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Summary record of the 2450th 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:-
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64. In respect of all the other crimes included in the draft Code, the Commission had sought the views and comments of Governments. There was clearly no time to do likewise with the present proposal, yet it was essential to ascertain the level of acceptance by Governments of the Commission's work *de lege ferenda*, since the absence of such acceptance would undermine the success of the Code as a whole.

65. In view of those considerations, he was regretfully compelled to say that he could not accept the proposal in principle, although he would be prepared to go along with a decision to refer it to the Drafting Committee or a working group. Should Mr. Rosenstock's proposal be accepted, he wished to give notice of his intention to make a formal proposal of his own for the reintroduction into the draft of the crimes of international terrorism and international drug trafficking.

66. Mr. MIKULKA said all members of the Commission were agreed that Mr. Rosenstock's proposal was motivated by a commendable wish to make sure that attacks against United Nations and associated personnel were ranked among the most serious of international crimes. Some doubts arose, however, as to whether that could be done within the framework of the exercise on which the Commission was at present engaged. To begin with, it was difficult to see why crimes against ICRC or regional organizations should not also be covered by the proposed provision. He understood and respected the reasons why ICRC did not want to be mentioned in the provision, but could not see why the personnel of regional organizations, who often stood shoulder to shoulder with United Nations personnel in the course of the same operations, should not be afforded the same protection. That problem, however, was essentially a technical one and could perhaps be resolved by adopting a more general formulation.

67. The objection raised by the Special Rapporteur was of a more fundamental nature. The Commission had decided to reduce the scope of the draft Code to a hard core of "crimes of crimes". The decision had been taken in the interests of achieving consensus, and members should now consider the potential threat to acceptance of the draft Code as a whole if the decision was reversed. The draft as it stood was, in essence, an exercise in the codification of existing international law, with, it was true, some undeniable elements of progressive development of the law. The addition of a completely new category of offences would place the whole exercise squarely in the area of progressive development of international law and would make it extremely difficult to defend the principle of a restrictive list which the Commission had arrived at with so much effort.

68. Lastly, he would be sympathetic to the adoption of a resolution recognizing attacks against United Nations personnel as a serious international crime, but seriously doubted the wisdom of including that crime among those covered by the draft Code.

69. Mr. AL-BAHARNA said that, provisionally, he had no reservations in connection with the proposal to include such an article in the draft Code. He had always favoured the incorporation of a wider range of crimes in the Code, but had decided to join the consensus reached

in the Commission at an advanced stage of the drafting process to the effect that the Code should cover only the most serious and heinous crimes. He thus had no objection of principle to the adoption of Mr. Rosenstock's proposal, taking due account of the observations made by the Chairman of the Drafting Committee, Mr. Crawford, Mr. Yamada and other members. On the question of procedure, he agreed with the Special Rapporteur that the proposed draft stood in need of improvement and should be referred to a working group. It was regrettable that the proposal had not been submitted at an earlier stage, possibly even at the previous session. Lastly, he supported Mr. Arangio-Ruiz's proposal to replace the word "violent", in paragraph 1 (b), by the word "serious"; the attacks referred to in paragraph 1 (b) should not be treated in the same way as those referred to in paragraph 1 (a) for purposes of punishment unless they resulted in death or serious injury.

70. The CHAIRMAN invited members to decide whether, in principle, they wished the proposal to be referred to a small working group.

71. Mr. PAMBOU-TCHIVOUNDA said that a new proposal submitted just as the Commission was about to conclude its work on the draft Code ought not to be discussed.

72. Following a brief exchange of views in which Messrs. CRAWFORD, Sreenivasa RAO, ROSENSTOCK, and VARGAS CARREÑO took part, the CHAIRMAN said he would take it that the Commission agreed to establish a small working group, consisting of Mr. Thiam (Special Rapporteur), Mr. Al-Baharna, Mr. Crawford, Mr. Lukashuk, Mr. Rosenstock, Mr. Vargas Carreño and Mr. Yamada, which would report back on 3 July 1996.

It was so agreed.

The meeting rose at 1.10 p.m.

