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Summary record of the 2351st meeting

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Extract from the Yearbook of the International Law Commission:-
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continue in future. He wished to extend his wishes to AALCC for every success in the future.

72. Mr. VILLAGRÁN KRAMER said that the Latin American members of the Commission, on whose behalf he was speaking, wished to thank the Secretary-General of AALCC for his statement. The work of the various regional forums was of great significance and often paralleled that of the Commission. The responses found in one region to challenges of contemporary international life could be compared and shared with other regions. With the end of the cold war, for example, politicization and ideological confrontation were diminishing everywhere, opening the way to progress in humanitarian affairs. He wished the Secretary-General every success in leading AALCC forward.

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

[Agenda item 2]

73. The CHAIRMAN informed the Commission that the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of the view that the time allocated to the consideration of his tenth report (A/CN.4/459) would be more profitably used in the Drafting Committee, which had a number of draft articles on the topic before it, than in the framework of the plenary. The Enlarged Bureau, which had considered the matter, therefore suggested that most of the plenary meeting time allocated to the topic should be set aside chiefly for meetings of the Drafting Committee on the same topic, without precluding the possibility that part of the time thus freed might be allocated, if necessary, to the Working Group on a draft statute for an international criminal court. The proposal meant that there would be no debate on the topic in plenary at the present session.

74. If he heard no objection, he would take it that the Commission agreed to the proposal of the Enlarged Bureau.

It was so agreed.

75. The CHAIRMAN noted that the Commission was beginning to be pressed for time and appealed to the members of the Drafting Committee and of the Working Group on a draft statute for an international criminal court to proceed as expeditiously as possible and to make optimum use of the limited time available to them.

The meeting rose at 1.25 p.m.

* Resumed from the 2335th meeting.

2351st MEETING

Friday, 10 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/457, sect. C, A/CN.4/459,¹ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. BARBOZA (Special Rapporteur), introducing his tenth report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459), said that it related to the first step in the work on the subject as foreseen by the Commission in the decisions taken on the basis of the recommendations of the Working Group it created at its forty-fourth session.² At that time, the Commission had decided that the draft articles³ should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm, and then with the necessary remedial measures. Once the Commission had completed consideration of the proposed articles on those two aspects, it would decide on the next stage of its work. When consideration of the issue of prevention had been completed, in the context of the response measures proposed in chapter I of the tenth report, the Commission would have to examine the responsibility and liability issues to which the articles would give rise, in other words, the roles of the State and of the operator, as well as the provisions common to both. Lastly, the tenth report considered the issue of the procedural means available to enforce liability.

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

² *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, paras. 344-347.

³ For the texts of draft articles 1 to 10, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 9 *et seq.* For the revised articles proposed by the Special Rapporteur, which were reduced to nine, see *Yearbook . . . 1989*, vol. II (Part Two), para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in his sixth report, see *Yearbook . . . 1990*, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add.1, annex; and *ibid.*, vol. II (Part Two), para. 471.

2. He proposed the use of the term "response measures" in referring to prevention *ex post facto*. At the Commission's forty-fifth session, a substantial number of members had expressed the view that prevention *ex post facto*, in other words, measures adopted after the event to prevent or minimize transboundary harmful effects, should not be regarded as preventive measures, which always came before the event. He was not entirely convinced by that argument. In his view, prevention involved two things: the incident itself and the damage it might cause. The *ex post facto* preventive measures to which he was referring were to be taken after the occurrence of an incident, but before all the damage had been caused. The purpose of such measures was therefore to control, or intercept, the chain of events that were set in motion by an accident and resulted in damage. Consequently, it was not possible to deal with them as part of reparation. In the tenth report, an example was given of the pollution of an international watercourse which showed that measures that could even be regarded as rehabilitative in the State of origin could be of a preventive nature in the context of transboundary harm. International practice regarded *ex post facto* measures as a matter of prevention and he had found no indication whatsoever to the contrary. If the Commission still wished the term "preventive measures" to refer only to measures taken prior to the incident, it would have to adopt another term for prevention *ex post facto*, such as "response measures".

