parties concerned. He disagreed with the Special Rapporteur on the role of ICJ. The Court did not develop international law. It simply applied it. It was for the Commission to develop international law if it thought benefits would ensue.

37. Since damage would always occur, the Special Rapporteur was suggesting that there should be a threshold of damage beyond which a reaction was triggered. That was a bad policy. The aim, even if it was utopian, should be to prevent all damage.

38. Mr. HAFNER said that the Special Rapporteur had raised an important point which had never before been clarified: did legal consequences arise only when damage had occurred or could they arise from non-compliance with the obligation of prevention? The Special Rapporteur took the former position. But a State which did not comply with the obligation of prevention automatically increased the risk of damage and must assume responsibility for it. The Commission must seek to resolve that issue.

39. Mr. BROWNLIE said that in trying to define prevention the Special Rapporteur might be creating a rod for his own back. What was clear was that the obligation of prevention was a policy datum and that Part One of the report provided the mechanics for pursuing that policy.

40. On the point raised by Mr. Hafner, it was his own assumption that the package of draft articles had its own logic and constituted a specific addition to the existing legal apparatus as part of progressive development of the topic of State responsibility. He could not see how the Commission could helpfully connect the draft articles to all the other possible legal consequences of some threat to a neighbouring State, because different areas of international law—the law of treaties and of State responsibility, for example—might apply in different sets of circumstances and might also overlap. The Drafting Committee should not seek to anticipate that situation in drafting its particular set of articles with its own modest economy.

41. Mr. HAFNER said that several approaches were possible. The Commission might regard its more detailed rules of prevention as *leges imperfectae*, but that was not really its purpose. Alternatively, it might regard them as a self-contained regime with its own consequences, but that would complicate the task. In the case of State responsibility, the consequences of a wrongful act were too flexible, so that they might also be triggered by non-compliance with the obligation of prevention. Things should be left as they were for the time being. Otherwise, the Commission would have to discuss matters lying far beyond its remit.

42. Mr. SIMMA said that there was clearly a difference in the philosophies of Mr. Brownlie and Mr. Hafner: Mr. Brownlie's very pragmatic attitude versus Mr. Hafner's systematic way of thinking, to which the Commission was to some extent tied. There was no reason why the Commission should not ask whether, given the existence of a duty of prevention, it should be attached to legal consequences irrespective of the damage or only when the damage occurred. In other words, the question of the way in which the international legal obligation of prevention should be linked to State responsibility did fall within the Commission's mandate.

43. Mr. Sreenivasa RAO (Special Rapporteur) said that, unless the Commission understood what prevention was all about, it could not properly define "due diligence" and so could not really discuss the consequences of non-compliance with the obligation of prevention. He too would prefer Mr. Brownlie's approach: to leave some of the details to the States concerned in specific activities, each of which would have its own self-contained regime, as was already the case for nuclear reactors, watercourses and chemical plants, for example. As new activities emerged, rules on how to manage them would be developed, perhaps on the basis of a schematic outline such as the one devised by Mr. Quentin-Baxter⁸ or one the Commission would work out. In fact, throughout the study of the topic all of the Special Rapporteurs had stressed that no a priori principles could be laid down for all situations. All that could be done was to urge States to come together and agree on arrangements for such matters as costs, compensation, and so on.

44. Paragraph 226 stopped at that point. In the event of non-compliance with the procedures set out in the draft articles, the States concerned might or might not reach agreement on how to proceed. It was in that context that Mr. Economides had suggested a dispute settlement procedure and that unilateral measures of prevention should be allowed to come into play only on exhaustion of that procedure. A situation might arise in which, without any damage having occurred, certain consequences—notification, consultation, negotiation and dispute settlement had already been engaged. Conduct of those procedures was itself an obligation. Any further sanctions which might be required after that point were discussed in paragraphs 229 and 230 of his report. In paragraph 231 he had stressed that the various duties of prevention were duties which States were expected to undertake willingly and voluntarily. Few hazardous activities would be deliberately intended to harm another State; most were development activities hazardous to the originating State itself. In inter-State relations, States had in fact shown pragmatism in producing the right implementation mix.

45. He had drawn attention in paragraph 232 to the case of States which were capable of showing sensitivity to the established obligations but did not do so. That case must also be examined in connection with the question of legal consequences, a conclusion which had been reached by the UNEP Expert Group Workshop.

46. It was important to remember that, in the matter of State responsibility, the responsibility incurred was that

of the State and not of the individual. The steps the State could take vis-à-vis its own operators, before a neighbouring State was involved, to make sure that its standards were observed also constituted part of the legal consequences. It was a very difficult area, and further discussion in the Commission was essential.

47. Mr. BROWNLIE said that the general question of the precise legal consequences of violations of the obligations under consideration led on to the question of the status of the document the Commission was proposing to draw up. His own assumption so far had been that, because the principles in question fell within the scope of progressive development, the Commission would simply include them in a declaration to be submitted for the approval of the General Assembly, in the hope that, through a process of gradual acceptance, they would eventually acquire the status of principles of customary law. Another possibility would be to draft something in the nature of a self-contained regime with built-in dispute settlement provisions, but given the controversy around the subject of dispute settlement in the context of State responsibility, that might not be advisable in the current instance. What kind of a vehicle did the Special Rapporteur have in mind?

48. Mr. ROSENSTOCK said that the question of responsibility of one form or another in the event of a breach of an obligation was a separate question from whether or not there was an obligation. The document the Drafting Committee was to produce would deal with the latter issue. Clearly, a breach of an obligation entailed legal consequences. As to the sentence in paragraph 232 cited by the Special Rapporteur, namely that the case of States which were capable of showing sensitivity to the obligations established or undertaken but did not do so, the wording was singularly infelicitous because of the excessive prominence it gave to subjective factors. It could certainly be said that the obligation was not to prevent damage but, rather, an obligation of conduct. The formulation should not move towards a subjective perception of the issue.

