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Summary record of the 2496th meeting

Topic:
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68. Mr. MIKULKA (Special Rapporteur) said that Mr. He's interpretation of article 1 was wrong. The entire draft was designed in such a way as to encourage neither multiple nationality nor the prohibition of multiple nationality. States were free to choose their policies in that regard and a rule prohibiting multiple nationality could not be imposed on them. Perhaps Mr. He's concern could be met by indicating in the commentary that article 1 was in no way intended to encourage multiple nationality.

69. Mr. GALICKI said that he endorsed the Special Rapporteur's comments. The right to nationality was a human right and a person could in fact have the right to many nationalities. The right to nationality was not a privilege granted by the State. Article 1 in no way encouraged multiple nationality and the relevant safeguards were set out further on in the draft, specifically in article 8. Article 1 was neutral and took no position either in favour of multiple nationality or against it.

70. Mr. SIMMA said he took the opposite view that the words "of at least" seemed to encourage multiple nationality. The result of deleting them, however, would be even less satisfactory and it was necessary to choose the lesser of two evils. He was therefore in favour of the retention of the words "of at least".

71. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. He that article 1 seemed to encourage multiple nationality. In reply to the Special Rapporteur, he pointed out that the Commission was not obliged to remain neutral because it was responsible for developing the law and he was convinced that there was a very clear tendency within the international community to oppose the practice of dual or multiple nationality. It would therefore be better to discourage multiple nationality than to encourage it. That was why he also was in favour of the deletion of the words "of at least".

72. Mr. ROSENSTOCK said that the right of the individual to choose ran as a leitmotif throughout the draft, with the will of the individual being the primary consideration. The right of option was important in that connection, for it presupposed the right to more than one nationality. It would be inconsistent to take the opposite position in the very first article of the draft. There were various ways in which, elsewhere in the text, dual nationality could be discouraged, if that was what was desired. Without wishing to imply that dual nationality was a good thing, he did not think it was such a bad thing that the individual should be deprived of his right to choose it when it was a legitimate right, as it was throughout the draft. Unless completely neutral wording was found, the text as it stood should be retained, even if it did seem favourable to multiple nationalities, for it was completely in consonance with the rest of the draft.

73. The CHAIRMAN, speaking as a member of the Commission, said he did not believe that the only principle that served as a leitmotif throughout the draft was the right of the person concerned to choose. Although preventing statelessness was essential, the rights of States must likewise be preserved and the draft articles did so quite well. The text would be much more neutral if the words "of at least" were deleted.

74. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) recalled that the draft articles dealt with

nationality in relation to the succession of States. They were in no way intended to encourage multiple nationality. It had been precisely to take account of the opinion of Mr. He and other members that the Drafting Committee had deleted the words "Without prejudice to their policy in the matter of multiple nationality" at the beginning of article 7, which had become article 10. Determining what was State practice in cases other than those of succession of States was not part of the topic under consideration. The problem that arose in connection with article 1 could be solved either by amending the text of that provision or by indicating in the commentary that it was in no way intended to encourage dual or multiple nationality.

75. Mr. GOCO said that he endorsed the comments made by Mr. He; the problems of allegiance to which he had alluded were extremely important in practice. The words "of at least" should therefore be deleted.

76. Mr. HAFNER said that he agreed with the comments made by Mr. Rosenstock and the Special Rapporteur. Deleting the words "of at least" in article 1 might give rise to problems, for example, in the light of provisions that imposed on more than one State the obligation to grant its nationality. A distinction should be drawn between the right to nationality and possession of nationality.

77. Mr. THIAM pointed out that nationality was the purview not only of the individual, but also of States. The wisest course would probably be to retain article 1 as currently drafted.

78. Mr. HERDOCIA SACASA, supported by Mr. KABATSI, said that the Commission should retain the text as it stood. The wording was neutral and encouraged neither dual nationality nor multiple nationality.

79. The CHAIRMAN said that the majority of the members of the Commission seemed to wish to keep the text of article 1 as adopted by the Drafting Committee. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 1.

Article 1 was adopted.

The meeting rose at 1 p.m.

