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Summary record of the 2413th meeting

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2413th MEETING

Friday, 7 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State succession and its impact on the nationality of natural and legal persons (*concluded*)* (A/CN.4/464/Add.2, sect. F, A/CN.4/467,¹ A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

REPORT OF THE WORKING GROUP (*concluded*)*

1. Mr. HE, said that he noted with appreciation the terms of the mandate of the Working Group on State succession and its impact on the nationality of natural and legal persons as set forth in paragraph 2 of its report (A/CN.4/L.507), namely to identify and categorize the issues arising out of the topic. He also agreed with the main finding of that report: that the concept of an obligation to negotiate should be incorporated in legal practice in order to solve questions of nationality, on the understanding that such questions would be determined primarily by internal law. The emergence of a number of new States in a rapidly changing world had, on a succession of States, brought the question of nationality to the fore, and the experience in that connection of certain Asian States after the Second World War could shed some light on the matter. A typical example was Indonesia, which, after attaining independence, had immediately enacted legislation and had endeavoured to solve the problem of dual nationality through negotiation both with the predecessor State—the Netherlands—and with the third State, China. Of major concern to both India and China had been the question of the nationality of the Chinese minority in Indonesia, a matter it had been important to settle in the interests of good relations between the two countries. Their mutual endeavour had culminated, satisfactorily, in the Treaty on Dual Nationality which had imposed an obligation on all persons having both Chinese and Indonesian nationality to opt for one of the two nationalities within two years of the entry into force of the Treaty and to make their choice by denouncing the other nationality.² Such a broad

provision—an innovation in international bilateral treaties on nationality—had made a significant contribution to solving the question of dual nationality.

2. In that particular case, Indonesia had been a successor State and China, not a predecessor or a successor State, but a third State. That raised the question whether the agreement referred to in paragraph 6 of the report should be entered into between the predecessor State and successor State alone or whether, as he believed, a third State closely concerned in a nationality problem in the successor State should also be party to such an agreement. If so, that prompted the further question of whether a reference to another category of persons should not be included in the report, perhaps under section 2 (a) (iii) (Obligation of the predecessor and the successor States to grant a right of option), and which could perhaps read: “persons having acquired the nationality of a third State on the basis of the principle of *jus sanguinis* and residing in the successor State”. At all events, the question of State practice in solving issues of dual nationality, as exemplified in the above-mentioned Treaty, might usefully be mentioned in the report.

3. Mr. de SARAM said that the large number of specific points listed in the Working Group’s report would need to be considered carefully at future sessions. He was acutely sensitive and sympathetic to the hardships suffered by persons, in the matter of nationality, where there was a change—whether by way of State succession or otherwise—in the State under whose law they had secured a nationality. At the same time, he wished to emphasize that his observations were not made in reference to any past, present or prospective international crisis or concern—all such crises or concerns having their own characteristics. He had, however, been much impressed by Mr. Kusuma-Atmadja’s account (2411th meeting) of Indonesia’s experience with State succession when the various problems had been resolved by arrangements—arrived at through consultation and diplomatic exchanges—that were humane yet entirely consonant with the national interest.

4. The report set out in paragraph 2 the Working Group’s terms of reference, which had been established after a number of statements had been made in plenary regarding the methodology to be followed by the Commission. While it contained an excellent categorization of the kinds of situations in which State succession affected the nationality of persons in inhumane ways, in view of the Working Group’s mandate the report should then have set forth “issues”, on which there might well have been different views, followed by recommendations concerning ways in which such “issues” could be resolved. On the other hand, the report did indicate a number of “obligations” which the Working Group appeared to have concluded should be assumed by the States concerned to avoid the problem of statelessness. However, in setting out such a system of “obligations” for acceptance by Governments, the sources and rules of law on which such a system was founded must be adequately clarified and, if the law currently applied was inadequate, an indication should be given of ways in which it could be progressively developed consistent

* Resumed from the 2411th meeting.

¹ Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

² See 2390th meeting, footnote 9.

with realistic expectations. That was something the report of the Working Group did not seem to do.

5. Further, it would have been helpful if the report had contained notations indicating whether any of the “obligations” proposed for eventual adoption by Governments corresponded to provisions in treaties in force or in treaties prepared by the United Nations or other bodies but not yet in force. Again, the Working Group’s report did not refer to the way in which State practice on relevant points could be ascertained. That might be done, for instance, by means of a questionnaire, to which reference had in fact been made at the previous meeting during consideration of the topic of the law and practice relating to reservations to treaties. Nor did the report contain a calendar for future work, as apparently required by the terms of reference set out in paragraph 2. He none the less appreciated that, at the current session, the Commission’s various working groups had had to work under considerable pressure.

6. Mr. GÜNEY said that he agreed with the two basic propositions reflected in the Working Group’s report, first, that any person whose nationality could be affected by a change in the international status of a territory had, in principle, the right to a nationality and that States had an obligation to prevent statelessness, and secondly, that there should be an obligation to negotiate, incumbent on both parties, with a view to resolving problems by agreement.