2450th MEETING

Friday, 28 June 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Robinson, 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 (A/CN.4/472/Add.1, sect. D, A/CN.4/475 and Add.1,¹ A/CN.4/L.533 and Add.1)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his twelfth report (A/CN.4/475 and Add.1).
2. Mr. BARBOZA (Special Rapporteur) said that the first part of the twelfth report was devoted to an aspect of prevention on which the Commission had not yet taken a decision. He reminded the members that, given the Commission's reluctance to accept the idea of prevention *ex post*—meaning the measures to be adopted after an incident had occurred—he had endeavoured in his tenth report² to explain as clearly as possible why he considered that that kind of prevention existed in international practice.
3. He invited the members of the Commission to refer in particular to chapter I, sections A and B, of the tenth report, and also to section C, which was essential in that regard, and contained comments on the two texts proposed in section D. The first of those texts, which would be inserted as paragraph (e) of article 2 (Use of terms),³ defined what was meant by the expression "response measures", which were nothing other than measures for prevention *ex post*. He had proceeded in that manner to avoid an impasse should the Commission continue to oppose the use of the term "prevention" for *ex post* measures. It should be noted, however, that calling them "response measures" would mean using a term that "differs from the term used in all the relevant conventions", namely, "preventive measures", and that would pose serious problems. At the same time, he had the impression that the Commission was receptive to the arguments put forward and that it currently accepted the idea of prevention *ex post*. If so, he would suggest that the Commission should consider the text at its current session and agree on a formulation that covered measures to prevent incidents and also measures to prevent further harm once an incident had occurred. In that way, the Commission would bring its terminology into line with that used in all existing conventions on the subject, under which the term "prevention" covered all measures taken after the incident had occurred to prevent the harm from developing to its full potential. In the case of the Basel incident, for instance, when the Rhine had been polluted by a large quantity of chemical substances, all the measures taken to prevent the pollution from reaching certain parts of Germany, France and the Netherlands could be described as measures of prevention. With the adoption of that terminology in mind, he was proposing two texts which appeared in paragraph 4 of the twelfth report.
4. Section B of the introduction of the twelfth report dealt with principles or, rather, with one principle which the Drafting Committee had not yet examined, namely, the so-called principle of non-discrimination, which was very useful and had been accepted in other contexts and, in particular, in that of watercourses. The Commission might wish to invite the Drafting Committee to consider that point and take a decision.
5. Chapter I of the twelfth report dealt with liability. As members would remember, they still had to consider two complete reports: the tenth report, which proposed a liability regime for transboundary harm, and the eleventh report,⁴ which dealt with harm to the environment. The Commission had heard the preliminary views of certain members on both reports, but had decided to use the time it would have spent considering them in plenary to enable the Drafting Committee to examine some of the articles on the subject appearing on its agenda. The Drafting Committee had ultimately adopted those articles and so had virtually finished the chapters on prevention and on principles.
6. The time had therefore come for the Commission to get down to the crux of the matter, namely, liability, which was no easy task. The Commission had decided that

the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first: only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.⁵
7. Against that background, he suggested that the Commission should determine the main features of the regime it wished to apply to liability for acts not prohibited by international law. He had included in his twelfth report the three basic proposals in that connection, which were, respectively, the schematic outline proposed by the Special Rapporteur, Mr. Robert Q. Quentin-Baxter, in the annex to his fourth report⁶ and the regimes proposed by himself in his sixth⁷ and his tenth reports. He proposed, that at the current session, the Commission should simply look at the main points of those liability regimes. To that end, he had indicated in his twelfth report the articles and paragraphs of the relevant reports which contained essential information. The Commission could therefore focus, in particular, on consideration of the annex to the fourth report of the Special Rapporteur, Mr. Quentin-Baxter; on chapters IV and V of his sixth report and, in particular, on articles 21, 23 and 28 to 31, which defined the proposed regime; and on the whole of chapter II and of sections A, B and C of chapter III of his tenth report.
8. The liability regime set forth in the schematic outline was a rough sketch, but the Commission would find in it the information it needed to take a decision or

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/459.

³ For the text of the draft articles provisionally adopted so far by the Commission, see *Yearbook . . . 1995*, vol. II (Part Two), chap. V, sect. C.1, pp. 89-91.

⁴ *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/468.

⁵ *Yearbook . . . 1992*, vol. II (Part Two), p. 51, para. 345.