2496th MEETING

Thursday, 19 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk,

Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/479, sect. C, A/CN.4/481 and Add.1,¹ A/CN.4/L.536)

[Agenda item 3]

REPORT OF THE WORKING GROUP

1. Mr. YAMADA (Chairman of the Working Group), introducing the report of the Working Group (A/CN.4/L.536), said that it had been established with the mandate of considering how to proceed with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It had held two meetings at which it had reviewed the Commission's work on the topic since 1978. It had had before it the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-eighth session of the Commission,² comments made by Governments at the most recent discussion in the Sixth Committee (A/CN.4/479, sect. C) and the comments and observations received from Governments in reply to a note by the Secretary-General (A/CN.4/481 and Add.1).³ Members of the Working Group had exchanged views and the Chairman of the Commission had submitted a paper setting out his personal views.

2. The Working Group had noted that the Commission was dealing with two issues under the topic, issues that were distinct but interrelated. The Working Group felt that, in future, the two issues should be dealt with separately. As the work on prevention was already at an advanced stage and many articles in that area had already been provisionally adopted by the Commission, the Working Group had been of the opinion that the Commission could proceed with that work and possibly complete its consideration on first reading of the draft articles on prevention in the next few years. The form and nature of the draft articles should be decided on at a later stage. On the other hand, a majority of the Working Group's members had been of the view, with varying nuances, that international liability was the core issue of the topic as originally conceived and that the Commission should retain that subject. There had been no unanimity on that point, but it had been agreed that the Commission needed to await further comments from Governments before it could make any decision on the issue. The Working Group had also noted the view that the title of the topic might need adjustment when a decision was taken on the scope and contents of the draft articles.

3. In paragraph 6 (a) of its report, the Working Group concluded that the Commission should proceed with its work on prevention under the sub-title "Prevention of transboundary damage from hazardous activities" and that a Special Rapporteur for this sub-title should be appointed as soon as possible, with the aim of completing the first reading of the draft articles by the fifty-first session in 1999. Though the timing of the appointment of a Special Rapporteur was not specified, if it was done at the Commission's fiftieth session in Geneva in 1998, he believed the Commission would still be in a position to complete consideration of the draft articles on first reading by the fifty-first session. The question of appointing a Special Rapporteur should be decided within the overall framework of the Commission's work programme for the current quinquennium.

4. The Working Group recommended, in paragraph 6 (b) of the report, that the Commission should defer its decision on the "international liability" aspect of the topic pending further comments by Governments in the Sixth Committee or in writing, and accordingly, the Commission should request comments by Governments if they have not yet done so on that aspect, in order to assist the Commission in making a decision in that regard.

5. He expressed gratitude to all the members of the Working Group for their cooperation and contributions.

6. Mr. KATEKA said that the two subjects of prevention and international liability were interconnected and should not be treated as separate items. His acceptance of the consideration of prevention as a topic was therefore without prejudice to subsequent treatment of the international liability aspect. Paragraph 5 of the report of the Working Group gave the wrong impression. No decision had been taken that the title might need adjustment: a view had merely been expressed to that effect. The title of the topic had been established many years ago and to use any other wording would be to fail to reflect the correct situation.

7. Finally, in the first sentence of paragraph 6 (b), the words "its decision" should be replaced by "further action".

8. Mr. KABATSI thanked the Working Group for its efforts and noted with satisfaction that study of the subject, especially the work on prevention, was to continue. However, the question of liability should not be left in abeyance and he entirely agreed with Mr. Kateka that the two subjects were not totally divorced from one another. When prevention failed, consequences arising out of State responsibility might be triggered. As the Chairman of the Working Group himself had pointed out, a majority of members had thought that international liability should continue to be studied. No service would be done to the international community or to the development of international law by the Commission's taking up only half of the topic. Accordingly, the Special Rapporteur who was to be appointed should deal with both subjects, as had been the case in the past.

9. Mr. ROSENSTOCK drew attention to a typographical error in paragraph 3 of the report of the Working Group; and said that some participants in the Working Group's discussions had expressed the opinion that the Commission should face the fact that it could not usefully

¹ Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

² *Yearbook . . . 1996*, vol. II (Part Two), annex.

³ See footnote 1 above.

attempt further work on prevention and international liability, as it lacked the special expertise required. Other participants had wanted to proceed with that work as in the past. Still others had felt that prevention was a topic fundamentally grounded in primary rules, while international liability, if it had any meaning, was based on secondary rules, and that to mix the two was to engage in self-deception. The report reflected a middle ground among those views, namely that prevention was something the Commission could possibly tackle now, without delay, since the relevant material had already been well developed. He acknowledged that the report was a reasonable compromise among a variety of opinions in the Working Group and thought it unlikely that agreement could be reached on a significantly different conclusion.

