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Held at Headquarters, New York, on Monday, 26 October 1998, at 10 a.m.

Chairman: Mr. Enkhsaikhan ..... (Mongolia)

Contents

The meeting was called to order at 10.20 a.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session
(A/53/10)

1. **Mr. Baena Soares** (Chairman of the International Law Commission) said that on the occasion of the fiftieth anniversary of the International Law Commission, it was worthwhile to point out that the Commission had played a central role in the progressive development of international law and its codification. It had produced over 20 sets of draft articles setting forth basic rules in most of the key areas of international law, ranging from State jurisdiction to the position of the individual, and from succession of States to natural resources and economic relations. Some of the most prominent examples were the law of diplomatic and consular relations, the law of treaties, the law of the sea and the law of international organizations. The global treaties had played a fundamental role in international law, and even the draft articles had exerted a substantial influence on the practice of States and of international organizations.

2. At its fiftieth session, the Commission had held a seminar to evaluate critically its work and the lessons learned for its future. It had taken advantage of the ideas and suggestions that had emerged from the 1997 Colloquium held by the Sixth Committee at the request of the General Assembly (resolution 51/160, para. 18). He noted with satisfaction that the proceedings of the Colloquium had been published in June 1998 under the title "Making better international law". He had been informed that the report on the International Law Commission seminar held in April 1998 would also be published soon.

3. The draft statute of an international criminal court prepared by the Commission in 1994 had served as a useful basis for the recently adopted Rome Statute. It was most gratifying that delegates had referred to the Commission's contribution in that regard.

4. At its fiftieth session, the Commission had made significant progress in several areas. The topic of international liability had been on its agenda for a very long time; the new approach it had adopted had enabled it to complete at that session its first reading of a set of 17 draft articles with commentaries on prevention of transboundary damage from hazardous activities. Before embarking on its final reading, the Commission would like very much to have the views of the Governments on the subject.

5. Another important achievement of the Commission's 1998 session had been its work on State responsibility and reservations to treaties. In 1997, the Commission had completed its first reading of the draft articles on State responsibility. In 1998, in the light of Governments' comments and observations, it had further clarified several general but important issues, most importantly the distinction between "criminal" and "delictual" responsibility. On the topic of reservations to treaties, the Commission had adopted seven draft guidelines pertaining to the definition of such reservations. It had then moved on to the definition of interpretative declarations. Again, the Commission looked forward to Governments' comments on the guidelines.

6. The Commission had also considered and reviewed the first reports on two new topics: diplomatic protection and unilateral acts of States. It had established specific premises on which further work should be conducted. The respective Special Rapporteurs had been requested to submit further reports on the basis of those premises.

7. With regard to the topic of nationality in relation to the succession of States, the Commission had formed a working group to examine the question of the nationality of legal persons. Certain preliminary conclusions had been reached and had been submitted in the report. Governments' views on those conclusions would be welcomed.

8. The Commission had continued its fruitful examination of its working methods and work programmes. It had paid special attention to its long-term programme of work and had identified and examined a number of topics for future consideration. In addition, the Commission had continued its useful cooperation with other intergovernmental regional bodies working in the field of public international law. It was worth noting, in particular, the very useful exchange of views with the International Court of Justice.

9. Recalling that in keeping with the tradition of the Sixth Committee, his statement would be delivered in three parts, he said that for the time being, he would refer only to chapters I to V of the report of the Commission (A/53/10).

10. Chapter I was the introduction, and dealt with general issues relating to the membership and officers of the Commission. As in the past, chapter II provided a brief overview of the work of the Commission during its fiftieth session. Chapter III, which had been prepared in response to requests by Governments, listed questions about the work of the Commission on which comments by Governments in the Sixth Committee were particularly helpful to the Commission. The purpose of the chapter was to draw the Committee's attention to the important issues raised in the report, and it was hoped that it would serve as a focus for the Committee's discussion.

11. Chapter IV dealt with international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), a topic on which the Commission had made remarkable progress during its fiftieth session. The Commission had completed the first reading of 17 draft articles on the topic, the texts of which were included in the report. Most of them drew their inspiration from the articles adopted by the Working Group of the Commission in 1996, which had been reconsidered in light of the Commission's decision to focus first on the prevention aspect of the topic as well as on relevant recent developments, especially the adoption of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. In particular, he wished to draw attention to the specific questions raised by the Commission in paragraphs 31 to 34 of the report.