7. As to the guideline for negotiations between States on the nationality of different categories of natural persons, care must be taken, within the framework of the topic, not to reverse the respective roles of the State and the individual. Also, the categories of persons to whom it was envisaged that the right of option would be accorded must be limited or at the very least should not be enlarged to such an extent that that right was granted to persons with a secondary nationality.

8. Although the general view which had emerged in the Commission during consideration of the Special Rapporteur’s first report (A/CN.4/467) was that the nationality of natural persons should be dealt with first, the question of legal persons was also important and interesting from the legal standpoint. In his view, therefore, that question should be appropriately dealt with in future to round off the framework of the topic.

9. He endorsed Mr. de Saram’s comments and in particular his reference to the possible inadequacy of the applicable law and the need to affirm State practice.

10. Mr. KABATSI said that, from a reading of the report, he took it that the Working Group had decided not to pursue the question of legal persons and to deal only with natural persons. In the circumstances, the title of the topic should perhaps be amended accordingly.

11. The Working Group had based its preliminary findings on two fundamental premises—that any person affected by State succession had a right to a nationality, and that, as a consequence, the States involved had an obligation to prevent statelessness. Thus, the focus was on the right of persons to a nationality and, in so far as reasonably possible, to a nationality of their choice. The report also discussed a number of important principles, including the obligation to negotiate and to determine under and in what circumstances nationality could be

granted or withdrawn; the obligation on the predecessor State not to withdraw its nationality from an individual to the detriment of that individual; the obligation on one State to grant nationality if the other State had a right to withdraw that nationality; and the obligation on States to grant a right of option.

12. In identifying the various types of succession and the treatment to be accorded to the persons affected, the Working Group seemed to concentrate on recent experience of the eastern European situation which was, of course, in many respects applicable universally. But very little mention was made of the colonial experience, presumably because, according to the statement made by the Special Rapporteur in his first report, that no longer appeared to be a problem. Yet a colonial situation was not necessarily a thing of the past. At all events, there had been very little negotiation between the colonial powers and the States that had succeeded them, which had led to complications and, in many instances, to statelessness. That applied in particular to non-indigenous peoples who did not belong to the colonial power or to the territory that had become independent. Quite often such people fell between two stools, as had occurred in some parts of Africa in the case of persons of Indian, Asian and Chinese origin.

13. Furthermore, because of the cut-off dates laid down under the constitutional arrangements passed on by the colonial Powers, many people had not known exactly where they belonged. For instance, under the Constitution of Uganda, which had become independent in 1962, any person whose parents had been born in the territory and who were in Uganda on the day before independence became citizens. Many people whose parents had not been born in that territory or who did not know about the cut-off date had thus lost their citizenship yet had not become citizens of any other country. That problem persisted in Uganda. The report made little, if any, attempt to address the problem. He trusted that it would be dealt with as work on the topic progressed.

14. The CHAIRMAN, speaking in his capacity as member of the Commission, congratulated the Special Rapporteur and the Working Group on the important work they had done. The Commission was aware that the Working Group’s report was only preliminary and that only limited time had been available. The report, which reflected a great intellectual effort, had neatly categorized the issues and policies involved and would serve as a good basis for formulating principles to serve as guidelines.

15. Paragraph 7 referred to a number of “effects” of State succession. In his view, those were consequences of nationality and it was not necessary to focus on them in the effort to identify the impact of State succession on nationality itself. They should not be the subject of long discussions in the study.

16. As to paragraph 10 (*d*), it was not clear how the concept of “secondary nationality” worked in connection with a federal State. His own country, which was a federal State, did not have two nationalities. In other countries in which two nationalities existed, he was not aware that a distinction was made between primary and secondary nationalities. To his mind, the latter category was confusing and should not be placed on the same

footing as the main issue of nationality. The point needed to be looked into further so as not to distract the General Assembly from the prime focus of concern.

17. He wondered whether it was appropriate to speak of rights and obligations in subsequent paragraphs, especially when guidelines were at issue and where situations under present-day law were not clear. To speak of obligations at such an early stage, before State practice or *lex lata* concerning obligations was clear, might cause confusion. If the Working Group was suggesting guidelines on the basis of which certain *lex lata* could be developed by States themselves, an effort should be made to try and explain why the Commission was talking about hard obligations and rights. He agreed in that connection with the point made by Mr. de Saram.

18. With reference to the right of option, mentioned in paragraphs 14 and 15, he endorsed Mr. Mahiou's comment (2411th meeting) on the need for a time-frame. The right of option could not be eternal, and some form of schedule must be judiciously set in a legal framework.

19. The last sentence of paragraph 23 required a careful analysis with regard to how States consulted individuals and whether they did so through plebiscites or through questionnaires. The matter should be addressed as a human rights issue. Persons had the right to choose in which State they wished to remain. In other words, renunciation was a fundamental right of individuals. The sentence in question was too stringent and he hoped that the Special Rapporteur would review it. Another important question concerned the consequences of non-compliance with regard to State responsibility. That had been dealt with in the report in a provisional fashion and would have to be looked into carefully at a later date.