10. Mr. LUKASHUK congratulated the Working Group on a concise report representing a judicious compromise among the various positions expressed. He appreciated the views of Mr. Kateka and Mr. Kabatsi about the close interrelationship of the two aspects of the topic but, as he understood the report, there would be two stages in the process of codification. The first aspect to be dealt with was the one that appeared most ripe for codification, but work on it would speed up the analysis of the topic as a whole.

11. There was something illogical, from the legal point of view, in the title of the topic as originally worded, for the implication was that liability could arise for lawful acts. That contradiction should be scrutinized. On the whole, however, he supported the report of the Working Group.

12. Mr. SIMMA said that, although the title of the topic did not reflect the underlying issues, prevention not being necessarily a matter of liability for injurious consequences, the original title should nonetheless be retained so that Governments in the Sixth Committee would readily grasp what was being discussed. Like Mr. Rosenstock, he was sceptical as to whether liability could be adequately dealt with by the Commission in view of the expertise required in private international law and insurance law, expertise that was already available in other bodies. The Commission could, on the other hand, do useful work on the prevention aspect, and, if it was to do so, the title of the topic should be changed at the fiftieth session in 1998. He believed a Special Rapporteur should be appointed as soon as possible and that the formulation of paragraph 6 (b) of the report of the Working Group should remain unchanged, pending resolution of the question of whether the Commission would continue with the topic in the light of comments by Governments.

13. Mr. BROWNLIE congratulated the Working Group on its efforts. He could see a practical case for building on articles already adopted on prevention, which went a long way towards creating a regime on environmental risk. However, the fundamental conceptual difficulties had still not been addressed and, in the Sixth Committee, Governments had indicated their concern about those difficulties. Any value of the norms that would emerge from the work on prevention and associated problems would be diluted if there was no clear legal framework in which those norms were to appear. Admittedly the work on nationality in relation to the succession of States, for example, could

properly take the form of a draft declaration, but a precise legal framework had to be envisaged in respect of damage or risk to the environment, the obvious framework being State responsibility. If the Commission wished to develop rules therefor, all well and good; it should agree to do so. But to agree to develop some of the specific rules already drafted, without deciding on the framework within which the rules would operate, would be the worst of all worlds.

14. Mr. THIAM said that at the current stage it would be difficult to develop proposals acceptable to each and every member. The topic had been before the Commission for some 20 years, with very few results. At the outset, the Commission had had to decide whether to consider international liability as one aspect of State responsibility for wrongful acts or to treat it separately. A former Special Rapporteur on State responsibility, Mr. Ago, had not wished to combine the two subjects, owing to the technical differences between them. The Commission had thus been obliged to take up the subject independently from that of State responsibility, even though many members, including himself, would have had preferred the opposite approach. As the situation now stood, therefore, the Commission could not consider prevention in isolation from liability. What it must do was to see whether the Working Group's proposal was acceptable.

15. Preventive measures differed in different fields of human activity—air pollution, water pollution, military activities, and so on. Did the Commission have the necessary technical ability to handle prevention in all of its ramifications? He was not convinced that it did. Moreover, the topic seemed more closely related to that of State responsibility for wrongful acts than to international liability for injurious consequences. He had a slight preference for dealing with international liability, even though it posed seemingly insuperable problems. But if the Commission chose to tackle that issue, it should clarify the content and specify the nature of the rules it was to elaborate.

16. He was grateful to the Working Group for identifying the two aspects of the topic of international liability, but was not convinced that the General Assembly had given the Commission a mandate to deal with the two aspects separately.