12. Article 1 set forth the scope of the draft articles, namely activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences. For a number of reasons, which were discussed in paragraph (1) of the commentary to the article, the Commission had chosen to define the scope in general terms rather than listing the activities to which the draft articles would apply. The expression "risk of causing significant transboundary harm", as well as the term "harm", were further explained in article 2 on the use of terms. He emphasized that, as indicated in the relevant commentary, the draft articles applied where the combined effect of risk and harm reached a level that was deemed significant.

13. The term "significant" constituted a threshold that had found wide acceptance in international law. It was also clear from the definition of "transboundary harm" in article 2 that the draft articles applied only where an activity caused harm in the territory of or in other places under the jurisdiction or control of a State other than the State of origin. Harm to the global commons per se was thus excluded from the scope of the text.

14. Articles 3 and 4 constituted the cornerstones of the draft articles, setting out the general principles from which the other draft articles were derived. Article 3 embodied the fundamental rule that States must take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm. As was clear from the commentary, the Commission had considered that to be an obligation of due diligence and not an obligation of result. The question arose, nevertheless, as to the consequences of non-compliance with the duty of prevention in the absence of damage, and the Commission would appreciate the guidance of States on that issue. He referred members again in that connection to paragraph 32 of the report.

15. The principle of cooperation between States concerned, namely the State of origin and the State or States likely to be affected, which was reflected in article 4, was essential in designing and implementing effective policies to prevent, or to minimize the risk of, significant transboundary harm. As provided in the article, in certain cases, the assistance of one or more international organizations might be useful in that regard. It was important to stress that the principle of good faith must govern any measures of cooperation taken by States in order to prevent transboundary harm or to minimize the risk thereof.

16. Article 5 dealt with the question of the implementation of the provisions of the draft articles. It was left entirely up to States what measures to adopt, but some measures were mentioned in the article to provide guidance in that respect. Reference was thus made to legislative and administrative action, as well as to the more concrete measure of establishing suitable monitoring mechanisms.

17. The last article of a general nature was article 6, which was in fact a saving clause. It underlined the residual character of the draft articles, which applied only in situations not governed by more specific international rules or regimes.

18. Turning to the articles which spelled out more in detail how the duty of prevention of transboundary damage was to be implemented, he observed that article 7 set forth the fundamental principle that the prior authorization of a State was required for activities carried out in its territory or otherwise under its jurisdiction or control which involved a risk of causing significant transboundary harm. Such authorization was also required for a major change in an activity which had already been authorized, as well as for any change which transformed a non-hazardous activity into one involving a risk of transboundary harm.

19. It would of course not suffice to apply the requirement of prior authorization only to hazardous activities undertaken after the State of origin adopted the regime contained in the draft articles. Pre-existing activities must also be brought under the regime of prior authorization to ensure compliance with the duty of prevention. Article 7 also addressed the question of the consequences of the failure of an operator to conform to the requirements of an authorization, albeit in a general manner, by requiring the State of origin to take appropriate action, which could in extreme cases include the termination of the authorization.

20. In order to decide whether a particular hazardous activity should be authorized, the State of origin must evaluate

the possible transboundary harm caused by that activity. The requirement that an impact assessment be undertaken was reflected in article 8 in very general terms. Indeed, the prevailing view had been that the specifics of the content of the assessment should be left to domestic legislation. Some members, however, had felt that it was desirable to provide some guidance to States in that regard.

21. Article 9 was inspired by new trends in international law, in particular international environmental law, which sought to ensure that individuals whose lives, health, property and environment might be affected were involved in the decision-making process by providing them with a chance to present their views to those ultimately responsible for making the decisions. It should be noted that States were required to provide information not only to their own public, but also to that of other States.

22. The duty of notification was the subject of article 10. Thus, where the assessment of an activity's impact indicated a risk of significant transboundary harm, the State of origin must notify the States likely to be affected and provide them with relevant information, pending any decision on the authorization of the activity. The article balanced that obligation imposed on the State of origin by requiring that States likely to be affected should respond within a reasonable time to the notification, so that the decision whether an activity might be authorized would not be delayed indefinitely.

