Document:-

A/CN.4/SR.2414

Summary record of the 2414th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1995, vol. I

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.

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

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

[3] Ibid.

2. Mr. FOMBA said that, at the present stage of the debate, he would confine himself to general remarks on the articles under consideration. The title of the topic referred to three key concepts, all of which were problematic.

3. The concept of acts not prohibited by international law posed a problem in that it had to be given a definite content by specifying whether it covered all or only some of the activities likely to fall within the category.

4. The concept of injurious consequences should be defined in both quantitative and qualitative terms. It would also have to be decided whether such consequences should be determined in their "absolute" or only in their "relative" diversity.

5. The concept of international liability had to be specified clearly in that context, since it was not known, a priori, whether it covered responsibility for a wrongful act or some other form of responsibility, although the actual logic of the title, with its reference to "acts not prohibited by international law" seemed to favour the second solution. By analogy with internal law, that second form of responsibility could, in point of fact, be only what was termed liability without fault or strict liability.

6. In terms of methodology, it was essential to pinpoint those three concepts accurately so as to draw a clear boundary with the question of State responsibility and to give a definite direction to the topic under consideration, in either a positive or a negative sense.

Mr. Sreenivasa Rao took the Chair.

7. Mr. EIRIKSSON said that he would like to return to the comments he had made at the preceding meeting, when, following on a remark by Mr. Bennouna, he had questioned whether, in the wording of article C, the adjective "reasonable" qualified action and the adjective "necessary", qualified measures. He believed that they did.

8. However, he had re-examined the report of the Drafting Committee in which the mention of measures or action in article C, referred back to the articles adopted by the Commission at the preceding session[4] and, in particular, to article 14. He therefore wondered whether the words "or action", in article C, could not just be deleted, which would simplify matters. It would suffice to indicate in the commentary to the article that the word "measures" to which reference was made encompassed the concept of "action".

9. Mr. BENNOUNA, supported by Mr. RAZAFINDRALAMBO, said that, if reference was had to article 14, the words "or action" were in fact superfluous. But there could still be a problem of substance, since a distinction could be made between measures, which might be of a legal nature, and action, which was intervention on the spot. If the concept of action added something to the wording of the article, it should be retained. He would like to have the view of the Chairman of the Drafting Committee on that point.

10. Mr. VILLAGRÁN KRAMER said that Mr. Bennouna's point was well taken. In the Charter of the United Nations, the word "measures" was used to designate the course of action adopted or recommended by the Security Council, the object of which was to impose an obligation not to act. Personally, he would like the Commission to abide by that understanding of the term.

11. The CHAIRMAN said that, to clarify the debate, he would ask the Secretary to the Commission to read out the passage in the commentary to article 14 adopted on first reading by the Commission at the preceding session, which explained the meaning of the word "actions".

12. Ms. DAUCHY (Secretary to the Commission) said that the relevant passage read:

> The words 'administrative and other actions' cover various forms of enforcement actions. Such actions may be taken by regulatory agencies monitoring the activities and courts and by administrative tribunals imposing sanctions on operators not complying with the rules and the standards or any other pertinent enforcement procedure a State has established.[5]

13. Mr. ROSENSTOCK said that there did not seem to be anything in that paragraph that would not be encompassed by the term "measures". To avoid the complexities referred to by Mr. Eiriksson, therefore, he would suggest that the words "or action" should be deleted.

14. Mr. YANKOV (Chairman of the Drafting Committee) said that, in his view, the word "action" covered any activity, whereas the word "measures" could apply to "remedies", in other words, to measures to prevent or mitigate and so on. Preventive measures could, however, themselves cause harm. For instance, in the event of oil spillage, excessive use might be made of detergents or dispersants. That was why, in conventions and instruments on environmental protection, the word "measures" referred basically to preventive measures or even to measures of control, while the word "action" could cover any kind of activity. On a more liberal interpretation, one could of course take the view that action was also a measure, but he would personally prefer to use both terms.

15. Mr. EIRIKSSON said that the purpose of the articles under consideration was to lay down general principles. There was no need to repeat, in article C, the list that already appeared in article 14. The main obligation in the case of prevention was to take measures even if that presupposed certain preliminary "actions".