3. After dealing with the issue of prevention, both *ex ante* and *ex post facto*, the report turned to that of liability, the main feature of the topic, as was apparent from its title. The first question that arose was whether there was some form of strict State liability for transboundary damage. The previous Special Rapporteur, Mr. Quentin-Baxter, had taken the view that there could be that kind of liability and that it would be incurred if all else failed; he himself was inclined to adopt the same viewpoint, though international practice had not followed that trend, but tended towards the civil liability of the operator. The only instrument which provided for the "absolute" liability of the State was the Convention on International Liability for Damage caused by Space Objects due to the fact that at the time of its signature States had regarded space activities as their exclusive concern.

4. The civil liability channel had several advantages: compensation of the victims of transboundary harm was determined by a court, through due process of the law, so that the victims did not have to rely on the discretion of the affected State, which might not, for political or other reasons, take action. The State of origin, for its part, did not need to respond to the action of a private individual before the national courts of another State, and that might prevent some difficulties. Civil liability was, however, always strict liability. Indeed, it was in hazardous activities that the application of that form of no-fault liability in modern legal systems had its origin. There were two irrefutable legal principles which could not be discarded simply because the operator was in one country and the victim in another: whoever caused the risk and profited from the hazardous activity must be liable for its injurious consequences; and, it would be inequitable to place the burden of proof on the victim.

The draft articles under consideration could provide the international mechanism by which the strict liability of the operator could be affirmed.

5. There was the question of whether the State should share in the operator's liability. According to international practice, there were several possibilities: the State could have no liability for transboundary damage caused by accidents; the operator could have strict liability for damage caused and the State would have to provide the funds for that portion of compensation which was not satisfied by the private operator or his insurance; and the operator could have strict primary liability for the damage caused and the State could have subsidiary liability for that portion of the compensation which was not satisfied by the operator, provided that the damage would not have occurred if the State had not failed to comply with one or more of its obligations. That third possibility was what the Commission had termed "indirect causality", at the time it was considering the reports of Mr. Roberto Ago. Such a system, combining failure by the State to fulfil one or more of its obligations and "indirect causality" was set forth, for instance, in the proposed draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

6. The fourth situation found in international practice was one in which the State bore both strict liability and responsibility for a wrongful act, depending on where the harm occurred, an example of that was the Convention on International Liability for Damage Caused by Space Objects. In his view, that last alternative should be rejected, the Commission and the Sixth Committee of the General Assembly having in the past expressed their preference for a subsidiary liability of the State. Of the three remaining possibilities, he preferred the first, namely, non-participation by the State in the payment of compensation, which he proposed choosing, along with the third, namely, State responsibility (for a wrongful act) for the portion of compensation not covered by the operator or his insurance if the victim proved the "indirect causality" of action by the State of the accident. He ruled out the second possibility because he saw it as a form of strict liability which States might be reluctant to accept, but he remained open to any suggestion should the Commission decide to proceed otherwise.

7. Concerning liability for a wrongful act or no-fault liability and whether or not the State intervened in a subsidiary manner, thus far, only the relationship between a State and injured persons had been explored. What, then, of the State-to-State relationship on the international plane resulting from the failure of a State to comply fully with its own obligations? As stated in the draft articles on State responsibility, such a failure gave rise to a number of obligations: cessation of the wrongful conduct, restitution in kind, compensation, satisfaction and assurance and guarantees of non-repetition. With regard to cessation, the State of origin would be under an obligation to cease the conduct constituting a wrongful act having a continuous character. That continuous act would generally consist in the State's failure to take the measures required by the draft articles and cessation of that act would be in keeping with the view expressed at the forty-fifth session of the Commission that a dangerous

activity performed without the appropriate precautionary measures being taken ceased to be a lawful activity under international law. It went without saying that the wrongful act in question must be duly proved to be such and that the affected State could therefore not oppose a lawful activity by the State of origin.

