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Summary record of the 2769th meeting

Topic:
<multiple topics>

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subject entrusted to the present Special Rapporteur was also a very “hot” topic and the focus of many basically political, economic, financial and technical controversies which could not be settled by legal experts, but required political negotiations. Without refusing to deal with the problems, the Commission must have the clear awareness of what it could and could not do. The topic of responsibility had been “saved” by Mr. Ago, one of whose strokes of genius had been to place himself in the area of general rules. It could be in the Commission’s interest to do the same for the topic under consideration, because it would then be staying within the realm of the law and would be in a position to make a contribution with every ounce of skill it possessed.

52. In the first place, the title of the topic was a problem because the Commission’s concern was primarily compensation for harm arising out of transboundary activities. According to the basic principle on which a consensus seemed to have been reached during the discussions by the members of the Commission, operators were liable and must provide compensation. Requesting States to encourage the establishment of insurance mechanisms and compensation funds was not within the Commission’s competence, and it would be better to deal with that question by drafting a model clause. The third key point of the study of the topic was that States were liable only on a conventional basis.

53. In any event, the Commission must not follow as dangerous a course as the one that had led to the “García Amador deadlock”.

54. Mr. Sreenivasa RAO (Special Rapporteur) said that he had tried to indicate in his humble way which options were available to the Commission, without advocating any of them, because he had wanted to know the preferences of the members, who would all be able to choose what suited them best. Mr. Pellet’s proposal, which was, of course, welcome, might be discussed in the working group whose establishment had rightly been suggested by several members, including Mr. Brownlie.

55. The purpose of his study was to find ways of ensuring that an innocent victim could obtain compensation without running into legal problems unless he wanted to. With regard to ways of supplementing limited liability, he had suggested in paragraph 153 of his report that a State should have “an obligation to earmark national funds”, and that was very different from having to pay as a party to the damage under some kind of liability. Of course, the State would then only be helping to compensate the loss or injury caused to the victim, and that corresponded to the principle of social cost, as seen from another point of view. He wondered why the Commission could not deal with that question from the viewpoint of primary rules of law, without worrying about international law or politics.

The meeting rose at 1 p.m.

2769th MEETING

Friday, 6 June 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

later: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

Tributes to Mr. Robert Rosenstock, outgoing member of the Commission

1. The CHAIR announced that, for personal reasons, Mr. Rosenstock, who had served the Commission for the past 12 years, was resigning with effect from the present meeting. Mr. Rosenstock had been the Special Rapporteur for the topic of the law of non-navigational uses of international watercourses, and his legal expertise, diplomatic skills and leadership had been instrumental in ensuring the final completion of the work on that topic¹ and its adoption as an international convention.² He had been a dedicated member of the Commission, participating in every drafting committee, working group and planning group on every subject. There was no aspect of the Commission’s work that he had not seriously studied and commented on.

2. Those members who had known Mr. Rosenstock from other international conferences and Sixth Committee meetings over the years had come to admire him as a man of impeccable dignity, with a wonderful sense of humour and a unique New York accent, one who liked a good fight, but always remained professional and looked for a solution to the problem at hand. On behalf of the Commission, he thanked Mr. Rosenstock, who would be remembered as a remarkable and productive colleague, and conveyed to him the Commission’s best wishes for his future endeavours.

3. Mr. PELLET said that, contrary to custom, he would address Mr. Rosenstock directly rather than through the Chair, and in the second person singular, for Mr. Rosenstock’s inimitable mastery of Shakespeare’s language did not preclude a thorough familiarity with the language of Molière. With characteristic dignity, courage and dis-

¹ At its forty-sixth session the Commission adopted the final text of 33 draft articles on the law of the non-navigational uses of international watercourses and a resolution on transboundary confined groundwater (*Yearbook ... 1994*, vol. II (Part Two), para. 222).

² Convention on the Law of the Non-navigational Uses of International Watercourses.

cretion, Mr. Rosenstock had decided to leave the Commission after 12 years' service. In the course of those 12 years he had soon made his highly influential presence felt: not because he hailed from the United States of America—even if, in that capacity, he had initially employed a royal plural that could occasionally be disconcerting—but because he had placed at the Commission's disposal his long experience of the United Nations; because he had accommodated himself to the collaborative approach that was one of the Commission's richest assets; and because, despite some memorable occasions when he had crossed swords with the late Doudou Thiam, or with Mr. Arangio Ruiz and himself, Mr. Rosenstock had been a moderating element, stating his often very firm point of view with moderation, winning his point or remonstrating without recourse to bullying and threats. He had been scrupulous in his attendance of plenary meetings, drafting committees and working groups; and, latterly, had even desisted from his celebrated habit of raising points of order.