16. Mr. PAMBOU-TCHIVOUNDA said he was pleased that Mr. Eiriksson had drawn attention to the wording of article C and had pointed out that the problem was not just one of semantics, but also one of substance. In his view, measures and action did not cover precisely the same concept and that was why he had suggested that the conjunction "or", which seemed to offer an alternative, should be replaced by the word "and". In light of the present debate, the latter seemed to be even more important. But, if it was not acceptable to the Commission, he would suggest another solution, namely, that the words "all reasonable measures or action" could be

[4] *Yearbook... 1994*, vol. II (Part Two), pp. 158 *et seq.*

[5] Ibid., p. 170, commentary to art. 14, para. (8).

replaced by the words "measures, including all appropriate action,".

17. Mr. TOMUSCHAT said that, having looked into the matter more closely, he was struck by the close relationship between article C and article 14 as adopted at the preceding session, the text of which was, incidentally, not very satisfactory, since the word "actions" was redundant. There again, it would suffice to speak of "measures". The problem of overlapping between the two articles would have to be resolved.

18. Mr. YANKOV (Chairman of the Drafting Committee) said that he had been persuaded by Mr. Eiriksson's new arguments and was now able to support his proposal. He would also like to include in article C a concept set forth in the United Nations Convention on the Law of the Sea and to add the word "control" between the words "prevent" and "or minimize".

19. Mr. BARBOZA (Special Rapporteur) said that the discussion was taking a somewhat Byzantine turn. After all, a State could not act in and of itself and it was the fire department, the army, and so on, that carried out the measures it adopted. Clearly, therefore, the Commission could delete the word "action" and explain in the commentary that that concept was covered by the word "measures". Article 14, as one speaker had pointed out, indicated as much. In his own view, it would be wrong to make categorical distinctions between concepts that were so closely related. In addition, drafting exercises in plenary should be kept to a minimum.

20. Turning to the case, mentioned by the Chairman of the Drafting Committee, of excessive prevention measures that in themselves could cause harm, he said that, in most of the relevant treaties, such a case would come under the category of damage for which compensation was owed, not under the category of prevention.

21. It was true that articles 14 and C dealt with fairly similar concepts. Article 14, however, referred to the specific measures that the State had to take and was responsible for in order to ensure that the operator applied preventive measures, which themselves were the responsibility of the operator. The State must "ensure" that, "act in such a way" so that, through legislative, administrative or other measures, the operator took steps to prevent or minimize the risk of harm, taking account of the technological complexity involved.

22. It was true that the two articles were similar, but article C had been included in the section on principles because the Drafting Committee and the Commission had thought a general article on prevention should be drafted. Article 14 was perhaps a bit too specific to state a general principle. Consequently, he believed that the reason for including article C should be explained in the commentary.

23. Mr. de SARAM said that he endorsed Mr. Eiriksson's proposal that the words "or action" in article C should be deleted. He had some reservations about article D and took it that matters relating to that article would be considered in greater depth at the Commission's next session.

24. Mr. IDRIS, noting that the discussion related not only to the form, but also to the substance of article C, said that he had three comments to make. First, he endorsed the idea that the tenor of articles 14 and C was the same and that they should not be kept as they stood. Secondly, the Arabic text of article C only added to the confusion, for it said that "States shall take all appropriate measures or actions to prevent or minimize the risk of significant transboundary harm". The Arabic word for "measures" had a purely preventive connotation, while the word for "actions" related solely to procedures. Accordingly, either the Arabic version did not accurately reflect the article's content or the article must be understood in a completely different way. Thirdly, he wholeheartedly supported the proposal that the word "action" should be deleted and an explanation should be included in the commentary.

25. The CHAIRMAN indicated that, once the content of article C had been decided, the translation services would bring the Arabic text into line with the original text.

26. Mr. EIRIKSSON suggested that the Commission should set up a small group to look into the link between articles 14 and C. His view was that the commentary to article 14 adopted at the preceding session actually applied to article C and that that commentary should therefore be transferred from article 14 to article C.

27. Mr. MAHIOU said that the discussion, and particularly the statement by the Special Rapporteur, provided a better understanding of the reason for having two articles, one of which—article C—stated a general principle of prevention, while the other—article 14—explained that principle in greater detail. The differences between the two articles should be clearer, however, and that was not the case as they now stood. He therefore supported the proposal that a small group should be set up to draft article C so that it would no longer appear to duplicate article 14. Article C should perhaps apply to all States, whereas article 14 would apply only to the States of origin of the risk or harm. The commentary should clearly define the scope of both articles.

28. Mr. de SARAM said he agreed that the discussion was bringing up matters of substance. The group proposed to be set up should take a position on the words "reasonable", "necessary" and "appropriate". The choice between those words would be of considerable practical importance and must be explained by the commentary.