8. The State injured by the breach could request that all appropriate forms of reparation should be made, as provided for in the current wording of articles 7, 8, 10 and 10 *bis* of part two of the draft on State responsibility.⁴ In addition, the injured State would be able to take the appropriate steps following a breach of an obligation. In other words, it would have the right to take any appropriate countermeasures under the same general conditions of lawfulness to which countermeasures were subject under international law. It should be remembered that the obligations of prevention were obligations of due diligence and that the State was required only to attempt to prevent accidents and harm. If an accident and transboundary harm occurred while the activity in question was being carried out, strict liability of the operator would automatically come into play in order for the private victim to obtain compensation. The affected State nevertheless kept its rights regarding the other consequences of the breach: it could make diplomatic representations and take such steps—for example, countermeasures—as were necessary to make the State of origin fulfil the requirement in question by ceasing the wrongful act. The coexistence of obligations of prevention, the breach of which resulted in State responsibility, and of a regime of strict liability for the operator made it necessary to draw a very clear distinction between the two and was perhaps the reason why prevention and liability were in practice covered by separate instruments.

9. Turning to the issue of civil liability, he said that, in the case of hazardous activities, international conventions generally provided for strict liability of the operator. The existing civil liability regimes had certain features in common: (a) the operator bearing liability must be clearly identified, liability being joint and several when several operators bore liability; (b) the operator was invariably obliged to take out insurance or to provide some other financial guarantee; (c) where possible, compensation funds were to be established; (d) in order for the system to function, the principle of non-discrimination must be respected; in other words, the courts of the State of origin should accord the same protection to nationals and to non-nationals, to residents and to non-residents; (e) in all matters not directly covered by the convention, the law of the competent court applied, provided it was consistent with the convention; (f) except where otherwise provided, judgements enforceable in one court were to be equally enforceable in courts of all States parties to the convention; and (g) monetary compensations awarded could be transferred without restriction in the currency desired by the beneficiary.

10. The fact that the party bearing liability for any harm was clearly identified had the advantage not only of putting the potentially liable parties on notice and making them do their best to avoid causing harm, but

also of facilitating redress of the injured party in case of harm. A review of civil liability regimes showed that liability was channelled through the operator, on the grounds that the operator: (a) was in control of the activity; (b) was in the best position to avoid causing harm; and (c) was the primary beneficiary of the operation and should therefore bear the cost of the operation to others. Basing himself on the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, which, because of its general character, was of particular interest for the study of the topic, he proposed provisions for defining the operator and his liability, stipulating in substance that operator referred to the person who exercised the control of an activity; that the operator bore liability for any significant transboundary harm caused by that activity during the period in which he exercised control over the activity; and that, if several operators were involved in an incident, they were jointly and severally liable, unless an operator proved that he was liable only for part of the harm, in which case he would be liable only for that part of the harm.

11. Relying on existing civil liability conventions, he was proposing provisions under which the operator conducting activities covered by the topic under consideration had to provide a financial guarantee. To that end, it would be for the State to require the operator to take out insurance or to set up a financial security scheme in which operators would have to participate. Actions for compensation could be brought directly against the insurer or the financial guarantor. Existing conventions had identified various courts as competent to hear claims. The list included courts having jurisdiction in the place: (a) where the harm occurred; (b) where the operator resided; (c) where the injured party resided; or (d) where preventive measures were supposed to have been taken. Each of those courts offered advantages in terms of gathering evidence and by virtue of its link with the claimant or the defendant. In his view, the first three possibilities should be retained.

12. In order for civil liability regimes to be effective, the competent courts must ensure equal treatment before the law for nationals and non-nationals, residents and non-residents. The draft articles should therefore include a provision to that effect. The Commission might decide that the principle set forth in article 10 of the draft⁵ was sufficient; otherwise, a specific article with equivalent language should be included in the section under consideration.

13. In respect of causality, dealt with in chapter III, section G, of the tenth report, he proposed, in keeping with a provision of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, that, in considering evidence of a causal link between acts and consequences, the court should take due account of the increased danger of damage inherent in the dangerous activity, that is to say, of the specific risks of certain dangerous activities causing a given type of damage. The text of the proposed article did not, however, establish a presumption of causality between incident and harm.

⁴ *Yearbook* . . . 1993, vol. II (Part Two), p. 52.

⁵ See footnote 3 above.