17. Mr. HAFNER said he disagreed with the argument that the Commission was not the proper body for dealing with international liability and thought the technical and legal information required for dealing with both issues, prevention and liability, was similar. To study prevention, for example, the Commission would need extensive information on toxicity and dangerous activities and on the technical requirements for preventing damage. The Commission was eminently suited to dealing with liability, as had been demonstrated by the study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".⁴

18. Mr. LUKASHUK said that a matter of considerable significance for the Commission's future work had been raised. The Sixth Committee had submitted a whole new

⁴ *Yearbook* . . . 1985, vol. II (Part One), *Addendum*, document A/CN.4/384.

range of subjects for the Commission's consideration, including environmental law and international economic law, which did not necessarily correspond with the Commission's special profile. Consequently, it was important to determine the Commission's place in the general work on the progressive development and codification of international law. Such a new approach could be tested in connection with preventing the fragmentation of international law in the process of its codification and progressive development. He agreed, however, that, in order to deal with all the questions involved, the Commission would have to cooperate with the international bodies which specialized in that field. The Commission's task was not to deal with matters of detail or to set technical parameters but to establish and define only general principles. That was the direction its future work must take. Above all, it must fulfil the mandate conferred upon it by the General Assembly, which included the obligation to prevent the fragmentation of international law.

19. Mr. HE said that the Commission should not abandon its work on the topic, which had been under study since 1978, but should rather decide how to proceed and make a fresh start on it. The problem was that, while there was agreement that the question of prevention should be dealt with, there were strong doubts whether the Commission was properly equipped to deal with the question of liability. The two problems could perhaps be combined and studied in the manner propounded by Mr. Hafner. At the same time, he endorsed the Working Group's recommendations, contained in paragraph 6 of its report, that the Commission should proceed with its work on prevention under the subtitle "Prevention of transboundary damage from hazardous activities" but should defer its decision on liability pending further comments by Governments.

20. Mr. YAMADA (Chairman of the Working Group) said he had endeavoured to report what had transpired in the Working Group as faithfully as possible and believed his report reflected the middle ground of the views taken by members. In particular, Mr. Kateka's opinion was reflected in paragraph 3 of the report.

21. His understanding was that the existing title of the topic would stand unless the Commission decided otherwise. The Working Group recommended, however, that the prevention aspect of the topic should be dealt with under a subtitle. No recommendation as to the possible adjustment of the existing title of the topic would be made until a decision on the question of international liability had been taken.

22. Mr. AL-KHASAWNEH said he was not persuaded by the argument that the Commission was ill-suited to deal with the topic because of the need for technical data. Perhaps it should establish some mechanism to compile such data and distil the relevant legal principles to regulate the area of international law in question.

23. From the very outset, there had been a fundamental question of conception which had not been resolved. The topic, which could be said to have been grossly misconceived, was in fact the product of the approach of the late former Special Rapporteur on State responsibility, Mr. Ago, to the question of circumstances where responsibility was precluded. Prevention, to his own mind, was

by definition a matter of prohibitions and as such would take the topic out of the realm of liability into the realm of responsibility.

24. It had been suggested that the existing title of the topic should stand but that, at the same time, work on prevention should proceed. In his view, however, the title should match the content of a topic and liability and prevention were entirely different things. In the circumstances, the Commission should not be unduly hasty about deciding to move ahead with the work on prevention, particularly if it was decided that the international liability aspect of the topic should be deferred pending further comment by Governments.

25. Mr. GOCO said it was clear from the mandate conferred on the Commission that the subject with which the General Assembly was primarily concerned was international liability for injurious consequences arising out of acts not prohibited by international law. Some 20 years had elapsed since that topic had first been taken up, during which time it had become bogged down in conceptual and theoretical difficulties. It was too late in the day, however, and would not create a very good impression, to divide the topic into two parts that could be dealt with separately. The main thrust of the topic was international liability and there should be no difficulty in treating the question of prevention in that context.

26. The CHAIRMAN pointed out that at the forty-fourth session, if memory served him correctly, the Commission had practically already decided to divide the topic into two parts.⁵

27. Mr. SEPÚLVEDA said that the topic as a whole was gradually being diluted and being turned from a general subject into a relatively minor issue. It was difficult to know how that gradual erosion could be explained to the General Assembly. The subject of liability for risk should be retained, although it could, if necessary, be examined in conjunction with the broader subject of international liability. If the subject of prevention was dealt with, it should be made clear that it was as but one chapter that fitted into the overall subject of liability for risk. That approach would be more in keeping with the Commission's mandate.

28. The CHAIRMAN said that, although the consensus in the Commission seemed to be that prevention was a relatively secondary aspect of the topic, the idea underlying the compromise reflected in the report of the Working Group seemed to be that, as the Commission had already adopted 11 articles on prevention in the past, it would be a pity if that could not be put to some advantage.