49. Mr. HAFNER said the idea that responsibility arose only in the presence of actual damage was inconsistent with practice in respect, for instance, of nuclear power plants operated without proper safety measures. There had been considerable diplomatic activity concerning such issues in recent years, resulting, *inter alia*, in the elaboration by IAEA of the Convention on Supplementary Compensation for Nuclear Damage. He could not imagine that, in the event of no damage, a breach of the convention would not entail responsibility or would not entail legal consequences under the law of treaties.

50. Mr. SIMMA commented that there were a number of issues before the Commission. One was the question of the legal consequences that would attach to a breach of the primary duty of prevention. Like Mr. Hafner, he thought the question needed to be raised, although he recognized that it lay outside the Special Rapporteur's current mandate. Another, separate, issue was that of self-contained regimes. In his opinion, breaking international law up into independent segments would not be conducive to its integrity and effectiveness.

⁸ See 2528th meeting, footnote 12.

51. Mr. Sreenivasa RAO (Special Rapporteur) said that at a later stage the Commission would certainly have to go into the question of the legal consequences, if any, that would arise if a State failed to perform its duties of prevention or to comply with its obligations of conduct.

52. Mr. ECONOMIDES said that the legal consequences which arose where there was no occurrence of harm but a breach of an obligation would vary from case to case, depending on the precise nature of the international undertaking entered into by the State concerned. In his view, the draft on prevention of transboundary damage from hazardous activities should include a *lex specialis* provision making it clear that all self-contained regimes which might have a bearing on a particular case would continue to operate. As to the point made by the Special Rapporteur, transboundary damage was a very serious issue and prevention too was a very delicate matter. Accordingly, every precaution should be taken to give a broad meaning to the term "damage" and the consequences, which must be included in the draft, would need to be discussed later.

53. Mr. BROWNLIE said that, unfortunately, he was still speculating about the final form of the document the Commission was to produce. Was it to be a declaration containing a number of standard-setting yet procedural principles designed to supplement the existing law of State responsibility relating to transboundary risks and damage, or a convention, with or without a dispute settlement apparatus, setting out obligations of conduct? In the latter case, a State acting in breach of those obligations would clearly incur treaty-based State responsibility. In the event of transboundary disaster, a breach of the duty-of-prevention treaty would be supplementary to some claim based on customary law made by the injured State. The question of the final form could not, in his view, be divorced from the current debate.

54. Mr. HAFNER said that the consequences of failure to comply with a duty depended on the nature of that duty. The problem was that the conclusions to the first report could be interpreted as applying even to cases where a legal obligation already existed. That impression should be removed.

55. Mr. BROWNLIE said he agreed that the Commission should take care not to prejudice the possibilities available in general international law by what it said under the heading of progressive development.

56. Mr. DUGARD congratulated the Special Rapporteur on a thorough study that would enable the Commission to proceed positively in its search for consensus on the subject of the prevention of transboundary damage from hazardous activities. Some members had criticized paragraph 232 of the conclusions to the first report as being too political. Admittedly, the report dealt with the issues mentioned in that paragraph in a political context, but it did so in a frank and open manner and the issues in question could not, in his view, have been sidestepped.

57. The developing countries' commitment to environmental protection was evidenced by such documents as the African Charter on Human and Peoples' Rights. At the same time, a conflict between the interests of environmental protection and the right to development was bound

to arise in poorer countries. The question of potential transboundary damage caused by the activities of foreign companies and the consequences of the North/South divide in that respect had to be taken into account. In paragraphs 205 and 207 of the report, the Special Rapporteur referred to those problems and to the relevant principles of the Rio Declaration,⁹ while paragraph 210 suggested various steps that might be taken. Pointing out that ideas of that kind had not featured prominently in the past work of the Commission, he asked whether the Special Rapporteur intended to draw on the principles referred to in chapter VI, section C, and paragraph 232 in the body of the draft articles or to leave them to the commentary. Mr. Brownlie's question about the future form of the draft articles was very much to the point in that connection. Personally, he doubted whether principles that could be set forth in a declaration would be acceptable in a multi-lateral treaty.

58. Mr. Sreenivasa RAO (Special Rapporteur) said that the ideas referred to by Mr. Dugard were being debated in other forums and, as Mr. Rosenstock had pointed out, did not fall within the Commission's mandate in connection with the current topic. So far as the future form of the draft articles was concerned, he had no clear-cut proposal to make, but awaited guidance from the Chairman of the Drafting Committee and from other members. A flexible approach would undoubtedly achieve the best results.

59. Mr. PAMBOU-TCHIVOUNDA said that he saw no need to emphasize the distinction between principles of procedure, on the one hand, and principles of content, on the other; there was a considerable amount of overlap between the two areas, especially in terms of precaution and good governance. The principle of equity was perhaps the only one that represented a completely new departure from the work of the previous Special Rapporteurs. On the subject of the future form of the proposed instrument, he did not think it urgent to reach a decision since the intention was not, in any case, to produce a catalogue of principles.

Organization of work of the session (*continued*)*

[Agenda item 1]

60. The CHAIRMAN announced that the Working Group on nationality in relation to the succession of States was composed of the following: Mr. Mikulka (Chairman; Special Rapporteur), Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. Rosenstock; and Mr. Dugard would be an *ex officio* member.

The meeting rose at 1.05 p.m.

* Resumed from the 2519th meeting.

⁹ See 2527th meeting, footnote 8.