⁶ *Yearbook . . . 1983*, vol. II (Part One), p. 201, document A/CN.4/373.

⁷ *Yearbook . . . 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

develop that sketch further, if it so desired. The regime applied to activities carried out in the territory or under the control of one State which gave or might give rise to loss or injury to persons or things within the territory or the control of another State. In other words, the activities covered by article 1 (Scope of the present articles), provisionally adopted on first reading, would be covered by the provisions of the outline.

9. It should be noted that, under the schematic outline, a breach of the obligations of prevention did not give any right of action to the affected State, in other words, there was no responsibility for a wrongful act. That was an important and indeed classical aspect of the matter, since he knew of no convention on liability for risk under which such liability had to coexist with responsibility for wrongful acts.

10. So far as liability for risk was concerned, where transboundary harm occurred and there was no prior agreement between the States concerned regarding their rights and obligations, those rights and obligations were determined in accordance with the schematic outline, which established that there was an obligation to negotiate in good faith. There must be some form of reparation, by virtue, in particular, of the principle set forth in the schematic outline whereby the innocent victim should not be left to bear his loss or injury. Section 4, paragraph 2, of the schematic outline established in that the acting State, namely, the State of origin, should make reparation to the affected State, the amount of such reparation being determined by a number of factors, including, in particular, the "shared expectations" of the States concerned. The principles spelled out in section 5 and the factors outlined in section 6, some of which had been incorporated in article 20 (Factors involved in an equitable balance of interests), provisionally adopted on first reading. The criterion of "shared expectations" had not found much favour with the Commission, which, however, had received the schematic outline fairly well at the time.

11. To sum up, the schematic outline contained the following general ideas: first, recommendations to States on the prevention of incidents resulting from activities which give or may give rise to transboundary harm; and, secondly, no fault (*sine delicto*) State liability for transboundary harm caused by dangerous activities because the acts were not prohibited by international law and in any event the liability could be attenuated. Although in principle the innocent victim should not bear the injury, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors that could justify a reduction in the amount.

12. The regime proposed in his sixth report constituted an almost complete draft on the topic. In the field of prevention, it followed the general ideas contained in the schematic outline and, in particular, there was no responsibility for a wrongful act. Article 18 (Failure to comply with the foregoing obligation), as proposed in the sixth report, stripped the obligations of prevention of their "hard" nature, since it did not give the affected State the right to institute proceedings.

13. With regard to liability, the sixth report followed the schematic outline in part, but also offered a new option. In other words, there was no fault (*sine delicto*) State liability for transboundary harm, but, once again, it translated into a simple obligation to negotiate the determination of the legal consequences of the harm with the affected State. The States concerned must take into account the fact that the harm should in principle be compensated in full, even though, under article 23 (Reduction of compensation payable by the State of origin), the State of origin could, in certain cases, seek a reduction of the compensation payable by it. That applied, for example, if the State of origin took precautionary measures solely for the purpose of preventing transboundary harm. Thus far, the draft articles did not depart from the general lines of the schematic outline. But, at that time, he could not have failed to see that there was an undeniable trend in international practice towards introducing civil liability for transboundary harm in conventions on specific activities and he had therefore felt bound to present that possibility to the Commission. For that reason, in addition to State responsibility which was exercised through diplomatic channels, the draft articles provided for the so-called domestic channel or, in other words, for a remedy for victims through the domestic courts of law either of the State of origin or of the affected State, according to which one was competent. As explained in paragraphs 62 and 63 of the sixth report, the aim was simply to establish a minimum regulation for the domestic channel.

14. To summarize, the general thrust of the regime proposed in the sixth report consisted, first, of recommendations to States on the prevention of incidents and, above all, of drawing up a legal regime between States to govern the activity in question and, secondly, State liability for transboundary harm caused by dangerous activities. That liability was no fault (*sine delicto*) liability, since the activities giving rise to it were not prohibited by international law. There was however provision for attenuation of liability: although in principle an innocent victim should not have to bear the injury caused, the nature and amount of reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which might result in a reduction of the amount. Thirdly, in addition to the diplomatic channel where one State dealt with another, provision was made for a domestic channel available to individuals, private entities and the affected State. Once a channel had been selected for a specific claim, another channel could not be used for the same claim. With respect to the character of the liability, he had provided that it should be established according to the domestic law of the State of the court having jurisdiction.