4. When he had felt strongly about a point, Mr. Rosenstock had not hesitated to stick to his guns for as long as he felt the match was winnable, elegantly conceding defeat when he had seen that his cause was lost, seeking mutually acceptable compromises and always respecting his opponent. He had been a highly competent special rapporteur on the—ironically—somewhat arid topic of the non-navigational uses of international watercourses, which he had successfully shepherded to the General Assembly; and, despite recent ill health, an effective, dignified and courageous Chair of the Commission's previous session. He had been a noble brother-in-arms, bold but not rash, determined but not obstinate, learned but not pedantic, circumspect but not timid. He would be sorely missed.

5. Mr. Sreenivasa RAO congratulated Mr. Rosenstock on a productive and brilliant career in international law. Mr. Rosenstock was one of the best international law practitioners it had been his privilege to work with and a spirited advocate and defender of the interests he had chosen to represent with such distinction in the United Nations and the International Law Commission. He had contributed in no small measure to the codification and progressive development of international law as Special Rapporteur on the international watercourses topic and through his vigorous participation in other topics, particularly that of State responsibility. Honest, pungent, to the point, he went straight to the heart of the issues, but always worked to ensure agreeable outcomes. His fighting qualities and sense of accommodation were truly worthy of emulation. He wished Mr. Rosenstock a happy and healthy retirement.

6. Mr. MELESCANU said that it was always a sad moment when a member left the Commission. Yet it was also a source of satisfaction to members to have worked closely with a colleague from whom they had learned so much; one who had served as an exemplary Chair of the Commission; one with so great a fund of practical experience and common sense; and one who had so often brought his more speculative and theoretically inclined colleagues back down to earth and to reality—a reality in which international law was not what international lawyers might like it to be, but what States wanted it to be. Mr. Rosen-

stock's contributions were part of the history of the Commission, but would also remain as an inspiration for the Commission's future activities.

7. Mr. DUGARD, speaking for the African continent and on behalf of Mr. Kateka, who was unfortunately unable to be present, said that Mr. Rosenstock had been an exemplary colleague from whose wisdom the Commission had benefited tremendously. His interventions in plenary had been short, sharp, sometimes caustic, often good-humoured, his words carefully chosen, wise and amusing; and he had on many occasions brought those members who had tried to fly too high back down to earth. As a special rapporteur, he personally had particularly benefited from Mr. Rosenstock's invaluable contributions to the work of drafting committees, through his ability to effect a compromise. Mr. Rosenstock had been a great team player and a great team leader. He took the opportunity to say *au revoir* to a great international lawyer and a model member of the Commission and to wish him every happiness in his retirement.

8. Mr. OPERTTI BADAN said that he heartily endorsed the Chair's words and those of other members. His tribute to Mr. Rosenstock differed from others, in that his duties as President of the fifty-third session of the General Assembly had prevented him from devoting to the Commission the time and dedication it demanded of its members. Nonetheless, he had had the opportunity to recognize in Mr. Rosenstock a solid, straightforward and frank lawyer whose indispensable assistance to him during his term as President of the General Assembly he wished to acknowledge personally.

9. Mr. BROWNLIE offered Mr. Rosenstock his best wishes for the future. In his seven years as a member of the Commission, he had always had the benefit of Mr. Rosenstock's humour, patience and professional skills. It had been a great pleasure to work with him, and he would indeed be missed.

10. Mr. ROSENSTOCK recalled that, on the last occasion when he had spoken French in the Commission, a distinguished jurist representing France who had subsequently become a judge of ICJ had waved his handkerchief in the air in token of surrender. Since then he had never inflicted his French on anyone on a public occasion. Nonetheless, he had enjoyed working in the Commission and had enjoyed, too, the cooperative spirit that had almost invariably motivated it. Members were not representatives, but sat in the Commission in their expert capacity, to seek common goals. The very excessive praise being heaped upon him had the merit of showing that that spirit of cooperation still prevailed. That was enormously encouraging, enormously important, and a note on which he felt very comfortable to leave. He was truly grateful to colleagues for their overly gracious statements and for the pleasure he had derived from working with them in the Commission and other forums.

The Commission gave Mr. Rosenstock a standing ovation.