20. If the main objective of the study was to consider the impact of State succession on nationality and to prevent statelessness, it was important to avoid dealing with questions of dual nationality, which were of a different nature. Some persons would always have more than one nationality, and Mr. He's point in that regard was well taken.

21. A study of practice was essential, particularly because nationality involved economic, social, cultural and political, including colonial, aspects, as Mr. Kusuma-Atmadja had correctly stressed (*ibid.*). In short, statelessness should be prevented at all costs, and other nationality problems to the greatest extent possible.

22. Mr. CRAWFORD said that he wanted to join other members in praising the work of the Special Rapporteur and the Working Group. He was surprised to hear it implied that their work had not represented progress in the field. Anyone reading the literature on nationality and State succession over the past 30 years, with its rather intractable dualism, would regard the Working Group's efforts as a refreshing breakthrough. The Special Rapporteur was himself fully aware that the topic needed to be addressed with discretion and care.

23. It seemed to him, however, that that area could not be approached simply on the premise that it concerned residual indications to States about policies they might or might not adopt. The various problems which arose would be dealt with case by case. The basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succes-

sion was none the less essential. If it was not at present a rule of international law, the Commission should aim to make it one. Yet having regard to developments both in the general field of statelessness and in the field of human rights, he was of the opinion that the ingredients for such a rule already existed. It was gratifying that that fundamental rule was the leitmotif of the Special Rapporteur's work. In other words, it was important to distinguish between the basic principle which it should project as a rule of international law and issues of modalities, options, dual nationality and the like, which must be adjusted to fit the circumstances. The balance struck so far was admirable.

24. Mr. MIKULKA (Special Rapporteur and Chairman of the Working Group on State succession and its impact on the nationality of natural and legal persons) said that, rather than sum up the debate, he would reply to a number of comments and suggestions made by members of the Commission.

25. He was very pleased that the debate had confirmed a degree of consensus in the Commission on the obligation to prevent statelessness in cases of State succession and the obligation on the States concerned to negotiate to that end. As he had already stressed in his introduction (*ibid.*), the report of the Working Group was preliminary. It was not always pleasant to look into the kitchen before the meal was ready, but the Working Group had taken the risk of showing the Commission something that was not yet ready to be served; the criticism thus came as no surprise. In fact, he had been looking forward to the reactions of the members of the Commission.

26. With reference first to comments on the Working Group's mandate, as pointed out earlier, if the Working Group was reappointed it would complete its mandate at the next session, in 1996. In order to satisfy those who had criticized the report for not mentioning that point, an appropriate footnote might be added to that effect. But he did not think it was a good idea to rewrite the report, because it would then be difficult to understand the debate: anyone reading the summary record would no longer find the elements criticized in the report. If the Commission did not agree with the suggestion to insert a footnote, in any case there would be several paragraphs on the debate in its own report and the matter could be clarified there.

27. The Working Group was aware that it had not touched upon the question of legal persons, as his own report had not contained enough material for a discussion. The Working Group had instead focused on problems on which he, as Special Rapporteur, had posed a sufficient number of questions, and it had attempted to produce concise, preliminary conclusions or hypotheses.

28. As to presenting the Commission with a calendar of action, the Working Group could not do so until it had examined the entire spectrum of issues. Only then could it propose a calendar and address matters of form. He understood Mr. Yankov's concern (*ibid.*), because the Commission had in fact had unfortunate experiences with certain topics in the past, one of which had even been dropped from the agenda several years previously because the Commission had concluded that it was not sufficiently clear what the final results should be. It was

therefore important to avoid any such situation; the Commission must know where it was heading when it took a decision on future work in the matter under consideration.

29. He said he would point out that the Commission had hesitated a while before deciding to create the Working Group, a decision which some had thought to be premature. Later, some of the meetings set aside for the Working Group had been given to the Drafting Committee and, in the end, the Working Group had only been able to hold five meetings. Its success, or lack of success, should therefore be appraised in the light of the time made available to it.

30. It was unfair to accuse the Working Group of not going beyond his report. He had raised a number of questions in his report, and the Working Group had proposed preliminary conclusions or hypotheses. Actually, the outcome of the Working Group's efforts would be useful when he came to preparing his second report.

31. He was pleased that there was a consensus on the obligation to negotiate, which should be based on certain principles or guidelines. As Mr. Vargas Carreño had pointed out (*ibid.*), those guidelines were of a subsidiary nature. The Working Group did not maintain that everything it had formulated was an interpretation of positive law, but certain principles should be regarded as already being part of it. That was where the problem arose. For example, to use the term "obligations" implied *lex lata*, whereas when speaking of guidelines, the term "obligations" was inappropriate. In that sense, the criticism was well taken. The Working Group had not engaged in drafting work, but all those elements could be borne in mind in the future. However, as Mr. Crawford observed, not all principles should be considered subsidiary, because the fundamental principle—preventing statelessness—could not be left to the discretion of States. In other words, it was unacceptable that the States concerned should be under an obligation to negotiate and, because the guidelines proposed to them were residual, they could as a result of their negotiations decide to leave a million persons stateless. The principle of preventing statelessness was fundamental and took precedence, whereas the other obligations were meant to assist States and were open to negotiation. If a State found a better solution to a particular situation, other States could not interfere. He did not think that there was any misunderstanding on that point, which could be taken up by the Working Group in the future. Mr. Mahiou was right to speak (*ibid.*) of the need to fix a reasonable time-frame for exercising the right of option, an idea that could easily be incorporated in the Working Group's next report.