23. The same concern of balancing the interests of States concerned underlay article 11, regarding consultations on preventive measures. The parties must enter into consultations in good faith and must take into account each other's legitimate interests, the purpose being to achieve mutually acceptable solutions on measures to prevent or minimize the risk of significant transboundary harm. If that objective was not achieved, the State of origin might proceed with the activity, but in so doing, must take into account the interests of the States likely to be affected.

24. Article 12 contained a non-exhaustive list of factors that States were to take into account in the course of consultations so as to achieve an equitable balance of interests. The relevance of a particular factor would depend on the specific circumstances of a case, but article 12 provided some guidance in that respect.

25. The situation where a State had reasonable grounds to believe that an activity carried out in another State involved a risk of significant transboundary harm but had received no notification to that effect from the State of origin was addressed in article 13. In such a case, the former State might request the State of origin to apply the notification procedure described earlier. In some instances, however, the absence of notification was not due to an oversight on the part of the State of origin, but to its belief that the activity in question did not pose any risk. If disagreement persisted on that issue between the States concerned, they could hold consultations. It was important to note that paragraph 3 of article 13 further safeguarded the interests of the State likely to be affected; indeed, if so required, the State of origin must adopt appropriate measures to minimize the risk of the activity, and in certain cases it might even be obliged to suspend the activity for a period of six months or as otherwise agreed.

26. The obligation to exchange information regarding the prevention or minimization of the risk of significant transboundary harm was not limited to the authorization phase, but was a continuous duty. That was made explicit in article 14. However, there was an exception to the obligation to provide information under the draft articles: as indicated in article 15, States were not obligated to disclose information vital to their national security or to the protection of industrial secrets.

27. The Commission had considered it necessary to protect not only the interests of the States likely to be affected by a hazardous activity, but also the interests of natural or juridical persons thus affected. Article 16 therefore provided that in the absence of an agreement on the issue between States concerned, the State of origin must grant access to its judicial or other procedures for seeking protection or redress without discrimination on the basis of nationality, residence or the place where the injury might occur.

28. Lastly, article 17 provided for compulsory resort to the appointment of a fact-finding commission if the parties to a dispute concerning the draft articles were unable to agree on a means of settlement within a period of six months. The Commission realized that article 17 required further elaboration in regard to the establishment and functioning of such a commission, but had felt that it was premature to go into further detail before a decision was taken as to the form of the draft articles. The comments of States on that issue would be particularly welcome.

29. Chapter V was devoted to the topic of "Diplomatic protection". In his report, the Special Rapporteur had sought the views of the Commission on a number of basic issues which underlay the topic and were divided into two broad categories, namely the legal nature of diplomatic protection and the nature of the rules governing diplomatic protection.

30. With regard to the legal nature of diplomatic protection, the Special Rapporteur had explained that at the heart of diplomatic protection there was a dispute between a host State and a foreign national whose rights had been denied and who had suffered injury as a result. If the foreign national was

unable to internationalize the dispute and take it out of the sphere of local law, his or her State of nationality, at its discretion, could espouse the individual's claim by having it undergo a veritable "transformation". The Special Rapporteur had noted two important developments. First, States through agreements recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to their nationals. Second, individuals, by treaties, were granted direct access to international arbitration. The Special Rapporteur believed that those developments and the fact that some legal personality was conferred on the individual, as the direct beneficiary of international law, led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

31. The Special Rapporteur considered that the nature of the rules governing diplomatic protection depended on whether one took the traditional view that a State was enforcing its own right by endorsing the claim of its own national or a more contemporary approach which suggested that the State was simply an agent of its national who had a legally protected interest at the international level. The approach chosen would have practical implications for the formulation of the provisions relating to the topic.

32. The Commission had generally agreed that the topic dealt with a complex issue of great practical significance and that there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law. It had been noted that the original purpose of the institution of diplomatic protection had been to mitigate the disadvantages and injustices to which natural and juridical persons had been subjected. Hence, far from being an oppressive institution, diplomatic protection had at least partially rectified the injustices of a system that reduced the individual, and specifically the private individual, to the rank not of a subject of international law, but of a victim of violations of that law. Some members of the Commission considered that diplomatic protection was a construction in the same sense as the concepts of possession and ownership. For that reason the diplomatic protection in the context of the *Mavrommatis* construct should not be considered a fiction.