Mr. Melescanu (Vice-Chair) took the Chair.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/529, sect. D, A/CN.4/531³)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR
(concluded)*

11. Mr. Sreenivasa RAO (Special Rapporteur) said that he was grateful for the encouragement given him to continue with the difficult task at hand. He was also gratified that several members had focused specifically on the recommendations made in his report (A/CN.4/531), particularly in chapter III. He was especially grateful to Mr. Economides, who had reviewed those recommendations in the light of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, recently adopted in Kiev. There was a need to examine, *inter alia*, the standard of proof for establishing a causal link, and to clarify the eligibility of loss of profits and tourism on account of environmental damage. There was also the issue of referring to suitable forums for the resolution of claims and to forms of dispute settlement to address any dispute concerning the interpretation and application of the model to be proposed. The need to specify minimum international standards for regulating the resolution of claims also required more thought.

12. Given the strong support within the Commission for examining his recommendations further, he felt that it was important to establish a working group for that purpose. The Working Group set up in 2002 should therefore be reconstituted to continue its development of a suitable model for allocation of loss. No one disputed that the Commission should pursue the remaining part of its mandate on international liability, especially since the General Assembly had held up the adoption of the draft articles on prevention⁴ to allow the mandate to be completed. That was a duty the Commission could not shirk, and continued delay would undermine its credibility.

13. The Commission should therefore continue the search for a model of allocation of loss which, as Mr. Kabatsi had rightly noted, did not conflict with the regime of State responsibility or duplicate concepts better addressed under civil liability. Most members seemed to support that approach, although some would have liked a clearer and more detailed reference to the totality of the regime applicable to the resolution of claims for damage. Once the Commission had succeeded in developing a model, it could explain the difficulties it had seen in the development of a regime on international liability and request the General Assembly to treat the submission of the model on allocation of loss as a full response to its original mandate. Various members had argued that the devel-

opment of such a model was perfectly possible. Moreover, given the difficulty of addressing the concerns of innocent victims through the regime of State responsibility, it might, as Ms. Xue had said, be essential.

14. Mr. Pellet had surprisingly argued that developing such a model would amount to negotiation—a task reserved for States. That raised interesting questions about the task of codification and progressive development. Not long ago, the Commission had been asked to submit a draft Statute for an International Criminal Court,⁵ a mandate that it had successfully completed.⁶ Moreover, its drafts always had been, and always would be, subjected to political scrutiny and negotiation by States before their eventual adoption. The Commission's mandate was not to confine itself strictly to restating the law, and progressive development had never been understood only as an extension of codification. Otherwise the Commission could not have made such progress on State responsibility. The Commission could not, in fact, alter the mandate he had reluctantly assumed.

15. It had been asked whether it would be proper to allow claims for compensation for damage arising from a single incident to be pursued through more than one source. In that connection, Mr. Gaja had suggested that it might be desirable to develop a comprehensive regime to respond to claims arising from transboundary harm. The important point of policy was that a claimant should not be allowed to seek compensation on the same legal basis in different forums. However, claims could be made in different forums on a different legal basis and decided on their merits. To reconcile different legal systems and divergent national jurisdictions was no easy task, however, and he agreed with Mr. Pellet that the Commission was not particularly suited for it.

16. A multi-tiered approach to compensation for innocent victims was now well established in all regimes which addressed damage resulting from accidents or incidents involving hazardous activities. While the Commission's mandate was restricted to compensation for transboundary harm, the future model was expected to appeal to States to provide similar relief for innocent victims within their own jurisdiction and boundaries. The working group could consider the best way of reflecting that aspect. The multi-tiered approach provided for the first share of the loss to be allocated to the operator and the second and subsequent shares to be allocated to States and to supplementary funding mechanisms. There had been considerable support in the General Assembly for such an approach. Several members of the Commission had likewise emphasized the need to provide suitable redress for innocent victims through a model that was not limited to the liability of the operator, and Mr. Al-Baharna had even questioned the assumption that State liability was an exception.

17. The sectoral regimes reviewed in the report generally endorsed the multi-tiered approach, placing primary liability at the door of the operator or person most in con-

* Resumed from the 2767th meeting.

³ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

⁴ General Assembly resolution 56/82, para. 2.

⁵ General Assembly resolution 47/33 of 25 November 1992, para. 6.