32. As to dual nationality, it was clear that the same approach could not be used as in the case of statelessness. Dual nationality could not be prohibited. Some States did not accept that concept, while others found it to be a solution to certain problems. The Working Group had not addressed the question as yet. The guidelines, however, allowed States to choose their own policy. For example, by using the right of an exclusive option, a State could stress the importance of preventing dual nationality; the idea of a positive option, on the other hand, would endorse the concept of dual nationality. The

Working Group could look into that matter at the next session.

33. With regard to secondary nationality, he agreed that the term caused problems, but he did not have a better way to describe the situation. Even certain federal States used the same term to describe secondary nationality and nationality itself, for example, in the legislation of the former Czechoslovakia. The word "citizenship" might be used, but there was no substantive difference in meaning. He had added the adjective "secondary" simply to indicate that it was not the nationality that had international validity. It was a link between the federal unity of the State and the individual that was of relevance for domestic law. From the standpoint of international law, however, that link had virtually no importance before the date of State succession. Mr. Sreenivasa Rao had pointed out that, in his country, the concept was unknown or did not have the same meaning as had been the case in the Czechoslovak or Yugoslav federations. But the problem lay precisely in the different degrees of "federalization" of a State. He would be grateful for any suggestion to replace the term that would clear up any misunderstandings.

34. In Mr. Pellet's view (*ibid.*), the Working Group had placed too great an emphasis on the links of *jus soli*. He was not certain that the criticism was valid. The fact that, for the purposes of withdrawal and granting of nationality, the Working Group had distinguished, in paragraph 10 of its report, three categories of persons, depending on the place of birth, did not necessarily mean the Working Group had based its thinking on the principle of *jus soli*. While it was true that the criteria used by the Working Group to define those categories were those customarily accepted by the countries which enshrined the principle of *jus soli* in their legislation, the correspondence between legislative practice and the criteria applied in cases of State succession did not always hold. For instance, Czechoslovakia, the legislation of which had always been based on *jus sanguinis*, had had recourse to the criterion of *jus soli* for the purpose of granting nationality in the newly created States of the Czech Republic and Slovakia. Furthermore, each category of persons listed in paragraph 10 of the report had been further subdivided according to the place of habitual residence of the individual concerned. Thus, the Working Group had been influenced in its conclusions more by the place of habitual residence than by the place of birth.

35. In general, the emphasis given by the States concerned to either the criterion of residence or the criterion of birth would largely depend on which principle was set out in the legislation of the predecessor and successor States. It was undoubtedly true that States whose legislation was based on *jus soli* would have a tendency to accord greater importance to it.

36. The Working Group would be reviewing the paragraphs of the report pertaining to the right of option in the light of comments made during the debate in plenary. A number of members had felt that the Working Group had given too broad a scope to the concept of right of option. The last sentence in paragraph 23 had been in particular a source of dissatisfaction. In reality, that sentence did not accurately reflect the views of the Working Group. What the Working Group had actually meant was

that it was no longer possible to defend the absolute freedom of the State to decide the question of nationality, without any regard for the will of the individual concerned. That did not imply that the individual's will had to be taken into consideration in every instance. There were some situations in which the successor State should be presumed to have, a priori, the right to impose its nationality on certain persons, without regard for their wishes in the matter. In other circumstances, however, the will of the individual had to be taken into account. The Working Group would have to redraft paragraph 23 to make that clearer.

37. Section 4 (Other criteria applicable to the withdrawal and granting of nationality) dealt with a very delicate matter. Mr. Razafindralambo had raised doubts (*ibid.*) with regard to the conclusion that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria, including ethnic, linguistic, religious, cultural or other similar criteria. In Mr. Razafindralambo's view, that might open the way to discrimination. It was true that the issue did require further study. In drawing the conclusion in question, the Working Group had based itself on Latin American jurisprudence under which the application of those criteria, in certain circumstances, could not be interpreted as discrimination. It was a matter to which the Working Group would revert later.

38. Section 5 (Consequences of non-compliance by States with the principles applicable to the withdrawal or granting of nationality) had given rise to a number of objections. In defence of the Working Group's thinking in that regard, he wished to draw attention to the first sentence of paragraph 29, which stated that "The Working Group concluded that a number of hypotheses merited further study". The Working Group had not even considered those views as preliminary conclusions; they were quite simply hypotheses and, if found to be inaccurate, would have to be modified.

39. With reference to section 6 (Continuity of nationality), Mr. Pellet had criticized the Working Group for distinguishing three situations in paragraph 31 in which the rule of continuity of nationality should apply and then going on, in paragraph 32, to conclude that there was no point in making such a distinction because the rule should not apply at all in the cases identified. In fact, paragraph 31 had been included to demonstrate that the Working Group had reviewed carefully all the issues arising from the rule of continuity and to show exactly how it had reached the conclusion set forth in paragraph 32.