33. As for the question of who held the right exercised by way of diplomatic protection – the State of nationality or the injured victims – many members of the Commission considered that diplomatic protection had always been a sovereign prerogative of the State as a subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War regarding indemnification for nationalized property.

34. With regard to the relationship between human rights and diplomatic protection, a number of comments had emphasized the need for caution in assimilating the two institutions or establishing a hierarchy between them. It had been noted that, while it was true that the law of diplomatic protection had existed long before the emergence of human rights as a term of art in international law, the two approaches had existed in parallel, and their respective potentials had overlapped only partially. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could now serve to buttress the diplomatic protection exercised by the State of nationality. In that context, it had been noted that the traditional "*Mavrommatis* approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual's rights effective. It had also been noted that the human rights approach could be allowed to permeate the Commission's further debate on the topic on a case-by-case basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

35. It had been stated that the necessary preconditions for diplomatic protection were that there must be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim had been brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. The second precondition for the exercise of diplomatic protection was that the injured subjects must have been unable to obtain satisfaction through domestic remedies which afforded the State an opportunity to avoid a breach of its international obligations by making timely reparation.

36. Some members considered that the basis for the prior exhaustion of local remedies was empirical and that there might be circumstances in which the requirement did not apply, such as in the absence of any prior voluntary connection with the jurisdiction concerned. The view had also been expressed that the requirement of the exhaustion of local remedies entailed a further consequence that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right.

37. In the context of local remedies, the question had arisen as to whether the minimum standard of treatment accorded

to aliens under international law should be the sole standard and whether the standard of treatment should not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens. To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences which might exist between the host State and the foreign State. It had been further noted that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

38. Questions had been raised as to whether a State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State only had the right to exercise diplomatic protection after all other domestic modes of dispute settlement had been exhausted.

39. As to the question whether the topic dealt with primary or secondary rules, it had been observed that such theories and concepts could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. Those points could be debated as they came up in specific contexts.

40. In order to assist the Special Rapporteur, the Commission had established a Working Group to provide directions in respect of issues which should be covered in his second report. The Working Group's conclusions were contained in paragraph 108 of the Commission's report.

41. **Mr. Fomba** (Mali), referring to the topic "Diplomatic protection", said that Mali agreed with the Working Group's first conclusion that the customary law approach to diplomatic protection should form the basis for the Commission's work on that topic. As the Special Rapporteur had noted, the topic "Diplomatic protection" involved mainly codification and its customary origin had been shaped by the dictum in the *Mavrommatis Palestine Concessions* case.

42. With regard to the second conclusion, while Mali agreed that the topic should deal with secondary rules of international law relating to diplomatic protection, it did not believe that international law could be placed in watertight compartments of "primary" and "secondary" rules. Mali agreed with the Special Rapporteur that the Commission should discuss primary rules only where necessary for the appropriate codification of secondary rules. Theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. Mali likewise considered that the study of diplomatic protection must also include study of the means for exercising it, namely, the traditional machinery for the peaceful settlement of disputes and the question of countermeasures.

43. Mali supported the Special Rapporteur's suggestion that the title of the topic should be changed to "Diplomatic protection of person and property", which appeared more in line with its content and clarified the distinction between that topic and those dealing with diplomatic and consular relations.

44. With regard to the third conclusion, Mali agreed that the exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection. That conclusion pointed to the need for greater emphasis to be placed on the progressive development of customary law based on the international community's recognition of human rights.

45. The Special Rapporteur had correctly posed the questions whether diplomatic protection was a right of States or of individuals and what practical consequences the choice of one or the other might have on the formulation of provisions on the topic. Clear-cut and realistic replies must be found to those as well as to the following questions: Was there in international law a right of the individual to diplomatic protection? If so, to what extent had that right been established? What were or would be the consequences of that right in relation to the discretionary power of the State to refuse or to grant protection and to its right to determine reparation? Did recognition of the right of individuals to have direct access to international judicial forums not call in question or change the nature of the traditional conception of diplomatic protection? Lastly, it was essential to distinguish between the "desirable" and the "possible" and to take account of the legal and political aspects as well as of the interests of the State and of the individual.