⁶ *Yearbook ... 1994*, vol. II (Part Two), para. 91.

trol at the time of the incident or accident. While most members had agreed with that approach, some—for instance, Mr. Kolodkin—had questioned the rationale for allocating some loss to the State in the absence of any wrongdoing on its part. However, the suggestion was not that the State should participate in the regime of allocation of loss on the same basis as the operator, but that it should, out of a sense of social obligation, help make good the loss suffered by innocent victims. After all, it was the State that initially authorized hazardous activities despite the risk of harm. Moreover, as the General Assembly and many members of the Commission had emphasized, such an approach might prompt States to take their duties of prevention more seriously and to be more vigilant in monitoring hazardous activities within their jurisdiction. The social justification and equitable dimension of the subsidiary tier in any regime of allocation of loss could not be overemphasized, particularly when the operator's liability was limited, or the liable operator could not be traced or identified.

18. Mr. Koskenniemi had drawn attention to a gap in the report, in that it analysed various sectoral regimes but did not refer to them in its summation. Mr. Brownlie had rightly noted the absence of any clear signposts. The gap was intentional. He had been directed, after reviewing existing models and without confusing the role of the State in such a scheme with State responsibility, to develop a model that was not linked to any particular legal basis. Accordingly, he had focused on the results of various sectoral arrangements, rather than on their negotiating process or on States' attitude to them. It was not his mandate to seek the views of States or draw conclusions with a view to codification, but only to propose a model by developing a primary obligation.

19. There had been unanimous agreement on the operator's liability, but the legal basis for that liability was not self-evident and presented difficulties for uniform application. While strict liability was recognized in most domestic legal systems and some special treaty regimes, it was not well accepted in the context of transboundary harm. In some systems, it was acceptable for some hazardous activities but not others. It should therefore be approached with caution.

20. The review of some essential elements of civil liability had also revealed considerable variations in the way in which such elements were treated in different national jurisdictions. That was why he had taken the view that the exercise of developing a model should be general and residual, a view that had received wide support.

21. Mr. Brownlie had raised questions about the relationship between claims invoking the operator's civil liability and possible claims against the State. However, if a share of the loss was to be allocated to the State only as a matter of social obligation, rather than one of liability, that issue would be better addressed in the context of apportioning the social cost of beneficial but hazardous activities.

22. Mr. Kateka and others had raised the issue of compensation for harm to the global commons. His reason for keeping that issue separate had been the need to keep the scope of the topic suitably narrow, but the Commission could return to the issue at a later stage if the General Assembly gave it a separate mandate to do so.

23. He apologized if he had not fully addressed all the points raised. That was not because they were not important, but because they required more time and reflection. The working group would have to address those and other issues with a view to submitting a more concrete set of principles or, as Mr. Yamada had suggested, even draft articles to the Commission in 2004. The Commission must respond by completing such principles or draft articles as soon as possible. That would also help the General Assembly to expedite the adoption of the draft articles on prevention.

24. The CHAIR asked whether the Commission wished to establish a working group on international liability.

25. Mr. PELLET said that, in principle, he was not opposed to establishing such a working group. However, since pursuing the topic was the Special Rapporteur's task, he wondered what precise mandate would be entrusted to the working group.

26. The CHAIR said that the working group's mandate, as defined by the Special Rapporteur, would be to refine the principles and proposals put forward in his first report.

27. Mr. OPERTTI BADAN said that, as he understood the Special Rapporteur's thinking, the working group would be requested to develop a model for allocation of loss which would be residual and subsidiary and not require the modification of domestic models. The emphasis would be not on trying to determine the applicable law but on identifying a number of guiding principles with a view to protecting the rights of victims. Those objectives would constitute a good mandate.

28. Mr. Sreenivasa RAO said the Working Group established in 2002 had looked into ways of proceeding by clearly demarcating specific areas, without reopening issues relating to State responsibility or liability. That did not mean that matters relating to civil liability had to be completely ignored or carefully avoided, however. The model could be designed to provide sufficient guidance on the settlement of claims and the forums for doing so. Those were all just ideas on which the working group could and should reflect, and they should not be deemed to constitute a rigid mandate.

29. Mr. ECONOMIDES said he agreed that, on the basis of the material contained in the report and the debate in the Commission, the working group must map out the route to be followed. The mandate was a very broad one: to develop an approach to the topic while addressing the specific issues involved.

30. Mr. MELESCANU said that the working group's task should be to draft provisions or principles to serve as a model for allocation of loss arising from transboundary damage. Such an undertaking would be pragmatic and useful. He agreed with the Special Rapporteur's preference for not delving into the type of responsibility or liability that was the basis for allocation of loss, but he thought it must also be understood that nothing prevented reference from being made to the principles underlying the model. The components of the model would, after all, be determined by its legal foundations, which, in the present case, were State practice in respect of strict, objective civil liability.

