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COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE

LEGAL SUB-COMMITTEE

Fourth Session

SUMMARY RECORD OF THE FIFTY-FOURTH MEETING

Held at Headquarters, New York,
on Thursday, 30 September 1965, at 3.30 p.m.

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Mr. LACHS (Poland)

Members:

Mr. COCCA Argentina

Sir Kenneth BAILEY Australia

Mr. ZEMANEK Austria

Mr. LITVINE Belgium

Mr. de MEDICIS Brazil

Mr. DIMITROV Bulgaria

Mr. KINGSTONE Canada

Mr. DOUBANGAR Chad

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Mr. LEMAITRE France

Mr. USTOR Hungary

Mr. SAJJAD India

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Mr. YAMAZAKI Japan

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Mr. WALEWSKI Poland

Mr. GLASER Romania

Mr. KELLBERG Sweden

Mr. RYBAKOV Union of Soviet Socialist
Republics

Mr. IBRAHIM United Arab Republic

Mr. DARWIN United Kingdom of Great Britain
and Northern Ireland

Mr. SOHIER United States of America

Secretariat:

Mr. SCHACHTER Director, General Legal Division

Miss CHEN Secretary of the Committee

CONSIDERATION OF THE DRAFT AGREEMENT ON LIABILITY FOR DAMAGE CAUSED BY OBJECTS LAUNCHED INTO OUTER SPACE (A/AC.105/21 and A/AC.105/C.2/W.2/Rev.3) (continued)

The CHAIRMAN suggested that the Sub-Committee should begin by giving further consideration to the question of international organizations.

Sir Kenneth BAILEY (Australia) said that it was not disputed that international organizations were in many ways subject to rights and duties of the same order as those to which States were subject under the general law of nations. An international organization conducting space activities would be liable in tort, just as a State would. However, it was also common ground that the object of the present convention was to subject States to absolute liability, with possible exceptions and exonerations. Under international law, international organizations were not subject to absolute liability any more than States were. The question was therefore how in point of law international organizations could be brought under the same obligations as those to which States would be subjected by the convention.

At the 52nd meeting, he had stated that parties to a convention could not subject international organizations to the new and special obligations of the convention by their mere decree. In that connexion, he drew the Sub-Committee's attention to section 37 of the International Convention on the Privileges and Immunities of International Organizations. Under that section, the system of rights and duties provided for in the convention was applied to any one of a list of international organizations which notified the Secretary-General of the United Nations of its readiness to accept the provisions of the convention. It was on that kind of provision that article III, paragraph 1, of the United States draft was based. It was incorrect to say that an international organization making such a declaration would become a party to the convention and that was made clear in the United States text. The parties to the convention would merely agree that the provisions of the convention would apply to the international organizations making such declarations as if they were States parties to the convention. He also drew the Sub-Committee's attention to the provisions in the International Telecommunication Convention of 1959 governing the participation of the United Nations in the rights and duties of that Convention. Those provisions differed in form but not in principle from the United States text. United Nations participation in that Convention had not been established juridically by an act of the parties to

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the Convention but by agreement between the United Nations and the parties. His delegation believed that there was no case of participation by an international organization in the rights and duties of a convention in which the separate and voluntary act of the organization concerned was not involved. Article 98 of the Charter provided that the Secretary-General should perform such other functions as were entrusted to him by the organs of the United Nations and, in 1946, the General Assembly had authorized the Secretary-General to perform functions of a depository character in relation to conventions adopted under the auspices of the United Nations.

The Soviet representative had raised the question of the relevance of the internal constitution of an international organization to its ability to discharge functions which would apply to it under the present convention in accordance with the United States text. That relevance had been perceived by the United States and it was for that reason that article III, paragraph 2, had been inserted. That article covered the point made by the Soviet representative so far as it was possible to do so consistent with international legal principles.

Mr. USTOR (Hungary) said that there was general agreement that under existing international law international organizations were subject to the same rights and duties as States, although they were not exactly on the same footing. It was also true that in some cases international organizations participated in conventions to which States were parties. The Soviet representative had asked whether in the convention under consideration it was practical to deal with international organizations as parties to the convention as such. There were three drafts before the Sub-Committee. The Belgian draft had the advantage of providing that whenever an international organization acceded to the convention, it must at the same time reveal which States were members of the organization and provide individual declarations by each member State. It would therefore be clear which States were involved and which would have the ultimate responsibility for payment of compensation. The Hungarian draft amounted to the same, because his delegation considered that an international organization was a common undertaking and that liability would therefore devolve on all its members. It was important that there should be no doubt concerning which States bore final responsibility, and the United States proposal, in its present form, did not make that aspect absolutely clear.