29. The CHAIRMAN suggested that, because a number of positions had been taken during the discussion, a small group should be set up to draft a version of article C that would be acceptable to all members of the Commission. He suggested that the group should be composed, *inter alia*, of Mr. Barboza (Special Rapporteur), Mr. Eiriksson, Mr. Pambou-Tchivounda, Mr. Tomuschat, Mr. Villagrán Kramer and Mr. Yankov.

30. Mr. BENNOUNA recalled that the consideration of the draft articles as a whole on first reading had to be completed at the next session; that articles 14 and C had been considered by the Drafting Committee and by the Commission in plenary; that the Special Rapporteur had

clearly explained the justification for having two articles; and that it would therefore not be advisable to request a small group to redraft the two articles. At the current session, the Commission simply had to endorse what all members agreed on, namely, that only the term "measures" should be retained in article C, with an explanation in the commentary of what that word meant. The Drafting Committee would have ample time to harmonize the two articles after it had reviewed the articles as a whole at the forty-eighth session.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the suggestion he had made.

It was so decided.

32. Mr. RAZAFINDRALAMBO said that the principles embodied in the draft articles submitted by the Drafting Committee did not give rise to any particular problem. Article A only repeated, in virtually the same words, the principles which had been contained in the former article 6[6] and on which most representatives of Governments in the Sixth Committee had agreed. There was thus no need to reopen a substantive debate on the freedom of action of States and the limits thereto, and still less to call into question the specificity of the topic of international liability. The other articles also contained principles on which there had been a broad consensus within the Commission and he had no substantive comments to make on them. He simply wanted to make some drafting or structural suggestions. It seemed to him, although he was far from adamant on that point, that article C might come immediately after article A, since prevention was one of the obligations that could restrict the freedom of action referred to in article A. In article D, the words "*Sous réserve des présents articles*" were not an exact translation of the words "Subject to the present articles", since what was involved was not a safeguard clause, but, rather, the implementation of the draft articles in the event of significant transboundary harm. It would be better to use the words "In the framework of the present articles" or the words "Pursuant to the present articles". Alternatively, since article D ended with the words "in accordance with the present articles", those words could be retained and placed at the beginning of the article so that they would cover the entire text. The words "there is liability for" were certainly acceptable, but much too vague. Perhaps they should be replaced by the words "the liability of the State of origin arises from". Lastly, since the term *indemnité* in French was always "financial", the words *à indemnité, financière ou autre* (by compensation, financial or otherwise) should be replaced by the words *à une indemnisation financière ou à toute autre forme de réparation équivalente* (to financial compensation or any other equivalent form of reparation), which were similar to the wording used in article 8 of the draft on State responsibility.[7]

33. Mr. VILLAGRÁN KRAMER said that article D set out a principle, and principles were supposed to apply to all cases and situations. That principle should not be limited to the point of being set by the "present articles", especially if that restrictive language was repeated twice in the text. The word "compensation" was perhaps appropriate in English, but the words *compensation* and *indemnisation* in French, and their Spanish equivalents, did not have the same connotation. If the word was retained in English, a different translation than *indemnisation* in French and its Spanish equivalent should be found. It would be much better, in fact, simply to state the principle that any harm gave rise to an obligation to "compensate". That principle applied whether or not the liability involved fault, such a distinction being unknown in the civil codes and legal systems of Latin America. Any harm called for compensation, although the form that it would take was a separate problem. The Commission should consider deleting the words "Subject to the present articles" and "in accordance with the present articles" in article D or placing them in square brackets.

34. Mr. IDRIS said that, for future articles on liability, article D established a principle which was sound and progressive and which included a very important obligation. At present, the Commission might not agree on the obligation itself or on the establishment of an obligation of "compensation". It was not yet completely sure about the types of activities covered by the topic and it had not really defined what was meant by "harm". Under those circumstances, adopting article D might affect the important work already done on the chapter on prevention. The Commission might therefore take note of article D without adopting it as it stood in order to consider it in depth at the next session as it related to all aspects of liability.

35. Mr. BARBOZA (Special Rapporteur) recalled that he had submitted 11 reports on the topic and his predecessor 5. If, after 16 years of work, the Commission was not in a position to agree on the principle of liability, which was the title of the topic, then it might just as well stop working on the topic. Article D simply stated that significant transboundary harm gave rise to liability, as determined by the draft articles. While the legal effects might be significant, the harm done to another country was equally important. In the case of activities involving risk, how could the suggestion that no mention at all should be made of liability be taken seriously?