15. Since the consideration of those two initial attempts had not led to any firm conclusions, he had had to envisage the possibility, in his tenth report, of proposing a substantially different regime to the Commission. It should be recalled that the Commission had categorically rejected the suggestion that obligations of prevention should be "soft" and that, consequently, any violation of such obligations gave rise to State liability for a wrongful act. That made the articles proposed in the tenth report extremely unusual and created many difficulties, since State liability for a violation of its obliga-

tions in respect of prevention must necessarily coexist with liability *sine delicto* for payment of compensation for injury caused. In the tenth report, the liability of a State arising from an act or an omission, as in the case of failure to exercise due diligence in fulfilling its obligations of prevention—in itself, a wrongful act, whether or not it gave rise to any consequences or damage—was distinct from the regime of compensation where actual damage had occurred. A State was thus liable for its own acts or omissions if it had not ensured that all due precautions had been taken in the conduct of the activity, for example, if it had failed to require a risk assessment study or to adopt relevant legislation or had adopted such legislation and had failed to apply it, regardless of whether an incident had or had not occurred. That was a very important aspect. The most likely consequence was the cessation of the wrongful act, or, in other words, the cessation of the breach of due diligence obligations of prevention.

16. However, if an incident did occur and transboundary damage was caused, there should be liability *sine delicto* of the operator of the activity because that was the regime that existed throughout the world, in domestic law and in all the conventions relating to liability for risk, with one single exception, the Convention on International Liability for Damage Caused by Space Objects. In order for a hazardous activity to develop normally, related costs such as payment of compensation should be taken into account “internally”, should be subject to a system of compulsory insurance and should ultimately give rise to the establishment of a fund to ensure payment of fair compensation to the victims. Otherwise, the hazardous activity would have to be financed by the victims.

17. If the Commission were to limit itself in the draft text to awarding compensation only in cases of damage resulting from a wrongful act by a State, the victim of the damage would not only have to prove that the State had not fulfilled its obligations, but would also have to demonstrate the causal relationship between the act of the State and the damage, which was known as indirect causality. It was clear that, if the Commission adopted the solution of State liability for wrongful acts, the damage caused in cases where the State or the operator had fulfilled their obligations of due diligence would go uncompensated. The same would be true of damage caused in the vast majority of cases by activities such as those referred to in article 1 as adopted on first reading, namely, hazardous activities. Moreover, the injurious consequences of an act not prohibited by international law would not even be considered at all in the framework of a topic entitled “international liability for injurious consequences arising out of acts not prohibited by international law”.

18. Thus, the regime proposed in the tenth report was not completely unsatisfactory in view of the difficulty of harmonizing obligations of prevention, which gave rise to the liability of the State for a wrongful act, with the liability of the operator, which was the rule for the hazardous activities dealt with in article 1. The system could be summarized in the following way: obligations to prevent incidents were the responsibility of the State and the State was liable for failure to comply with such obliga-

tions; the liability in such a case was for a wrongful act, with the characteristics and consequences provided for in international law; and payment of compensation for transboundary harm was the responsibility of the operator; in that case, liability was *sine delicto*.

19. In his twelfth report, he was proposing three alternatives to the Commission. It might be a good idea to set up a working group, whose members should be sufficiently representative of the various trends in the Commission with regard to the topic, to examine those alternatives or any others which might arise from their consideration and to propose guidelines to the Commission on that very important aspect of the topic.

20. In his view, such a working group, and the Commission itself, must take account of three important considerations. First, activities falling within the scope of the articles would most likely be identified by their inclusion in a list of activities or by the substances used to carry them out, thus making the scope sufficiently precise. Secondly, in the event that such hazardous activities gave rise to damage in the normal course of their operation, the corresponding liability in the majority of domestic law systems and in all but one international convention was that of the operator. Thirdly, it was necessary to build on what had already been agreed, namely, prevention. The Commission had agreed that the activities referred to in article 1—those with a low probability of causing disastrous harm and those with a high probability of causing significant harm—must be included in a special prevention regime in which certain preventive measures, such as prior authorization by the State, transboundary impact or risk assessment, notification and consultation, were compulsory. Hard obligations of prevention were a legal way to prevent an evil—in the present case, transboundary harm—from occurring. That evil arose not from a wrongful act, but from an act which was not prohibited by international law and which society would like to continue because it was a useful activity for society in general.