46. With regard to the fourth conclusion, Mali shared the view that the Commission's work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and that the actual and specific effect of such developments should be examined in the light of State practice.

47. With regard to the fifth conclusion, Mali supported the view that the discretionary right of the State to exercise diplomatic protection did not prevent it from committing itself to its nationals to exercise such a right. Mali's own Constitution of 25 February 1992, although very progressive

in the area of human rights, did not specifically recognize the right of Malians to diplomatic protection, even though the protection of Malians abroad was one of the declared aims of his Government's foreign policy.

48. With regard to the sixth conclusion, Mali shared the view that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

49. Lastly, with regard to the seventh conclusion, Mali approved of the Commission's decision at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the current quinquennium.

50. On the topic of "Reservations to treaties", Mali's position on the Commission's invitation contained in paragraph 41 of its report was that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself should not be considered as reservations. A reservation in the form of a unilateral statement could and should have but a single purpose, namely, to exclude or modify the legal effect of certain provisions of the treaty as they applied to the State that made the reservation.

51. With regard to paragraph 42, it was essential for Governments to provide information or materials relating to State practice on such unilateral statements and Mali would make its contribution in a timely manner.

52. **Mr. Lavalle Valdes** (Guatemala) observed that the revised text of the 17 draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) omitted all the provisions relating to liability included in the original 22 draft articles contained in annex I to the Commission's report on its forty-eighth session (A/51/10). The revised text had thus focused exclusively on the regime of prevention and had omitted those provisions of the original text that related to liability and to the nature and extent of compensation or other relief. The intention of the authors was clearly to deal with the phases prior to the phase in which the harm occurred, during which the liability of the State of origin might be engaged. Article 16 of the revised text, for example, referred to "persons ... who may be or are exposed to the risk of significant transboundary harm", instead of to "persons who have suffered significant transboundary harm", as article 20 of the original draft articles had done.

53. In Guatemala's view, however, it was not possible to prevent the question of liability from being reintroduced into the revised draft articles. The latter imposed on States obligations whose main purpose was to prevent transboundary harm. Clearly, however, a State bound by the text of the revised draft articles could cause transboundary harm to another State as a consequence of its failure to fulfil those obligations, thereby incurring responsibility towards the affected State. That responsibility, however, was different from the liability to which the original text referred in that the State of origin committed not an act not prohibited by international law but rather an act prohibited by international law.

54. His observations were borne out by the commentary to article 3 of the revised text, which stated that the obligation of States to take preventive or minimization measures was one of due diligence and that the obligation imposed by article 3 was not an obligation of result. There was thus an evident need for primary and secondary rules, an essential attribute of State responsibility.

55. His delegation believed that, under the original draft, in cases where a State bound by the provisions of the draft text caused harm to another State, it incurred liability, even if it had complied with its obligations of prevention. If, however, it had failed to comply with those obligations, and if that non-compliance was the cause of the harm suffered by the other State, it would be held not liable but responsible. That was clear from the fact that in annex I to the Commission's report on the work of its forty-eighth session (A/51/10) paragraph (4) of the commentary to article 4 in the original draft was identical with paragraph (6) of the commentary to article 3 of the revised draft. It would therefore seem that under the original draft a State could be both liable and responsible: the former if it harmed another State despite complying with its obligations of prevention, the latter if it had failed to comply and the harm was due exclusively to that non-compliance.

56. The Commission had not explained why it had decided to delete the words in square brackets appearing in article 1 of the original draft. His delegation would suggest that in article 2 (a) of the revised draft the words "a low probability ... other significant harm" should be replaced by the words "any risk within a range extending from a high probability of causing significant harm to a low probability of causing disastrous harm". If that suggestion was unacceptable, an alternative would be to replace the word "and" with "or" and delete the word "other". If the second suggestion was acceptable, the following words could be added at the end of draft article 2 (a): "and any risk lying between those two extremes". His delegation welcomed the new draft article 2 (b) and the deletion of article 3 of the original draft, which, as it had previously argued, was unnecessary. It queried,

however, whether article 5 of the revised draft served any useful purpose: it had no equivalent in the original draft.