Mr. DARWIN (United Kingdom) said that the United States proposal was clearer than the Hungarian representative had suggested. Article III, paragraph 1, provided that the international organization should be liable. Subsequent payment to that organization of funds to meet the expenses involved was a matter of internal procedure. However, if the organization failed to meet its obligations, the claimant would then have recourse to article III, paragraph 3, of the United States text. The limitation contained in that article that the secondary claim could only be made against members of the organization which were contracting parties to the convention was a reasonable one, and was in accordance with the principle of the sovereign acceptance of individual treaties by States.

Mr. USTOR (Hungary) said that if the international organization refused to pay, a member State liable under article III, paragraph 3, of the United States text could argue that it was a third party and that the provision had been raised inter alios acta.

Mr. ZEMANEK (Austria) observed that in such a situation, if the presenting State claimed against a member of the organization which was not a party to the convention, that member State would not be liable under the Hungarian proposal any more than it would be under the United States proposal. If, however, the member State was a party to the convention, it could argue that article III, paragraph 3, had been raised inter alios acta.

Mr. USTOR (Hungary) said that his delegation's proposal did not provide that international organizations should become parties to the convention. The question was perhaps solved only by the Belgian draft which required the accession to the convention of the international organization itself and of all its members.

Mr. DARWIN (United Kingdom) said that the Belgian solution of requiring all members of the organization expressly to accept liability under the convention would have the effect of making it more difficult for international organizations to participate in it. That would work to the disadvantage of the presenting State, since there would be fewer States against which a claim could be made.

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Mr. COCCA (Argentina) said that the liability of a member State of an international organization could be viewed from three different standpoints. If the liability of a member State was to be regarded as "joint and several", that implied that the presenting State could claim against the international organization, or the member States or one individual State. If the liability was "joint", the claimant would have to apply to the international organization and to the member State. If, however, the liability was a subsidiary liability, then the claimant would only have recourse to a member State if the international organization refused to pay. There was general agreement that international organizations had legal responsibility; it now remained to be determined whether or not that responsibility was exclusive. The whole question of the responsibility of international organizations was very complex and could give rise to many legal difficulties. In that connexion, he pointed out that there was no agreement between the United Nations and the Government of India on the use of the Thumba launching site in India, on which, the question arose as to what extent the United Nations was responsible.

The CHAIRMAN, summing up, said that the only point on which the Sub-Committee had reached agreement was that international organizations should be liable; the relationship of the liability of an international organization to that of its constituent members and the relationship between an international organization and the convention remained open questions.

He invited the Sub-Committee to begin consideration of the question of the law applicable to compensation for damage and drew attention to the relevant provisions, contained in the first paragraph of article 2 of the Belgian draft, article II, paragraph 4, of the United States draft and article II, paragraph 2, of the Hungarian draft.

Mr. ZEMANEK (Austria) noted that article II, paragraph 2, of the Hungarian draft referred only to two particular types of claims, namely claims for compensation for loss of profits and moral damage. He wondered what principles were to be applied, under the Hungarian proposal, in determining the compensation for damage in general.

Mr. USTOR (Hungary) thought that, if the convention laid down no specific rules, the generally established practices for assessing damages would apply.

Mr. ROSSI-ARNAUD (Italy) said that that presumably meant that private international law would be applicable.

Mr. ZEMANEK (Austria), supported by Mr. COCCA (Argentina), considered that only public international law could govern the international responsibility of States.

Mr. LITVINE (Belgium) observed that the paragraph in his delegation's draft to which the Chairman had referred did not deal with exactly the same point as article II, paragraph 4, of the United States proposal. The text in question in the Belgian draft provided that, for the purpose of the definition of "damage", the law of the place where the loss was caused should apply. Article II, paragraph 4, of the United States draft, on the other hand, was concerned with the determination of the amount of compensation.

Mr. DARWIN (United Kingdom) pointed out that all three drafts would allow a State to claim compensation for damage suffered by its nationals irrespective of the territory in which the damage was suffered - even if it was the territory of a State not a party to the convention. Where claims were based purely on the principle of nationality, the case for applying an international standard and avoiding the differences in particular national laws seemed very strong.

If a national law was to be applied, it seemed clear that it should not be the law of the country which had caused the damage.

Mr. LEMAITRE (France) felt that although public international law would naturally come into play in the case of a dispute, [the national law of the country where the damage was caused should be the main guide in determining compensation.] The Belgian representative had said that the reference in his draft to the law of the place where the damage occurred related only to the definition of damage, but consistency would seem to require that that principle would be the guiding principle in the assessment of damages also. There were precedents for referring to national laws in international agreements.