14. With regard to the enforceability of the judgement, he noted that an effective civil liability regime must provide for the possibility of enforcing a judgement in the territory of a State other than the one in which the judgement had been pronounced. Otherwise, any efforts made by a private party to seek redress before a domestic court might be in vain. It was for that reason that civil liability conventions usually contained provisions on the enforceability of judgements, but also provided for certain exceptions, among them fraud; non-respect for due process of the law; and cases where the judgement was contrary to the public policy of the State where enforcement was being sought or was irreconcilable with an earlier judgement. Consequently, the party seeking enforcement must comply with the procedural laws of the State where the judgement would be enforced.

15. With regard to exceptions to liability, the grounds set forth in civil liability conventions included armed conflict; unforeseeable natural phenomena of an exceptional and irresistible character; wrongful intentional conduct of a third party; and gross negligence of the injured party. Those were reasonable grounds for exceptions to liability in respect of damages resulting from the activities considered in the report. With regard to State responsibility for wrongful acts, such as failure to comply with preventive provisions, the grounds for exception were those mentioned in chapter II, section C, of the tenth report.

16. Chapter IV of the report dealt with the statute of limitations in respect of liability. Under civil liability conventions, the time-limit varied from one year, as in the Convention on International Liability for Damage Caused by Space Objects, to 10 years, as in the Vienna Convention on Civil Liability for Nuclear Damage. Time-limits were determined on the basis of various considerations, such as the time within which harm might become visible and identifiable or the time that might be necessary to establish a causal relationship between harm and a particular activity. Since the activities covered in the report were similar to those dealt with in the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, the three-year statute of limitations provided therein seemed appropriate for civil liability claims, on the understanding that no procedure could be instituted after 30 years from the date on which the incident resulting in harm had occurred.

17. The last chapter of the report dealt with procedures to enforce civil liability. In the event that a State was objectively responsible for failing to comply with its obligations of prevention, the procedural channel available was State to State and, consequently, the normal diplomatic procedures and the usual methods of settling disputes were applicable. However, where a State had to face a private party or another State before a domestic court, the situation could become more complicated and some of the possibilities referred to in the report could consequently be set aside. Thus, where a State was subsidiarily responsible for a wrongful act for amounts not covered by the operator or his insurer, it might have to appear before a domestic court. That possibility alone was sufficient reason to discard that type of State responsibility. Other situations also gave rise to serious diffi-

culties, for instance, where an affected State suffered immediate damage, as in the case of damage to its environment. Under such circumstances, the affected State might have to bring an action before a national court, which could be the competent domestic court of that same State. That might pose problems for the defendants. That type of difficulty was one reason to consider solutions such as that proposed by the Netherlands in the IAEA standing committee for considering the amendment of the Convention on Third Party Liability in the Field of Nuclear Energy, of 1960, and the Vienna Convention on Civil Liability for Nuclear Damage, of 1963, namely, the creation of a single forum such as a mixed claims commission, which would be competent to hear claims between States, between private parties and States, and between private parties.

Closure of the International Law Seminar

18. The CHAIRMAN said that the International Law Seminar, whose thirtieth session was coming to a close that day, was an opportunity for the members of the Commission to hold an exchange of views with young lawyers from various countries on topics of international law under discussion in the Commission and other national and international bodies. He expressed the hope that the participants would benefit from their experience and continue to take an interest in, and publicize, the Commission's work. He wished them a safe journey home.

19. Mrs. NOLL-WAGENFELD (Director of the Seminar), speaking on behalf of the Director-General, who was unfortunately unable to attend the meeting, said that she wished first of all to thank the members of the Commission who had made an active contribution to the Seminar and, in particular, Mr. Arangio-Ruiz, Mr. Tomuschat and Mr. Villagrán Kramer, whose expert advice had been so helpful to the three working groups established on the following topics: the legal bases for the establishment of an international criminal court; international crimes (art. 19 of part one of the draft on State responsibility), and reservations to multilateral treaties. The results of research carried out jointly by the participants in the Seminar had been presented the day before and would be distributed to the members of the Commission at a later time.