57. With regard to article 16 of the revised draft, it was strange that in discussing access to judicial or other procedures to seek redress, the text referred not to persons who had been harmed but to persons "exposed to the risk" of harm. Doubtless the authors of the revised draft had wished to remove any allusion to questions of responsibility, but, as he had pointed out, the revised draft already incorporated the concept of responsibility. The words "who may be or are exposed to the risk of" should therefore be replaced by the words "who have suffered, as a result of non-compliance with the duty of prevention,". Article 17 of the revised draft was unsatisfactory, since, as paragraph 1 of the draft article indicated, there might be disagreement not only over facts but also over interpretation.

58. Lastly, it should be asked whether the revised draft could stand on its own. The answer was that it could, but only in the sense that a person could survive the amputation of a leg. In his delegation's view, the amputated parts should be reincorporated into the revised draft; in other words there should be a return to the original draft. Alternatively, the amputated parts could form a protocol to the treaty that the revised draft would become.

59. **Mr. Manongi** (United Republic of Tanzania) said, with regard to international liability for injurious consequences arising out of acts not prohibited by international law, that the Commission had made a bold move in deciding to recommend a specific regime on prevention distinct from a regime of liability, raising the question whether the duty of prevention should continue to be treated merely as an obligation of conduct and not of result or whether failure to comply should be subjected to suitable consequences under the law of State responsibility or civil liability or both where the State of origin and the operator were both involved. The decision was bold because the distinction remained confusing. Prevention was, of course, better than cure, but liability had a dual significance – prevention and reparation – just as, in criminal law, the law had both a preventive and a punitive function. In both instances, prevention was only a cautionary obligation of conduct, with no consequential effect in itself, until and unless conduct resulted in an undesirable effect or fault. The establishment of a separate regime based solely on the obligation to prevent would give rise to presumed liability with consequences even when no effect had occurred. If prevention was better than cure, it was hard to understand how failure to perform a duty that had not resulted in an effect could give rise to an actionable cause. The consequence might be that States would not wait until harm occurred in order to invoke liability in the case of a State which seemingly failed to control or to impose certain standards. Such a course of action was fraught with subjective influences and was therefore worrying.

60. Although the International Court of Justice had stated that the obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control had become part of the corpus of international law relating to environment, it remained doubtful whether the notion of strict liability or the exclusion of fault by concentrating on result alone was just, when applied strictly on the regime of State liability. One of the consequences of globalization and liberalization was that in many cases the activity causing harm could be attributed to a private person and not to the State. It might therefore be appropriate to assign the State a secondary, not a primary, liability. The activities of the primary actors should not escape attention; the person responsible for pollution or harm should bear direct and consequential costs, as required by a number of international instruments.

61. His delegation commended the Commission on the sense of fairness that had gone into the formulation of draft article 12 on factors involved in an equitable balance of interests, and notably subparagraph (a). It was too often forgotten that, because of underdevelopment, such factors as low standards of technology or the financial inability to acquire the latest technology which might enhance a State's preventive capacity had to be taken into account if international environmental law was to reflect the existing range of interests.

62. Lastly, it was a matter of relief that the Commission had sought to adopt a title more compatible with the substance of the draft articles. Given its views, his delegation would prefer the draft articles to take the form of a model law rather than a convention. By the same token, it would prefer to see a voluntary dispute settlement regime *inter partes*.

63. **Mr. Caflisch** (Observer for Switzerland) said that the draft article on international liability for injurious consequences arising out of acts not prohibited by international law were of considerable interest, since they put a new slant on the topic, namely the prevention of transboundary harm resulting from activities that might be legal but were hazardous. The work of the Commission had doubtless been facilitated by the adoption of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, several of whose provisions had contributed much to the draft articles. The approach adopted – the insistence on a duty of prevention based on the rule of due diligence – seemed satisfactory, although his

Government had not yet had the opportunity to study the draft in depth.