Mr. LITVINE (Belgium) said that he fully agreed with the representative of France; there was a lacuna in his delegation's draft. A reference to the law of the damaged State would seem to him preferable to a reference, as in the

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United States draft, to the vague and possibly controversial notions of justice and equity. Different countries had different notions of what was equitable in such matters, as was evidenced by the fact, to which the Hungarian text drew attention, that compensation for moral damage was provided for under some systems and not under others.

Mr. KINGSTONE (Canada) thought it desirable that any provision governing compensation should be as precise as possible. Much of the value of the principle of absolute liability would be lost if there was no indication of how damages were to be assessed. (The idea that compensation should be based on the law of the country where the damage was suffered seemed attractive; however, the assessment of damages might then vary considerably according to the country where the damage occurred, and the possibility of special legislation being enacted by countries on the matter could not be discounted. The position would thus be uncertain, and States might be deterred from acceding to the convention.)

Accordingly, the United States proposal, under which compensation would be determined in accordance with applicable principles of international law, justice and equity, seemed preferable. As the United States representative had pointed out at the 48th meeting, that solution would ensure uniformity in the determination of damages. It might still be asked, however, whether the principles of international law on the subject were sufficiently developed for such a clause to require no further elaboration. The United States representative had spoken of the rules already established in international practice; it would perhaps be wise, however, in order to give the draft greater precision, to postpone a decision and meanwhile to review international practice and precedents. It might then be possible to include in the convention some broad principles elicited from such a review.

(The element of uncertainty in the United States draft was particularly apparent in the use of the terms "justice and equity" and the way in which they were loosely coupled together with the "applicable principles of international law". A possible alternative might be to use the term "ex aequo et bono", which had the authority of the Statute of the International Court of Justice behind it (Article 38 (2) of the Statute).)

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Mr. RYBAKOV (Union of Soviet Socialist Republics) pointed out that the Sub-Committee was not, in any case, being asked to take a final decision but merely to express its views on the question of the drafting of a convention. On the immediate issue, he thought that many practical and legal difficulties might arise if compensation was determined simply on the basis of the State whose nationals suffered the damage. [As regards the principle of compensation for moral damage, for example, practice varied from State to State. It seemed logical to provide, as the Hungarian draft did, that compensation for moral damage would be paid if the legal system of the State liable for damage normally provided for such compensation.]

He shared the feeling of the representatives of Belgium and Canada that equity and justice were concepts which might have varying interpretations and would be best avoided.

Mr. USTOR (Hungary) said that all would agree that the solution to be sought must be as equitable, as clear and as uniform as was reasonably possible. The question perhaps required further consideration, but a reference to some national law would appear advisable. The United States draft was unsatisfactory for the reason that the principles of international law on such matters, if they existed, could hardly be considered precise enough to be made the point of reference.

Mr. GOTMANOV (Czechoslovakia) said that his delegation shared the view which had been expressed by the Soviet Union representative. It seemed clear that the law of the State liable for damage should be applicable as far as the question of the scope of liability and of compensation was concerned. There would be no question as to which State was responsible, and the application of the principle in question would mean that there was no discrimination in the treatment of persons who suffered damage.

Mr. ZEMANEK (Austria) said that while it was technically possible to refer to national law in an international convention, he did think it appropriate to do so in the present case. [The notion that the law of the respondent State should apply would lead to the anomalous situation of a State determining by its own national law the extent of its international obligations. The State could

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(Mr. Zemanek, Austria)

in fact reduce its obligations to very little simply through domestic legislative action. [The idea that the law of the damaged State should apply would lead to the greatest diversity of solutions in the settlement of claims.] For example, an Austrian citizen damaged on Belgian territory could receive compensation for moral damage, which was provided for in Belgian law, while in Austria he could not, since it was not provided for in Austrian law. That was the sort of lack of uniformity which the Sub-Committee had so far sought to avoid.

Only the approach taken in the United States proposal was acceptable, although he had some reservations on it similar to those expressed by the Canadian representative and believed that further consideration of the question would be useful.

Mr. KELLBERG (Sweden) said that his delegation tended to favour the Belgian text. The principle embodied in it was just and equitable, even though it might not be conducive to uniformity. He wondered, in fact, whether the object in the present instance should be uniformity at all costs. The main consideration should more probably be the interests of the individual, and they could best be served through the laws which were applied in the case of ordinary accidents. The only case not covered by the Belgian text was damage to a visitor in the applicant State, but it could be regarded as rather exceptions; in any case, the text might, if thought necessary, be expanded to cover it.