29. He would be grateful for the Commission's guidance. It was doubtful whether the Commission could avoid some form of compromise unless it were to proceed to a vote, which, on such an issue, would be disastrous for its image. The only other solution he saw would be for the Commission to refrain from taking a decision and to explain to the Sixth Committee that it was very difficult to take a position in the absence of some significant reaction from States. He trusted that the Commission would adopt

⁵ See *Yearbook* . . . 1992, vol. II (Part Two), paras. 344 et seq.

the report of the Working Group: it was not possible to please everyone, but that was the disadvantage of a consensus.

30. Mr. BROWNLIE said that he found the debate extraordinarily depressing and not just because the difficulties involved had been around for a very long time. The rubric of international liability was peculiar in character. Normally, when the Commission refined and perhaps progressively developed an existing area of law on a topic, it was dealing with some recognizable juridical substance. In the case of international liability, it was not doing so. No textbook on existing law contained such a rubric; no digest of State practice employed such a rubric; nor did a collection of Japanese practice by two distinguished Japanese lawyers, one of whom was a judge at ICJ, employ the rubric.⁶

31. When Canada had made a claim for damage caused by the disintegration of a satellite owned by the former Union of Soviet Socialist Republics (USSR)⁷—a classic example of the kind of area with which the topic was supposed to overlap—it had not referred to the work of the Commission and the rubric of international liability. Not surprisingly, it had invoked the principles of State responsibility in general international law and the relevant multilateral convention. So, when the Commission decided to bifurcate the subject, treating prevention as a separate area, it was in fact working in a vacuum and it was very surprising that such a decision should be taken in the absence of some threshold decision on the legal character of the subject. Had the Commission decided to develop new principles regarding environmental risks, it would have been working on the basis of some existing juridical substance. For the time being, however, it had not done so and all that the report of the Working Group had achieved was a compromise that sought to put off the day when the juridical and practical value of the topic would have to be finally judged.

32. Mr. Sreenivasa RAO said that it would perhaps help the Commission to overcome its difficulties if the recommendations set forth in the report of the Working Group were slightly amended in two respects. In the first place, the phrase “with the aim of completing the first reading of the draft articles by 1999”, in paragraph 6 (a) seemed to send out a message that the Commission would focus on prevention alone and would not deal with liability. Therefore, the phrase should be deleted. Secondly, the first sentence of paragraph 6 (b) contained a hint that the topic of international liability would never be taken up. To correct that impression and achieve the right focus, the word “international”, in the first sentence of paragraph 6 (b), should be deleted.

33. The title of the topic should stand and the topic itself should encompass both liability and prevention. The views of those members who had made a special point that the work on liability must continue would, of course, be placed on record.

34. Mr. KATEKA said that he agreed with most of what Mr. Sreenivasa Rao had said but would propose one further amendment, namely, changing the words “defer its decision”, in paragraph 6 (b) to “defer action”.

35. Mr. ADDO said that, while he also broadly agreed with Mr. Sreenivasa Rao’s proposed amendments, he found the report of the Working Group balanced and acceptable. The idea of deferring a decision or action on international liability did not imply abandonment of the principle of such liability. The point was that the work on prevention should proceed pending the receipt of comments from Governments.

36. He disagreed with Mr. Brownlie that the principle of international liability was devoid of legal substance. In an era of proliferation of nuclear activities and transboundary movements of hazardous waste it was a highly relevant topic that should be dealt with as part of the corpus of international law. The advisory opinion of ICJ of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*,⁸ represented a significant statement of customary international law on environmental protection and was highly relevant to the topic. It stated in paragraph 29 that

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.⁹

37. Mr. SIMMA said he fully supported Mr. Sreenivasa Rao’s proposed amendments. He preferred the word “decision” to “action”, because the question of whether the Commission took action on the liability aspect or abandoned it should be left open.

38. Although he appreciated Mr. Brownlie’s view, he felt sure Mr. Brownlie would agree that international law already contained a solid body of material regarding prevention which might be condensed and codified by the Commission. Rules of prevention were primary rules that concretized the principle of due diligence. Where those rules were violated, State responsibility must come into play. He had himself worked on the prevention aspect of the peaceful use of nuclear energy in relation to nuclear power plants in border areas and had identified some 50 bilateral treaties that dealt with the issue of prevention in the form of, for example, information and consultation. In his opinion, it would be a useful topic for the Commission to tackle.