21. If damage occurred once those obligations of prevention had been adopted, was it logical to state that no reparation was due? Was there not a contradiction between the logic of prevention and the absence of reparation? In his view, if the Commission accepted the existence of obligations of prevention, it must accept that of an obligation to compensate for damage which should have been prevented, but had occurred. That was exactly the contradiction confronting the Commission when it had considered that article C (Liability and reparation), was a mere working hypothesis. That article, which had become article 8 in the twelfth report, read:

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Was it a wild conception to think that damage caused by a hazardous activity should be compensated, when that principle had been adopted by the vast majority of legal systems in the world? Should not a principle which was considered fair and equitable at the national level be acceptable in international relations? General international law was nevertheless not indifferent to damage. When damage resulted from a wrongful act, it was prohibited

and, in that connection, principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁸ the Trail Smelter case,⁹ the *Corfu Channel* case,¹⁰ and the *Lake Lanoux* case,¹¹ *inter alia*, were relevant. When damage resulted from a hazardous activity, such as those referred to in article 1, it must be compensated. The cost of damage caused in one State by an activity carried out under the jurisdiction or control of another State must be accounted for “internally” and assumed by the one who would benefit the most from that activity. Otherwise, the victims would end up financing the operator in the country of origin and, in that case, the general principle of unjust enrichment would be applicable.

22. In view of certain clear trends in international practice, moreover, a certain amount of progressive development was not ruled out by the Commission’s statute: conservatism had its limits.

23. The purpose of chapter II of the twelfth report was to organize the articles which had been approved thus far and those articles which were still on the Drafting Committee’s agenda. Chapter II was self-explanatory.

24. The CHAIRMAN said that he endorsed the Special Rapporteur’s proposal that a working group should be set up and requested, on the basis of the documents currently available and the Special Rapporteur’s suggestions, to provide the Commission with guidance on how to continue its consideration of the topic.

25. Mr. Sreenivasa RAO said that, since the special problems of the developing countries had been brought up many times during the discussions on the topic at the Commission’s earlier sessions and because the Special Rapporteur had said that he would look into that matter, he was surprised that the question had not been raised during the introduction to the twelfth report. He would like to know how the Special Rapporteur planned to deal with that issue.

26. It might also be asked what obligations of prevention or due diligence could be attributed to the operator over and above the State’s obligation of prevention. As the draft articles currently stood, prevention was basically the responsibility of the State. However, if it was up to the State to determine, by administrative, legislative or other provisions, the rules applicable to the operators under its jurisdiction, the regime established under the draft articles might be applied differently in different countries, and that would result in an absence of uniformity in international rules of prevention at the operational level.

⁸ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

¹⁰ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

¹¹ Award of 16 November 1957, original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

27. If the assumption was made that there must be reparation in the case of damage, a legal problem might arise as to the basis for the liability of the State if it had fulfilled its obligations of prevention, but damage had nevertheless occurred because the operator had not fulfilled his.

28. Mr. BENNOUNA said that, after listening to the Special Rapporteur’s introduction to his twelfth report, he was confused about the point of the exercise. The Special Rapporteur had in fact mentioned several areas which were not part of the topic properly speaking. The violation of obligations of prevention, for example, came under State responsibility. The standardization of the internal law of States on the liability of operators was yet another area.

29. Furthermore, while it might be possible to agree with the Special Rapporteur that there must be reparation where damage had occurred it could be asked on what basis: the violation of obligations of due diligence or prevention, a uniform regime of domestic law on operator liability or liability *sine delicto*? The Special Rapporteur had, of course, referred to some particular regimes of liability established by conventions, but the context was that of general law.

30. If the question was simply one of requesting States to adopt measures of prevention and to negotiate with States which might be affected by hazardous activities carried out in their territory, was a treaty really necessary and might not a recommendation, by the General Assembly, for example, be enough?

31. The idea of prevention *ex post* was not very clear either because there was a contradiction between the prefix “pre” and the term “*ex post*”. It was difficult to see how that idea could be harmonized with another regime, that which governed the cessation of the wrongful act.