20. She also thanked Mr. Mahiou, Mr. Mikulka, Mr. Villagrán Kramer and Mr. Yankov, who had given lectures on topics currently before the Commission and on other international law subjects of current interest, namely, State succession, United Nations peace-keeping operations, State immunity from civil and commercial jurisdiction, the new Constitution of ITU in the light of the Vienna Convention on the Law of Treaties, the World Conference on Human Rights, war crimes and the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

21. In conclusion, she drew the attention of the members of the Commission to a thorny problem that had arisen at each session in the past two or three years, that

of the interpretation services available for the Seminar. She recalled that the Seminar was organized by the United Nations, but was not funded from the Organization's budget. In other words, it could have interpretation services only when they were not being used by other bodies. So far, the efforts made by the Secretary to the Commission to have the Seminar included in the calendar of conferences had unfortunately been fruitless. The French-speaking and Spanish-speaking participants suffered most from that situation. All participants were fully aware that a lawyer intending to specialize in international law should understand English, French and, if possible, Spanish and should be able to express himself fluently in one of those three languages, but they were at the start of their careers and that was the stage at which they required the interpretation services. She therefore appealed to the members of the Commission who represented their countries in the Sixth Committee of the General Assembly to persuade the Committee to consider the problem and solve it in the interests of participants in future sessions of the Seminar.

22. Mr. TOMUSCHAT said that the quality of the work done by the participants in the Seminar had been impressive and he welcomed the fact that their reports, which would certainly provide the members of the Commission with valuable insights for their own work, were to be distributed. Many young lawyers, particularly from third-world countries, had been able to deepen their knowledge of international law and of United Nations practice by attending the Seminar. Its continuity should therefore be a common concern of the international community, the wealthier States naturally being called on to shoulder the immediate financial burden of an undertaking whose benefits would eventually accrue to the international community as a whole. In that connection, he said that his Government regularly provided funds for the Seminar and that four fellowships had been financed out of those funds in the current year. All Governments should be encouraged to do the same.

23. Mr. VILLAGRÁN KRAMER also stressed the high quality of the work done by the participants in the Seminar and which foreshadowed far-reaching developments in legal thinking in the years to come.

24. Mr. ARANGIO-RUIZ welcomed the research work submitted to him and expressed pleasure at the exchanges of views he had had with participants in the Seminar who expressed an interest in his topic.

25. He was convinced that the duration of the Seminar—three weeks—was quite inadequate as a means of becoming familiar with the Commission's work and deriving a real benefit from it. The Commission should explore means of persuading Member States to contribute more substantially to the financing of the Seminar; and, if funds were not sufficient, consider the possibility of reducing the number of participants, but making the Seminar twice as long.

26. Mr. GHERAIRI, speaking on behalf of the participants in the International Law Seminar, expressed appreciation to the organizers of the Seminar and the members of the Commission, thanks to whom the participants had been able to work in the best possible conditions. They were honoured to have had the opportunity to attend the

meetings of the Commission, as well as those of its Drafting Committee and its Working Group, thus being present at the conception of international rules. They came from different countries and horizons and would return home enriched by the experience of diversity which had taught them to cultivate a sense of compromise, nuance and consensus.

The Chairman presented participants with certificates attesting to their participation in the thirtieth session of the International Law Seminar.

The meeting rose at 11.30 a.m.

2352nd MEETING

Tuesday, 14 June 1994, at 12.40 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (concluded)*

[Agenda item 2]

1. Mr. CRAWFORD (Chairman of the Working Group on a draft statute for an international criminal court) said that the Working Group hoped to conclude its work in the course of the afternoon. By the end of the following week, the Commission could expect to have before it, in as many of its working languages as possible, an extensively revised draft statute containing no passages in square brackets and no alternative texts. The Working Group had also prepared a commentary on the revised articles. However, since it could not be translated in time, the commentary would not be issued as part of the Working Group's report and would be circulated among members of the Commission as a "non-paper".

2. He wished to make certain observations. The first was that the Working Group had been, and still was, engaged in an exercise of extraordinary difficulty, both because of the time constraints imposed on the Commission by the General Assembly and because of the trail-blazing nature of the task. The second point, which arose from the first, was that every member of the Working

* Resumed from the 2350th meeting.