39. The CHAIRMAN said he had been handed a proposal in writing by Mr. Sreenivasa Rao which might allay concerns regarding the idea of taking a decision or deferring action. Mr. Sreenivasa Rao proposed replacing the words “making a decision” at the end of subparagraph (b) by “finalizing its view”. The beginning of the subparagraph would be reworded accordingly.

40. Mr. THIAM noted with concern that drafting changes were being proposed before agreement had been reached on the substantive question of whether to deal with prevention first and liability later.

⁶ *The Practice of Japan in International Law, 1961-1970*, S. Oda and H. Owada, eds. (Tokyo, University of Tokyo Press, 1982).

⁷ Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954 (*International Legal Materials*, vol. XVIII, No. 4 (May 1979), pp. 899-930).

⁸ *I.C.J. Reports 1996*, p. 226.

⁹ *Ibid.*, p. 242.

41. Mr. KABATSI supported the two deletions originally proposed by Mr. Sreenivasa Rao, namely the last phrase in subparagraph (a) and the word "international" in subparagraph (b). He further proposed replacing "defer its decision" in subparagraph (b) by "defer its work", on the analogy of "proceed with its work" in subparagraph (a).

42. The CHAIRMAN, speaking as a member of the Commission, said that, if a final decision were to be taken at that meeting that the Commission would take up the liability aspect, he would take a vote on the matter and express his opposition thereto.

43. Mr. BROWNLIE said he hoped Mr. Addo and Mr. Simma had not misunderstood his position. He agreed that certain principles of international liability existed. Indeed some of them had first been recognized in some of his own publications. However, the point was that when authoritative decision makers wished to support those principles, they did so without invoking the Commission's work or the rubric "international liability for injurious consequences arising out of acts not prohibited by international law".

44. Mr. ROSENSTOCK said that, whatever the final wording of the recommendation by the Working Group, the Commission would have to face up to the issue at the next session. He therefore suggested opting for Mr. Sreenivasa Rao's version, which was the most neutral.

45. With regard to Mr. Brownlie's comments, it should be placed on record that the outcome of the current meeting was without prejudice to the possibility for the new Special Rapporteur, if he so wished, to reopen the debate on the decision pushed through by the former Special Rapporteur on State responsibility, Mr. Ago, to the effect that the subject was not part of the law of State responsibility. At the same time, that should not be understood as incitement to the Special Rapporteur to reopen the debate. Mr. Brownlie's view, if he had understood it rightly, was that the subject would have a context if it was made part of the responsibility topic as a secondary rule, bearing in mind some aspects of common law and presumably civil law, pursuant to which there was no fault liability.

46. Mr. SEPÚLVEDA said that, while he appreciated the subtlety and tactfulness of Mr. Sreenivasa Rao's proposal, he wished to suggest the following further refinement:

"The Commission should proceed with its work on 'international liability', undertaking first the topic of 'prevention' under the subtitle 'prevention of transboundary damage from hazardous activities'. A special rapporteur for this subtitle should be appointed as soon as possible. The Commission should request comments by Governments if they have not yet done so on this aspect to assist the Commission in finalizing its work."

47. The CHAIRMAN said that, personally, he greatly preferred "finalizing its view" to "finalizing its work", for there was a considerable difference between the two.

48. Mr. GOCO said that he broadly agreed with Mr. Sepúlveda's proposal. He was concerned, however, that the Commission was deviating from the mandate assigned to it by the General Assembly. The reference to finalization of work should be deleted, so that the sentence would read: "Further, the Commission should request comments by Governments if they have not yet done so on this aspect to assist the Commission."

49. The CHAIRMAN invited Mr. Goco, Mr. Sreenivasa Rao and Mr. Sepúlveda to confer with Mr. Yamada, the Chairman of the Working Group, with a view to producing a mutually acceptable text for consideration by the Commission before the end of the meeting. The Secretariat would concurrently prepare a French translation of the text.

The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.

50. The CHAIRMAN invited the Commission to comment on the following text prepared by the informal drafting group:

"6. The Working Group accordingly recommends to the Commission that:

"(a) The Commission should proceed with its work on 'international liability for injurious consequences arising out of acts not prohibited by international law', undertaking first prevention under the subtitle 'prevention of transboundary damage from hazardous activities'. A Special Rapporteur for this subtitle should be appointed as soon as possible;

"(b) Further, the Commission should request comments by Governments if they have not yet done so on the issue of international liability in order to assist the Commission to finalize its view."