31. Mr. MANSFIELD said he supported the idea that the entire range of issues that needed to be discussed should be discussed. He expressed confidence that the Special Rapporteur would make sure that they were. The term "model" conveyed a rather narrow view of what was to be done, but the working group would undoubtedly make constructive efforts in the right direction.

32. Mr. BROWNLIE said that he agreed with those remarks and thought the working group could be relied on to work out its own mandate, which was essentially to sharpen the focus within the boundaries of the current title of the topic.

33. Mr. Sreenivasa RAO said that the Commission should consider choosing someone other than himself as chair of the working group.

34. Mr. PELLET said that it was precisely the Special Rapporteur who must be in charge of the proceedings in the working group, and there was no need for the Commission to determine the group's mandate.

35. Mr. BROWNLIE said that, if the chair of the working group was anyone other than the Special Rapporteur, that might create greater rather than fewer difficulties for the Special Rapporteur. There had to be a single captain of the ship.

36. Mr. Sreenivasa RAO said that, if the Commission so wished, he would carry out the additional responsibilities to the best of his ability.

37. Mr. AL-BAHARNA proposed that the working group should be established under the chairship of the Special Rapporteur.

38. The CHAIR said that, if he heard no objection, he would take it that the Commission decided to establish the Working Group on the Topic of International Liability.

It was so decided.

Mr. Candioti resumed the Chair.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/529, sect. F, A/CN.4/L.644)⁷

[Agenda item 8]

39. Mr. KOSKENNIEMI (Chair of the Study Group on the Fragmentation of International Law) said that the open-ended Study Group had held a useful first meeting on 27 May 2003. It had discussed how to move forward during the second part of the Commission's fifty-fifth session and at its fifty-sixth session with a view to identifying priorities in and the methodology for its future work.

40. The Study Group had held an exchange of views based on the report of the Study Group contained in the Commission's report to the General Assembly on the work of its fifty-fourth session⁸ and on the debate in the Sixth Committee during the fifty-seventh session of the General Assembly (A/CN.4/529, sect. F). It had determined that its perspective on the topic would be substantive as opposed to institutional. It would not focus on institutional questions of practical coordination, hierarchy and the jurisprudence of various actors, but would instead consider whether and how the law itself might have been fragmented into special regimes that lacked coherence or conflicted with one another. That substantive focus was consistent with the approach outlined by the Commission⁹ and endorsed by the General Assembly, as was indicated in paragraphs 227 and 229 of the topical summary.

41. The Study Group had agreed on a tentative outline for its future work in 2003 and 2004 and would basically proceed on the basis of the recommendations contained in the Commission's report to the General Assembly on the work of its fifty-fourth session.¹⁰ Concerning the programme for 2004, it had been agreed that the Chair would undertake a preliminary study on the function and scope of the *lex specialis* rule and the question of self-contained regimes. The study would contain an analysis of the general conceptual framework in which the entire question of fragmentation had arisen. That was in line with paragraph 226 of the topical summary, which indicated a preference in the Sixth Committee for a comprehensive survey of the rules and mechanisms dealing with possible conflicts of norms. Shorter introductory papers would be prepared by individual members of the Commission on the topics mentioned in the report,¹¹ developing the issues, fleshing out the problems and highlighting what needed to be covered.

42. Expressions of interest in preparing certain papers had already been received from members of the Commission, and during the second part of the session the Study Group would finalize the allocation of topics. At that

⁷ Reproduced in *Yearbook ... 2003*, vol. II (Part Two), chap. X, sect. C.

⁸ *Yearbook ... 2002*, vol. II (Part Two), pp. 97–99, paras. 495–513.

⁹ *Ibid.*, p. 98, paras. 505 and 507.

¹⁰ *Ibid.*, pp. 98–99, para. 512.

¹¹ *Ibid.*, subparas. (b)–(e).

time, the Study Group would also discuss the structure and contents of the papers with a view to ensuring compatibility. To facilitate the process, he himself had undertaken to prepare a discussion paper which might be either a general outline or the basis of a substantive study on the function and scope of the *lex specialis* rule and the question of self-contained regimes. Those issues might also be discussed at a brainstorming session which would be arranged by the Study Group and to which Judge Bruno Simma, former Chair of the Study Group, might be invited.

43. He thanked all members of the Study Group for their participation and valuable contributions.

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

[Agenda item 2]

44. The CHAIR announced that the Commission had concluded the first part of its fifty-fifth session.

The meeting rose at 11.20 a.m.

* Resumed from the 2766th meeting.