36. Mr. FOMBA said that the question of the legal limits on the freedom of action of States, as dealt with in article A, related to two other questions: did international law govern State sovereignty on the basis of "lawful" or "wrongful" activities and to what extent was that concept itself recognized? For the category of activities involving risk, were there clear-cut legal limits on the action of States? Article A identified two categories of limits: general obligations of a customary nature (prevention or reduction of the risk) and specific obligations of a conventional nature (with respect to transboundary harm). What, then, was the nature of the liability in question? In the case of customary or conventional obligations, any failure of a State to meet those obligations could give rise only to responsibility for a wrongful act

[6] For the text, see *Yearbook . . . 1989*, vol. II (Part Two), para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in the annex to his sixth report (*Yearbook . . . 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1); see also *Yearbook . . . 1990*, vol. II (Part Two), para. 471.

[7] See 2391st meeting, footnote 9.

and thus related to the topic of State responsibility. Was there any place then for possible objective liability?

37. Article D stated the principle of liability and reparation, and that was natural in view of the title of the topic. Its wording was fairly neutral considering the current lack of specific ideas on the topic. Yet, as long as the basic premises of the topic remained unclear, in particular with regard to the type of activity in question and the type of liability arising from it, it would be unwise to take action on the substance of that provision.

38. Mr. MAHIOU said that the reference to the principle of liability in article D was entirely normal, since such liability had to be circumscribed by an expression such as "in accordance with the present articles". However, the wording of the principle must not prejudge the conditions under which such liability was implemented, for example, by giving preference from the outset to compensation as opposed to other forms of reparation. If restrictions were needed, they should be included not in the article stating the principle, but in subsequent provisions. In the second sentence, liability should therefore no longer be linked solely to compensation. In addition, it would be better to retain only one of the two expressions "Subject to the present articles" or "in accordance with the present articles" in order to avoid what seemed to be a redundancy. Even if a general principle was being stated in the first sentence, it might be better to specify who was liable. The principle embodied in article D was thus satisfactory, but its wording had to be fine-tuned.

39. Mr. TOMUSCHAT said that the Drafting Committee had been correct in making a distinction in article A between specific legal obligations and a general obligation, but the wording of that distinction was rather awkward. The words "specific legal obligations ... with respect to transboundary harm" gave the impression that such specific obligations were not of the same nature as the general obligation to prevent or minimize the risk of causing transboundary harm. However, the former obligations were simply more detailed than the latter obligation. Treaties relating to activities being carried out near a border, for example, focused mainly on the specific measures the State must take to avoid transboundary harm before it occurred. With regard to article D, his view was that it was simply not ready for adoption by the Commission because there was no commentary on its main characteristics. It was certainly unwise to establish a general principle before examining in detail the specific aspects of the issue. Thus, as to the expression "significant transboundary harm", as used in connection with the law of the non-navigational uses of international watercourses, the Commission might be more demanding with regard to the topic under consideration and decide, for instance, that, in such a case, liability arose only where the activity in question caused devastating harm.

40. As Mr. Mahiou had rightly pointed out, the word "compensation" was too restrictive. Without first studying the matter, it could not be stated that compensation was the sole form of reparation possible in the case of harm caused by a State. Like Mr. Mahiou, he was also surprised that no mention had been made in the article of who was liable for the harm caused. Perhaps that omission had been deliberate in order to give the impression that, in some cases it was not only the State that was liable, but also the private operator. Clarifications on that point were needed.

41. Considering all the complex issues raised by article D, it would, in his view, be premature to adopt it without being certain of what it meant, since it did not simply enunciate a general principle, but also contained a number of criteria which might limit the Commission's freedom of action in future. The proposed text also gave rise to a few small problems of form. Drawing attention to the presence of two nearly equivalent expressions in English—"Subject to the present articles", at the beginning of the first sentence, and "in accordance with the present articles", at the end of the second sentence, he noted that in French, the words "*Sous réserve de*" were incorrect in that context. For all those reasons, the Commission should, for the time being, set aside that article, which was simply not ready.

42. Mr. VARGAS CARREÑO said that he had no problem with articles A and B because they stated rules of international law and the Commission had, moreover, referred them to the Drafting Committee as articles 6 and 7.[8] Article C stated a general rule which it was important to formulate and which could be applied to all States, while article 14 might be more directly applicable to States likely to cause harm. He was convinced that the working group on that topic would be able to find wording that was acceptable to all. In that connection, he noted that the Spanish version of article C differed slightly from the English and French versions because the word "action" in English and "action" in French had been rendered in Spanish as *disposiciones*. He therefore proposed that that word should be replaced by the word *acción* so that the three versions would be harmonized.