51. Mr. PAMBOU-TCHIVOUNDA submitted that the phrase *adopter un point de vue définitif* (finalize its view) in the French text was meaningless. He suggested *déterminer définitivement* as a more felicitous rendering of the English phrase.

52. Mr. THIAM said he was concerned at the reference to the appointment of a special rapporteur for "prevention", since it conveyed the impression that the two issues under the topic had been definitively separated. Would a second special rapporteur be appointed for the issue of liability or would the same person deal with both issues?

53. The CHAIRMAN suggested deleting the words "for this subtitle" at the end of subparagraph (a).

54. Mr. ROSENSTOCK said he had no objection to the appointment of a special rapporteur for the "prevention" subtitle, provided the appointment was without prejudice to the role to be played by the same or another special rapporteur if and when the other portion of the topic was finalized. He feared that deletion of the words "for this subtitle" would prejudice the outcome.

55. The beginning of subparagraph (b) should be amended, for stylistic reasons, to read: "Further, the Commission should reiterate its request for comments by Governments."

56. Mr. KABATSI said he was not sure what was meant by to “finalize its view”. Was the Commission working on a particular view that must be finalized? He would prefer to revert to the Working Group’s original wording: “to assist the Commission in making a decision in this regard”.

57. The CHAIRMAN said that the new wording could be described as “constructive ambiguity”.

58. Mr. KATEKA said that constructive ambiguity was called for as a form of compromise. He was not keen on “finalize its view”, but he could live with it.

59. As to Mr. Rosenstock’s insistence on retaining “for this subtitle”, was there a precedent for the appointment of a special rapporteur to deal with a subtitle?

60. The CHAIRMAN said that, to his knowledge, it was an innovation. However, the wording “a special rapporteur should be appointed as soon as possible” left open the question of whether a second special rapporteur would be appointed for the other subtitle—another example of constructive ambiguity.

61. Mr. PAMBOU-TCHIVOUNDA said he supported Mr. Thiam in his opposition to separating the issues of prevention and international liability, which were related and complementary. The second half of subparagraph (a), beginning with the word “undertaking” might be altered, so as to take account of the concerns of Mr. Sreenivasa Rao, Mr. Thiam and perhaps Mr. Kateka, to read: “undertaking first prevention of transboundary damage from hazardous activities. A special rapporteur should be appointed as soon as possible.” He stressed that the quotation marks in the original version should be omitted.

62. The CHAIRMAN noted that the proposed amendment radically changed the meaning of the recommendation. Personally, he was unable to accept it unless it secured unanimous support.

63. Mr. AL-BAHARNA said that he hoped the Commission would continue its work on the topic despite the difficulties involved. He would have preferred the Working Group’s original recommendation but, for the sake of compromise, would raise no objection to the revised version, as amended. However, he wondered whether, in order to avoid any misunderstanding, the last sentence of subparagraph (a) might not be transferred from that position to form a separate, unnumbered subparagraph at the end of paragraph 6.

64. The CHAIRMAN said that the suggestion would destroy the balance of the paragraph as a whole by prejudging an issue that the Commission did not wish to prejudge.

65. Mr. GALICKI remarked that some of the proposed amendments, in particular the one by Mr. Pambou-Tchivounda, departed very considerably from the original proposal of the Working Group. In his opinion, the Commission should adopt the compromise draft, which followed the original text fairly closely while taking into consideration some of the observations made during the discussion. It was up to the Commission, and not to a

future special rapporteur, to define precisely what topic should be considered.

66. Mr. RODRÍGUEZ CEDEÑO supported the proposal to delete the words “for this subtitle” from subparagraph (a). The two subtopics were closely interconnected and it was desirable for both of them to be dealt with by the same special rapporteur. The revised text, as amended, allowed the Commission to decide at a future date whether the second part of the topic should also be taken up.

67. Mr. THIAM said he concurred with Mr. Rodriguez Ceneño. The Commission’s mandate related to international liability and not to prevention alone. A special rapporteur would have to be appointed for the topic of liability in general.