64. Draft article 1 stated that the text applied to activities which involved "a risk of causing significant transboundary harm", yet draft article 2 (b), (c) and (d) made it clear that the risk referred to was that of harm to another State. It would surely be appropriate to include a reference, such as that contained in articles 20 and 22 of the aforementioned 1997 Convention, to the risk of causing significant harm to an ecosystem. In respect of draft article 2, he drew attention to the confusion surrounding the word "significant". Paragraphs (4)–(7) of the commentary to draft article 2, after asserting that a determination regarding the word had to be made in each specific case, stated that "serious" or "substantial" had on occasion been used synonymously with "significant", even though earlier it had been stated that "significant" need not be synonymous with the other two words. It could not but be recalled that the debate on the term in the Working Group of the Whole for the Elaboration of the 1997 Convention had come up with a definition that was difficult to use. Hard though it might be to resolve the problem of definition, the scope of application of the obligation of prevention depended on its being resolved and the Commission should take another look at the matter.

65. Draft article 3 referred to "appropriate measures", and paragraph (6) of the commentary made it clear that the obligation to apply such measures was one of "due diligence", yet the latter concept was not fully broached until draft article 5, and rounded out in draft articles 7, 8 and 10–13. His delegation wondered whether the concept of "due diligence" should not rather be explicitly mentioned in draft article 3.

66. The system proposed in draft articles 7 and 8 and 10–13, embodying a relatively broad duty of notification counterbalanced by the fact that the obligation to prevent was not absolute but conditioned by the equitable balance referred to in draft article 12, seemed admirable. Such a mechanism, and the specific provisions relative to it, were largely acceptable to his delegation, but with two reservations. First, the reference to a "reasonable time" in article 10, paragraph 2, was too imprecise and should be replaced by a specific period of time; and, second, activities that risked harming the environment should not be merely one of the factors involved in an equitable balance of interests but should perhaps be simply forbidden.

67. With regard to paragraphs 31–34 of the report, his delegation had not yet determined its position on the question whether lack of due diligence would give rise to liability in the absence of any damage actually occurring. If damage did occur, however, the State was responsible; in other words, there remained an obligation of conduct, to which could be added the civil obligation of the exploiter. Lastly, draft article 17 – which was similar to article 33 of the 1997 Convention – was inadequate. If a dispute could not be settled by means of a fact-finding commission, a State party should be entitled to embark on a judicial procedure leading to a binding decision.

68. With regard to diplomatic protection, the Commission had made relatively little progress. Some confusion persisted regarding the distinction between the (secondary) material rules concerning the elements of international responsibility and the secondary procedural rules on the conditions for the exercise of diplomatic protection. His Government believed that the two categories should be distinguished as clearly as possible. It was true that part of the doctrine tended to view diplomatic protection as a mechanism allowing the State to act as an agent of its national who had a legally protected interest (para. 68). That, however, was hardly the approach adopted by chanceries in their everyday work. The Working Group had therefore been right to conclude that the "customary law approach to diplomatic protection" should form the basis for the Commission's work. Diplomatic protection was and should remain a right of the State, with all the consequences that that entailed. The difficult but interesting issue of the relationship between diplomatic protection and international human rights protection, raised in paragraphs 83–91, should be seen in that light. The exercise of diplomatic protection would thus remain a right of the State, whereas international human rights protection systems served individual rights. The two mechanisms should remain separate, even if their aims partially overlapped. The Commission should focus on diplomatic protection and should not prejudge questions relating to international human rights protection; for example, it should avoid the question whether the exhaustion of local remedies included the opportunities offered by international human rights protection systems.

69. The Commission had decided to tackle the whole question of diplomatic protection, including the protection of companies or associations as well as persons. His delegation had already drawn attention to the dangers in that approach, since codification would be difficult. It would have preferred that aspect of the matter to be avoided, but the Commission seemed not to share that preference. It would, nonetheless, be prudent to limit the first part of the Commission's work to the general aspects of the issue and the protection of physical persons, where codification would not be too difficult. The protection of companies or associations could be tackled later on. That approach would have the advantage of ensuring that rules relating to physical persons could be codified unhampered by disputes over protection for

companies and associations, which might hold up all the work relating to diplomatic protection.

Agenda item 154: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/53/L.2)

Draft decision on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (A/C.6/53/L.2)

70. **The Chairman** said he took it that the Committee wished to adopt draft decision A/C.6/53/L.2.

71. *It was so decided*.

The meeting rose at 12.10 p.m.