32. In his view, consideration had to be given to the overall structure of the topic and, in that regard, the Special Rapporteur should try to define the task of the working group, whose establishment he had proposed, or, at least, give it some guidelines.

33. Mr. LUKASHUK said that, while he endorsed the idea of setting up a working group, he wished to point out that, once the articles had entered into force, any violation of their provisions would be a wrongful act which would come within the scope of State responsibility.

34. Mr. PAMBOU-TCHIVOUNDA said that he was surprised by the difference between the Special Rapporteur’s clear introduction to his twelfth report and the dryness of chapter II. In his view, the working group’s first task should be to amend the content of chapter II in order to bring out more clearly the overall structure of the draft articles and the logical connections between, for example, the general provisions, the principles governing attribution, the principles relating to assessment or, in other words, the parameters to be taken into account in quantifying damage, and the system of reparation itself.

35. Mr. de SARAM said that the Special Rapporteur’s statement on the question of liability was one of the most interesting ever made on that subject in the Commission.

It was simply unfortunate that the statement had been made at a time when the current term of office of the members of the Commission was coming to an end. It would have been better to hear it before the Commission had decided to deal not with the question of liability, but with that of prevention. While the work accomplished on that question was quite remarkable, it was still the question of the obligation to make reparation in the event of transboundary harm that was at the heart of liability. In that regard, he did not share the views of those who, in the Commission and in the Sixth Committee, had maintained that, once the rules of prevention had been stated, the only case in which the State of origin would be bound to compensate the State affected by transboundary harm would be that of a violation of those rules. That question did not involve the progressive development of the law; the point was, rather, to determine the content of what should be regarded as an obligation in public international law which the State of origin owed to the affected State. The Commission had, however, not yet examined the content of that obligation.

36. Was it simply an obligation of due diligence or did it go further? Was it an obligation not to cause damage or an obligation to make reparation for damage caused, somewhat along the lines of the obligation to provide compensation in the event of lawful expropriation by the State of property belonging to foreigners? It therefore had to be asked whether, at a time when lawful activities carried out by a State in its own territory could cause catastrophic damage in the territory of another State, there was an obligation of compensation in general international law. The legal counsel of Australia in the *Nuclear Tests (Australia v. France)* case¹² had answered that question by Mr. Waldock, judge at ICJ, in the affirmative with strongly convincing arguments, but, because the case had been settled, the Court had not had to make a ruling.

37. Another question that deserved consideration was at what stage and by what means the general principles of internal law could be transposed to the international level.

38. The CHAIRMAN said he gathered that the Commission wanted to establish a working group and indicated that the members would be Messrs. Bennouna, Crawford, de Saram, Eiriksson, Fomba, Kabatsi, Lukashuk, Robinson, Rosenstock, Szekely and Villagrán Kramer, as well as the Special Rapporteur, on the understanding that any member of the Commission who wished to do so could also participate.

It was so decided.

The meeting rose at 11.30 a.m.

¹² Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 253.

2451st MEETING

Tuesday, 2 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

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. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

State succession and its impact on the nationality of natural and legal persons (*continued*)* (A/CN.4/472/Add.1, sect. B, A/CN.4/474¹)

[Agenda item 6]

RECOMMENDATIONS OF THE WORKING GROUP ON STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

1. Mr. MIKULKA (Special Rapporteur), reported that the Working Group on State succession and its impact on the nationality of natural and legal persons² had held four meetings from 4 June to 1 July 1996. At its first meeting, the Working Group had considered in depth the problem of the nationality of legal persons, the form that the work on the topic should take and the calendar of work. It had decided to recommend to the Commission that consideration of the question of the nationality of natural persons should be separated from that of the nationality of legal persons, as they raised issues of a very different order. While the first aspect of the topic involved the basic human right to a nationality, so that obligations of States stemmed from the duty to respect that right, the second aspect involved issues that were largely economic, centering on a right to establishment that could be claimed by a corporation operating in the territory of a State involved in succession. The Working Group had felt, moreover, that the two aspects did not need to be addressed with the same degree of urgency.

2. The Working Group considered that the question of the nationality of natural persons should be addressed as a matter of priority and had concluded that the result of the work on the subject should take the form of a non-

* Resumed from the 2435th meeting.

¹ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

² See 2435th meeting, footnote 2.