40. Some members of the Commission had regretted the Working Group's failure to deal with certain questions, including the significance of nationality in the context of human rights and the problem of individuals born after the date of succession of a State. He had, however, made reference to those questions in his first report and the Working Group would certainly examine them at the Commission's next session.

41. In preparing his second report, he would be taking ample advantage of the work done by the Working Group, which he greatly appreciated. The second report would be divided into three sections. The first section, in

response to members who had found the work thus far too academic, would cover both practice and doctrine relating to the nationality of natural persons and would contain suggestions for maintaining or modifying the relevant preliminary conclusions of the Working Group. The second section would deal with the issue of legal persons. The third would cover the form which the outcome of the work on the topic might take. He would be proposing several possibilities in that regard. Certain ideas had already crystallized at the present session. The proposed guidelines could become part of a comprehensive report of which the General Assembly might simply take note, or the General Assembly might invite the Commission to draft a declaration on the topic. Another possibility was to amend the Convention on the Reduction of Statelessness in the form of an optional protocol. However, the fact that the Convention had not been widely ratified cast some doubt on the utility of amending it. The Commission might also elaborate a text that was broader in scope and would include the effects of State succession on a number of social matters. The Working Group had recommended that States should consult on such issues as separation of families, military obligations, pensions, and so on.

42. Whatever its final form, the Commission's work would have to be applicable to both natural and legal persons. The Commission might choose to recommend more than one form in an order of priority or it might recommend that a combination of forms should be used. It was then up to the General Assembly to decide.

43. He wished to emphasize that the Working Group's report was preliminary and that his remarks should be considered as part of that report.

44. The CHAIRMAN thanked the Special Rapporteur for placing the various comments made by members in their proper context. It would be appropriate to include in the Commission's report the presentation made by the Special Rapporteur of the report of the Working Group, a summary of comments on the report in plenary, the reply of the Special Rapporteur to those comments and the Special Rapporteur's plans for future work.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/459,³ A/CN.4/464/Add.2, sect. E, A/CN.4/468,⁴ A/CN.4/471,⁵ A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)**

[Agenda item 5]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED
BY THE DRAFTING COMMITTEE AT
THE FORTY-SEVENTH SESSION

45. Mr. YANKOV (Chairman of the Drafting Committee) said that because the Drafting Committee had been chaired by Mr. Villagrán Kramer at the time it had

** Resumed from the 2399th meeting.

³ See *Yearbook* . . . 1994, vol. II (Part One).

⁴ Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

⁵ *Ibid.*

adopted the four articles contained in document A/CN.4/L.508, he had invited Mr. Villagrán Kramer to present the Drafting Committee's second report.

46. The Drafting Committee had devoted a total of five meetings to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In that connection, he wished to thank the Special Rapporteur, Mr. Barboza, for his thoughtful guidance and cooperation, the members of the Drafting Committee and, in particular, Mr. Villagrán Kramer, acting Chairman, for their efforts.

47. Mr. VILLAGRÁN KRAMER (Vice-Chairman of the Drafting Committee), presenting the second report of the Drafting Committee, said that the Commission, at its forty-fourth session, in 1992, had decided to proceed with its work on the topic in stages.⁶ During the first stage, it had completed the work on prevention relating to activities with a risk of transboundary harm and, at its forty-sixth session in 1994, the Commission had adopted a complete set of articles pertaining to prevention.⁷ Still remaining before the Drafting Committee were four articles dealing with general principles applicable to both prevention and liability and five other articles addressing various issues, such as the relationship between the articles and other international agreements, the question of attribution, non-discrimination, and so on. Since the Commission had not yet considered the Special Rapporteur's tenth report (A/CN.4/459), and since no article on the subject had yet been referred to the Drafting Committee, the Committee had decided to address, at the present session, the articles dealing with general principles and to postpone consideration of the other articles for the time being.

48. The four articles on general principles dealt with issues both of prevention and of liability. They constituted the theoretical basis for the articles already adopted by the Commission on prevention and for those which would eventually be adopted on liability. They provided the general orientation and framework within which all the other articles on the topic had been or would be formulated.

49. It was customary for general provisions to be placed at the beginning of an instrument. The placement of the four articles currently before the Commission would have to be determined once all the articles on the topic had been adopted on first reading. To avoid confusion, the articles were designated in document A/CN.4/L.508 by consecutive letters of the alphabet. The numbers in square brackets were the original numbers given to those articles by the Special Rapporteur in his reports. In 1988 and 1989, the Commission had referred to the Drafting Committee two different versions of articles on general principles. The two numbers in square brackets for articles C and D corresponded to the two sets of articles which had been referred to the Drafting Committee.