43. Article D simply stated a fundamental rule which was present in all legal systems and which was a principle of international law, namely, the "polluter pays" principle, which had already been known in Plato's time. The text of the article could certainly be improved and, in that connection, he endorsed the amendment Mr. Razafindralambo had proposed for the second sentence so it would be specified that the liability in question would give rise to financial compensation or "any other equivalent form of reparation". The main point was, however, to give expression to the principle of liability and that of the compensation to which it gave rise because, as the Special Rapporteur had said, the draft articles would be meaningless without a provision of that kind.

44. Mr. BARBOZA (Special Rapporteur), referring to the comments by Mr. Mahiou and Mr. Tomuschat on article D, said that there was no doubt that the obligation to make reparation for transboundary harm was a nearly banal principle, but it was still worth stating it expressly. He also thought that the expressions "Subject to the present articles" and "in accordance with the present articles" were a duplication. One would be enough to indicate that a particular type of liability was involved. He

[8] See footnote 6 above.

also agreed that the word "compensation" in English could be replaced by the word "reparation" and its equivalent in French and Spanish. In fact, that term had been used in order to avoid any confusion with the idea of responsibility for a wrongful act. The word "reparation", which was more general, was quite acceptable. The important point was to link the concept of liability to that of reparation. Lastly, the reason that the liable party had not been expressly designated in article D was that the article enunciated a general principle, namely, that harm gave rise to liability. It would be seen later whether the liable party might be the State, if it had not fulfilled its obligation of prevention, or the operator himself. There were several possibilities in that regard, but they were not endless.

45. Summing up, he said he supported the proposal that the expression "Subject to the present articles" should be deleted at the beginning of article D, that the word "compensation" in the title of the article should be replaced by the word "reparation" and that that word should be translated into French and in Spanish by a term which corresponded more to the general idea contained in the English word "compensation". He nevertheless insisted that the idea that the liability in question was liability arising from significant harm should be maintained. It was in fact from that type of harm that liability arose and he did not clearly understand why objections had been raised in that case.

46. Mr. EIRIKSSON said that he would confine his comments to articles A and D. As to the former, he agreed with Mr. Tomuschat that the reference to specific legal obligations owed by States to other States with respect to transboundary harm was inappropriate and that those specific obligations should be linked to the general obligation, stated at the end of the sentence, of "preventing or minimizing the risk of causing significant transboundary harm". He therefore proposed that the second sentence should be reworded in the following way: "It must be compatible with the general obligation, as well as with any specific legal obligation owed to other States, with respect to preventing or minimizing the risk of causing significant transboundary harm". That wording also had the merit of dealing first with the general obligation.

47. As far as article D was concerned, he, unlike Mr. Tomuschat, thought that an article stating the general principle of liability was necessary; on that point, he fully agreed with Mr. Vargas Carreño and the Special Rapporteur. The general obligation should be stated first, in the most general way possible, and the specific obligations spelled out afterwards. As to the actual wording of the article, it would be judicious to replace the work "compensation" by the word "reparation" because the words "or otherwise" appearing after the words "compensation, financial" in the third line of article D were suggestive of *restitutio in integrum* rather than of compensation. On the other hand, he saw no objection to maintaining both expressions "Subject to the present articles" and "in accordance with the present articles". The former indicated that the liability that arose was only that established in the articles, while the latter specified how that liability was to be met. To settle the problem and also to meet Mr. Mahiou's concern about who was liable, he proposed that the current text should be replaced by the following:

> "Liability arises from significant transboundary harm caused by an activity referred to in article 1 which shall be met by reparation in accordance with the present articles."

48. Mr. ROSENSTOCK said that he had the impression that the many problems arising in connection with the articles were due to the attempt being made to take action on the articles without dealing with the more specific articles that would appear in the draft convention. The four articles under consideration represented only a fragment of the draft as a whole. It made no sense to try to take action on them at the present stage before working out the precise meaning which they were eventually to have. Furthermore, the obligation enunciated in article D arose from specific treaty obligations and could not be generalized. That was why language such as "Subject to the present articles" was absolutely indispensable. Article D was already open to challenge in itself, but, without those words, it would be unacceptable. He did not believe that the changes proposed by Mr. Eiriksson would solve all the problems arising in connection with the articles; in his view, the most reasonable course would be for the Commission to take note of the articles on the understanding that they formed part of a larger whole and could serve as guidelines to the Drafting Committee, bearing in mind the comments made, when drawing up the relevant provisions in detail.