68. The CHAIRMAN invited the Commission to adopt the following text of paragraph 6:

“6. The Working Group accordingly recommends to the Commission that:

“(a) The Commission should proceed with its work on ‘international liability for injurious consequences arising out of acts not prohibited by international law’, undertaking first prevention under the subtitle ‘prevention of transboundary damage from hazardous activities’. A special rapporteur should be appointed as soon as possible.

“(b) Further the Commission should reiterate its request for comments by Governments if they have not yet done so on the issue of international liability in order to assist the Commission to finalize its view.”

69. Mr. BROWNLIE said that the wording of paragraph 6 (b) was inelegant to say the least and would have to be improved for purely linguistic reasons.

70. Mr. ROSENSTOCK asked for an assurance that the deletion of the words “for this subtitle” was without prejudice to whether the matter would be handled in the future by one or more special rapporteurs and without prejudice to the issues left in subparagraph 6 (b).

71. The CHAIRMAN said that he reiterated the assurances given to that effect. If he heard no objection, he would take it that the Commission agreed to adopt the report of the Working Group, as amended, which thus became part of the Commission’s report to the General Assembly. It was not his intention to reopen the issue when the Commission came to consider its report to the General Assembly on the work of the current session.

It was so agreed.

Nationality in relation to the succession of States (continued) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,¹⁰ A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

¹⁰ Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE¹¹ (*continued*)

72. The CHAIRMAN invited the Commission to resume its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

PART I (*continued*)

ARTICLE 2 (Use of terms)

73. The CHAIRMAN recalled the decision (2495th meeting) that the adoption of article 2 would be without prejudice to the precise position of that article in the final draft. He also noted that it had been agreed to replace the word *individu* in the French version by the words *personne physique* and to amend the Spanish text accordingly.

Article 2 was adopted.

ARTICLE 3 (Prevention of statelessness)

74. The CHAIRMAN recalled that the words *personnes qui avaient* in the French text had been amended to read *personnes physiques qui possédaient*.

Article 3 was adopted.

ARTICLE 4 (Presumption of nationality)

75. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 4 (Presumption of nationality), had not been included in the draft articles proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1)¹² but had been drafted by the Drafting Committee in the light of comments made during the discussion, in particular by Mr. Brownlie (2476th meeting). The Committee had felt that the issue was of sufficient importance and generality to warrant a separate provision in Part I, on general principles. The new article reflected a trend in practice, namely, that in cases of State succession persons concerned who were habitual residents of the affected territory *usually* opted for the nationality of the successor State. It also provided a useful backdrop for some of the provisions of Part II, which addressed the issue in some measure.

76. It should be noted that the article provided only for a presumption and was further circumscribed by the opening clause reading: "Subject to the provisions of the present draft articles". In other words, the provision would operate on a residual basis where the need arose. The article was designed to serve as a reminder to successor States that persons concerned who were habitual residents of the affected territory should be deemed to have opted for their nationality and that due consideration

should be given to that issue in resolving questions of nationality. Accordingly, the article was without prejudice to the right of option to which such persons concerned were entitled. The opening clause clearly indicated that the effect of the article should be seen within the overall context of other articles dealing with the right of option and also, perhaps, the obligation to grant nationality in the case of transfer of territory.

77. Mr. THIAM said that, to his recollection, the title of Part I had been changed to "General provisions". If no decision on that point had been taken as yet, he would reserve his comments for later.

78. Mr. ROSENSTOCK said that he had no objection to article 4, on the understanding that the presumption in question was not only subject to the provisions of the current draft articles but was also rebuttable.

79. Mr. GOCO said that, reading article 4 in conjunction with article 5, he was concerned about the situation of persons concerned living in the predecessor State pending the enactment of the appropriate laws by the successor State. It was important to ensure that, in the intervening period, such persons would not be divested of the nationality of the predecessor State.

80. The CHAIRMAN pointed out that the problem mentioned by Mr. Goco was obviated by the fact that article 5 used the conditional "should" rather than the mandatory "shall".

81. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the presumption formulated in article 4 had not prevented and would not prevent persons having the nationality of the predecessor State from retaining that nationality. The presumption could not entail loss of nationality.

82. Mr. BROWNLIE said that the addition of article 4 had been motivated by two considerations, one being the need to limit the possibility of statelessness and the other being the wish to provide a sort of fall-back clause by way of residual protection in precisely the type of case envisaged by Mr. Goco.

The meeting rose at 1 p.m.

2497th MEETING

Friday, 20 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

¹¹ For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

¹² For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,