50. As to the four articles themselves, article A [6] (Freedom of action and the limits thereto) was inspired by Principle 21 of the Declaration of the United Nations

Conference on the Human Environment (Stockholm Declaration),⁸ and Principle 2 of the Rio Declaration on Environment and Development,⁹ both of which affirmed the sovereign right of States to exploit their natural resources, subject to certain limitations prescribed by international law. Article A was based on the text for article 6 proposed by the Special Rapporteur.¹⁰

51. Article A had two parts. The first affirmed the freedom of action by States and the second part related to the limitations to that freedom. The first part provided that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control was not unlimited—another way of saying that the freedom of States in such matters was limited. The Drafting Committee had, however, felt that it was more appropriate to state that principle in a positive form, which presupposed the freedom of action of States, rather than in a negative form which would have emphasized the limitation of such freedom.

52. The second part of the article enumerated two limitations. First, such State freedom must be compatible with any specific legal obligations owed by a State to other States. Secondly, such freedom must be compatible with a State's general obligation with respect to preventing or minimizing the risk of causing significant transboundary harm.

53. The first limitation was intended to include obligations a State might have undertaken, in relation to another State or other States in respect of transboundary harm, which might be even more stringent than the obligations under the present articles. That, for example, applied to an agreement between two States, whereby States agreed to prevent or minimize any transboundary harm, a threshold which was higher than that of significant transboundary harm. Since the articles were intended to set the minimum standard of prevention, any other obligation raising that standard would take precedence over the obligations undertaken in those articles. Nevertheless, the Drafting Committee did not intend to resolve or even address the question of the effect of those articles on other treaties, an issue that would have to be handled by another provision at a later stage, once the Commission had a more complete picture of all the draft articles on the topic. The Drafting Committee might have to reconsider the issue covered in the first part of article A when it took up the relationship between the four articles under consideration and other international agreements.

54. The second limitation on the freedom of States to carry on or permit activities referred to in article A was set by the general obligation of States with respect to preventing or minimizing the risk of causing transboundary harm. The words "with respect to" were intended to distinguish between the situation in which there was an

⁸ See 2398th meeting, footnote 8.

⁹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1))* (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

¹⁰ *Yearbook . . . 1989*, vol. II (Part One), p. 135, document A/CN.4/423, para. 16.

⁶ *Yearbook . . . 1992*, vol. II (Part Two), p. 51, para. 344.

⁷ *Yearbook . . . 1994*, vol. II (Part Two), paras. 360 and 380.

“obligation to prevent or minimize transboundary harm”, and the situation in which there was an “obligation with respect to preventing and minimizing transboundary harm”. The first formulation referred to obligations of result, while the second referred to obligations of conduct or due diligence. The article should be understood in the context of the latter. It did not require that a State should guarantee the absence of any transboundary harm, but that it should take all the measures required to prevent or minimize such harm. That understanding was also consistent with the specific obligations stipulated in various articles on prevention, in particular, articles 12 and 14, which had already been provisionally adopted.¹¹ One member of the Drafting Committee had objected to the inclusion in the second sentence of article A of the words “with respect to”, holding that the formulation unnecessarily narrowed the scope and weakened the obligations of States to prevent and minimize transboundary harm.

55. He would reiterate that the articles under consideration set the minimum standards of behaviour and were without prejudice to the right of States to agree *inter se* to much higher standards. The title of article A closely reflected its substance.

56. As to article B [7] (Cooperation), two different versions of the article had been proposed by the Special Rapporteur in 1988 and 1989 and both versions had been referred to the Drafting Committee. The text now before the Commission was based on the version proposed in the fourth report of the Special Rapporteur.¹² It laid down the general obligation of States to cooperate with each other in order to fulfil the obligation to prevent or minimize significant transboundary harm. Together with the article that followed, it established the foundations for the specific obligations set out in the articles addressing issues of prevention which the Commission had adopted at its preceding session.

57. Article B required States concerned to cooperate in good faith. Even though good faith was presumed in any obligation of cooperation, the express inclusion of those words indicated the additional emphasis given to that aspect of cooperation. The words “States concerned” meant the State of origin and the affected State. While other States in a position to contribute to the objectives of the articles were encouraged to cooperate, they were under no legal obligation to do so. The words “as necessary” meant that the article was not designed to place States under an obligation to seek the assistance of any international organization in performing their obligations of prevention as set out in the articles under consideration. States were to seek such assistance only when that was deemed appropriate. The words “as necessary” were designed to take account of a number of possible situations.

58. First, assistance from international organizations might not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State might themselves be technologically advanced and have as much technical capability as international

organizations, or even more, to prevent or minimize significant transboundary harm. Obviously, in such cases there need be no obligation to seek assistance from international organizations. Secondly, the term “international organizations” was intended to refer to organizations that were relevant and in a position to assist in such matters. Despite the increasing number of international organizations, it could not be assumed that an international organization with the capabilities needed in a particular case would necessarily exist. Thirdly, even if relevant international organizations did exist, their constitutions might debar them from responding to such requests from States. For example, some organizations might be required or permitted to respond to requests for assistance only from their member States, or they might labour under other constitutional impediments. It should be stressed that the article did not purport to create any obligation for international organizations to respond to requests for assistance. Fourthly, requests for assistance from international organizations could be made by one or more of the States concerned. It was unquestionably preferable that such requests should be made by all States concerned, but any State concerned could request assistance. The response and type of involvement of an international organization in cases in which the request had been lodged by only one State would, of course, depend entirely on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, and so on.