49. Mr. BENNOUNA said that the four articles under consideration gave rise to problems of both form and substance. Whereas an agreement appeared to be taking shape on articles A, B and C, the same was not true of article D, which obviously could not be adopted as it stood. The most sensible course might be for all those members of the Commission who had spoken on that particular article, whether to propose changes of form or to raise problems of substance, to get together and report their conclusions to the Commission at a later stage. Such a group should either propose a solution that was meaningful and could be adopted by the Commission or recognize that the time was not yet ripe for a decision and that it would be best to defer the decision on article D until the next session.

50. Mr. VILLAGRÁN KRAMER, referring specifically to article D, recalled, first, that, in the general theory of legal obligations and of means of fulfilling those obligations, reparation was a principle common to all legal systems. The term "reparation" proposed by several members of the Commission would therefore be wiser and more appropriate than the term "compensation". Secondly, it was a general principle of law that all harm caused had to be made good. Exceptions did, of course, exist and those exceptions were dealt with by international law, but what the Commission had to do in the present case was to state the applicable rule or general principle in the clearest manner possible.

51. Thirdly, as Mr. Fomba had said, the Commission had been speaking of "strict liability" for years, having previously taken a long time to grasp the difference between the concepts of "responsibility" and "liability". In recognizing that preventive measures were called for

in certain areas, it had accepted an exception to the overall concept of general responsibility, thus reverting to the concept of fault. Should it be concluded that, because it had thus moved further away from the original concept of strict liability, the Commission should abandon it altogether after so many years of work? He had the feeling that the position of pure legal theory which underlay the nature of strict liability was being weakened. The question was one of principle. The Commission had to define the legal principle that was applicable in the matter and it had to do so in conformity with its obligation to codify the law in that area. He therefore appealed to Mr. Idris to reconsider his position so as to enable the Commission to take a decision on that fundamental problem.

52. Mr. HE said that he endorsed the view that the principle of strict liability should be stated in the form of a general provision. The question was whether the Commission should draft that general provision or, on the contrary, deal first with specific provisions. Pointing out that there was definitely some overlapping between article C and article 14, he took the view that it would be preferable to defer the adoption of article D until later. The Commission should have specific provisions at its disposal before taking action on article D.

53. The CHAIRMAN said that the working group set up to consider article C could also deal with articles A and D, which had been the subject of various comments and suggestions. He therefore invited all members of the Commission who had spoken on those articles, namely, Mr. Barboza, Mr. Bennouna, Mr. He, Mr. Idris, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov, and Mr. Eiriksson, who would act as Chairman, to take part in the working group.

The meeting rose at 1.10 p.m.

2415th MEETING

Wednesday, 12 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, 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 (*concluded*)

1. Mr. EIRIKSSON, speaking as Chairman of the working group set up at the previous meeting to deal with proposals made in plenary on the drafting of articles A, C and D (A/CN.4/L.508), recalled that the working group had been established in order to avoid turning the plenary into a drafting committee and to expedite agreement on the articles in question. The working group had been composed of Mr. Barboza, Special Rapporteur, Mr. Villagrán Kramer and Mr. Yankov, who chaired the Drafting Committee at the present session, Mr. Pambou-Tchivounda, the First Vice-Chairman of the Commission, Mr. Rosenstock, Mr. Tomuschat and himself. The working group had spent the whole of the previous afternoon on its task and had succeeded in reaching agreement on all the points which had been raised. Actually, some disagreement did remain, in principle, about whether article D was ready for adoption, but he would return to that matter later. Unfortunately, it had only been possible to circulate an informal document, in French and English only.

2. As already stated, the working group had confined itself to dealing with issues raised in the plenary. However, in considering forms of language to meet various concerns, it had felt obliged also to tackle related formulations. For example, it had changed the word *minimiser* as applied to risk in the French text of article B, to *réduire au minimum*, thereby bringing the language of the article into line with that used in the articles adopted at the previous session.

3. The revised version of draft article A [6] read:

"*Freedom of action and the limits thereto*

"The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard."

4. It would be seen that the second sentence had been somewhat streamlined. First, it now indicated that the specific obligations owed to other States should relate not only to "transboundary harm", as in the original draft, but also, like the general obligation, to the prevention and minimization of such harm. Secondly, the work-

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

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

[3] Ibid.