59. By referring in its latter part to “effects both in affected States and in States of origin”, article B anticipated situations in which, as a result of an accident, there was, in addition to significant transboundary harm, massive harm in the State of origin itself. The phrase was intended to introduce the idea that significant harm was likely to affect all the States concerned, including the State of origin, and that transboundary harm should, as far as possible, therefore be regarded as a problem requiring common endeavours and mutual cooperation towards minimizing its negative consequences. The phrase was not, of course, intended to place any financial costs on the affected State in connection with minimizing the harm or with clean-up operations in the State of origin. It should be noted that the article used the expression “affected State”, a new term which, although self-explanatory, would at a later stage be included in article 2 (Use of terms).

60. As already indicated, article C [8 and 9] (Prevention), based on two articles proposed by the Special Rapporteur in 1988 and 1989, provided, together with article B, the theoretical foundations for the articles adopted by the Commission at the preceding session by setting out specific and detailed obligations of States in connection with preventing or minimizing significant transboundary harm. The reference to “measures or action” related to those measures and actions that were specified in the articles on prevention and minimization of transboundary harm adopted in 1994. The article should be understood within the context of article A, on the “due diligence” obligation of prevention. States were not expected to guarantee that there would be no transboundary harm, but they must take all necessary measures to that effect. The obligation, it would be recalled, was the

¹¹ See footnote 7 above.

¹² *Yearbook* . . . 1988, vol. II (Part One), p. 251, document A/CN.4/413.

obligation of conduct and was compatible with the specific obligations set forth in articles 12 and 14.

61. The last of the articles adopted by the Drafting Committee was article D [9 and 10] (Liability and compensation). The three principles of “freedom of action and limits thereto”, “cooperation” and “prevention” he had introduced earlier dealt primarily with issues of prevention on which the Commission had already adopted articles. It had not yet worked out any provision on the issue of liability. For that reason, one member of the Drafting Committee had expressed serious reservations about adopting any article on liability at the present time. In the view of that member, it would be premature to formulate a general principle of liability and compensation at the present stage of the work because, first, the Commission had not yet clearly identified the types of activities covered by the topic, and, secondly, because it had not yet agreed on the description of harm that was liable to compensation. Other members of the Drafting Committee, however, had thought it useful to draft an article on liability and compensation at the present time, so as to set out the minimum requirement for establishing liability and the obligation to pay compensation. Article D formed the basis for future articles on issues of liability. The obligation set forth in the article should, of course, be understood in the context of whatever articles the Commission would adopt on liability in the future. That point was made abundantly clear by the reference to “the present articles” which appeared in both sentences of the article.

62. With regard to the title, it should be noted that both versions proposed by the Special Rapporteur had referred to an “obligation to pay compensation” in case of transboundary harm. However, in view of the fact that the title of the topic as a whole spoke of international liability, the Drafting Committee had considered that article D should first establish the principle of liability and then establish the requirement of compensation. Furthermore, as the Commission had not yet agreed on a specific regime of liability, the article on principles of liability should be without prejudice to the question of who should be liable and who should pay compensation. That explained the marked difference between the structure of article D and that of articles A, B and C. Unlike those articles, which clearly specified who bore the obligation in question, article D only established that there was liability and an obligation to pay compensation. It emphasized the rights of the victim.

63. Again, the Committee had felt that the article should not prejudge the question of forms of compensation, as the Commission had not yet taken a decision on that score. The article therefore spoke only of compensation, without indicating whether such compensation was monetary or took the form of restitution in kind or some other form. Nor did the article indicate that such compensation should be full, prompt, fair, and so on. Lastly, it had been felt that the article should not prejudge the question of what harm was to be compensated. With those factors in mind, the Drafting Committee had adopted the text of article D now before the Commission.

64. The words “subject to the present articles” in the first sentence and the words “in accordance with the present articles” at the end of the second sentence were

intended to convey the idea that the principles of liability and compensation were subject to the terms and conditions that were set forth and would be set forth in the articles on the topic.

65. In conclusion, with reference to the term “compensation”, he recalled that article 6 *bis* of part two of the draft on State responsibility was entitled “Reparation” and described different forms of reparation, which included restitution in kind, compensation, satisfaction and assurances and guarantees on non-repetition.¹³ The Drafting Committee had decided to use the term “compensation” rather than “reparation” in article D in order to distinguish remedies under the present topic from those under the topic of State responsibility. The Drafting Committee did not necessarily intend, of course, to limit the meaning of compensation to the definition given in article 8, paragraph 2, of part two of the draft on State responsibility, which provided that the term “compensation” covered any economically assessable damage sustained by the injured State and could include interest and, where appropriate, loss of profits.¹⁴ In the articles on international liability, the term “compensation” should be understood as taking its significance from what the eventual articles dealing with the issue would provide. The only purpose in using the term had been to draw a distinction between what might be available as a remedy under the topic now under consideration and the remedies provided under the articles on State responsibility. The Commission might, at a later stage, have to reconsider the use of the term “compensation” in the light of what the articles on international liability would provide.

66. Mr. BENNOUNA, speaking on a point of order, said that he was unable to discuss the texts proposed by the Drafting Committee because the French version of document A/CN.4/L.508 appeared in several respects to be a mistranslation of the English version. More particularly, the words “*un dommage transfrontière . . . engage la responsabilité*” in article C did not mean the same as “there is liability for significant transboundary harm”. Secondly, in article C, the word “*dispositions*” was not a correct translation of the English word “action”. Furthermore, the words “*raisonnables*” and “*nécessaires*”, in the same article, should be separated from one another, possibly by the insertion between them of the words “*qui sont*”.

67. The CHAIRMAN said that the secretariat would go into the matter in consultation with Mr. Bennouna, and, if necessary, reissue the document in time for the next meeting.

68. Mr. PELLET said that he wished to make three comments, the first being the most important. For reasons stated at length in the course of previous sessions, he wished to enter all possible reservations regarding the substance of the article now before the Commission as article D. To take a position on the crucial issue dealt with in the article without knowing the future contents of the relevant substantive provisions was entirely premature and inappropriate. It was not possible to speak of a principle of liability without knowing which principle

¹³ *Yearbook . . . 1993*, vol. II (Part Two), p. 54.

¹⁴ *Ibid.*

would be adopted, and he wished to place on record his refusal to discuss the article at the present stage. The second point, of far less importance, was that the order of articles B and C should be reversed, because article C set out the basic principle, while article B supplemented it. Lastly, while not raising any specific objection to the text of articles A, B and C, he would none the less draw attention to the fact that article A clearly posed the crucial problem of the relationship between liability for failing to observe due diligence and strict liability. When the freedom of States was not unlimited, any use of such freedom that went beyond the existing limits inevitably brought up the question of liability for failing to observe due diligence.

69. Mr. EIRIKSSON, referring to article B, said that the comma after the word "harm" was misplaced and should be transferred to appear between the words "and" and "if". In article C, the relationship between the adjectives "reasonable" and "necessary", to which Mr. Bennouna had referred in connection with the French text, was unclear in the English version as well. Did the word "reasonable" also qualify the word "action"? The meaning should be made more clear in the text of the article rather than in the commentary.

70. Mr. de SARAM said he wished to emphasize that the statement heard by the Commission was not a report of the Drafting Committee but a report of the Chairman or, as the case might be, Vice-Chairman of the Drafting Committee. As for article D, he tended to agree with Mr. Pellet, albeit for somewhat different reasons. Neither the Commission nor the Drafting Committee had given sufficient consideration, to the question whether, aside from specific obligations between States, there might lie at the basis of the obligation to compensate for harm, a criterion that went beyond "due diligence". The matter was of great importance and he believed that it could be resolved only on the basis of a list of certain activities of an ultra-hazardous nature.

71. Mr. PAMBOU-TCHIVOUNDA said that he agreed with Mr. Pellet's suggestion for reversing the order of articles B and C. The use of the word "or" between "measures" and "action" in article C weakened the impact of the provision and he would prefer it to be replaced by "and". The words "Subject to the present articles" and "in accordance with the present articles" in article D were somewhat perplexing and he would appreciate further clarification. He was also puzzled by the failure of article D to make it clear that liability for significant transboundary harm lay with the State in whose territory the activity which had caused the harm had taken place.

72. Mr. ROSENSTOCK said that he wished to identify himself as the member whose dissent on article D had been reported by the Vice-Chairman of the Drafting Committee. Associating himself with the comments made by Mr. Pellet, he said that he understood the words "Subject to the present articles" to represent an attempt to indicate that the formulations in question were not intended to have any independent value or meaning but had been adopted by the Drafting Committee merely to assist it in the preparation of the detailed provisions which, in due course, might constitute an instrument to which States could adhere or consent. Seen in that light, the article was perhaps helpful to some extent, but that

did not make the formulations it contained any less premature and unnecessary.

73. Mr. ARANGIO-RUIZ said that he needed to give more thought to the Drafting Committee's proposals and therefore wished it to be placed on record that he reserved his position.

74. Mr. THIAM said that he still failed to see the dividing line between the topic under consideration and that of State responsibility. Articles A and B brought the question to the fore in a particularly striking form. Which Special Rapporteur was responsible for what? He was concerned about the Commission's working methods in that respect.

The meeting rose at 1.10 p.m.

2414th MEETING

Tuesday, 11 July 1995, at 10.10 a.m.

Chairman: Mr. Mehmet GÜNEY

later: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/459,¹ A/CN.4/464/Add.2, sect. E, A/CN.4/468,² A/CN.4/471,³ A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED
BY THE DRAFTING COMMITTEE AT
THE FORTY-SEVENTH SESSION (*continued*)

1. The CHAIRMAN said that, for technical reasons, the French version of document A/CN.4/L.508 had been reissued and he would invite members to refer to the new version.

¹ See *Yearbook* . . . 1994, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

³ *Ibid.*