√ Mr. Kenneth BAILEY (Australia) said that it was unreasonable to take national law as the law to govern claims for compensation under the convention. States could hardly be expected to allow the measure of their liability to be determined by the law of another State. Moreover, he did not see how the collective liability of several States could be worked out on the basis of an amount arrived at in accordance with the municipal laws of any one of the States concerned. The problems of collective responsibility seemed to point conclusively, as did many other arguments, to the use of international law as the law applicable under the convention. He agreed with the Canadian representative that, while further study might be profitable, the United States text basically provided the correct solution.]

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Mr. GLASER (Romania) observed that it was easy and tempting to say that international law should apply. After all, the law of the launching State could only be applied within very narrow limits, and international law appeared to offer the great advantage of uniformity. There was, however, no established international law in the field under consideration. There were no treaties; the Sub-Committee was drawing up the first one. There was no custom; there had fortunately been no accidents so far. There were no generally recognized rules of law that were applicable, as far as he knew. Thus, to invoke international law was simply to defer the whole question.

That left only resort to the national law of the damaged State, and although that solution was not ideal, it seemed the most practicable and equitable in the circumstances. It would treat accidents resulting from space ventures like any other accidents occurring within the country; indeed, from the point of view of the individual, it made no difference whether the cause of the damage was a space object or a tram. It would be easier, furthermore, to obtain some uniformity among national provisions than to work out international rules. An attempt to establish a rule on moral damage, for instance, would meet with objections from certain States on the grounds of public policy and the independence of the judiciary. States might find themselves compelled to enter reservations on all "rules" which did not comply with their national law. He therefore supported the most workable, if not the most logical, solution of applying the laws of the damaged State.]

Mr. SOHIER (United States of America) said that the Romanian representative's statement seemed to imply that a claims commission established under the convention would be unable to settle the sort of claims which arbitral tribunals had been settling for years without any great difficulty on the basis of international law. The fact that damage was caused by a space object did not alter the nature of the problem. A very large body of law had been developed and there were ample precedents to be followed.

Mr. GLASER (Romania) disagreed with the United States representative and asked whether he could cite the particular rules of international law he had in mind and the precedents that had led to their establishment.

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Mr. SOHIER (United States of America) said that he had done so in his opening statement on the United States proposal and could elaborate if the Sub-Committee wished. There could be no question that the law was sufficiently well developed to be referred to in the convention.

Mr. DARWIN (United Kingdom) said that he did not think a discussion of the precise stage of development of international law in the matter was particularly useful at that point, but he would mention two relevant cases: the Chorzów case, decided by the Permanent Court of International Justice, and the Corfu Channel case.

Referring to the Romanian representative's remarks, he observed that courts were very jealous of public policy in dealing with affairs in their own country, but they did not attempt to export it in respect of incidents occurring elsewhere.

Mr. ZEMANEK (Austria) pointed out that all three proposals provided for an international claims commissions in one form or another. Therefore, considerations of public policy did not arise, for no national judge or court was involved. In addition, it might be thought from the discussion that very many kinds of damage would have to be covered, but in fact, that was not so. The various kinds of damage could easily be mentioned in the convention, and perhaps that should be done. A decision would have to be taken on moral damage, of course, but it would need to be taken only once, and whether it was in an arbitral tribunal or in the United Nations did not really matter.

Mr. LEMAITRE (France) said that inter-State claims probably offered the best guide to the solution of the problem. When one State suffered damage as a result of the activities of another State, it submitted a claim in which the damage was assessed according to its own laws. If the claim was not settled amicably, it was brought before an international tribunal or commission which might have recourse to public international law in certain matters but must ultimately resort to the laws of the claimant State in the matter of assessment and payment of the damage. There was, after all, no fixed international compensation for particular damage or injury, for example the loss of a limb. Only domestic law could settle such issues. Moreover, it was hardly conceivable that the injuries sustained by two persons, one of whom was struck by an automobile, and the other by a space object, should be compensated differently. There was no real alternative to the application of national laws. If a member of

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(Mr. Lemaitre, France)

a claims commission was told not to apply the laws of the claimant State, he could only fall back on the laws of his own State.

Mr. GLASER (Romania) observed that the commission established under the convention would have to be told what law to apply, and that would inevitably raise questions of public policy. He observed, in reply to the Austrian representative, that even if certain kinds of damage could be specified, the problem of the law to be used in assessing the damage would still remain. Lastly, the precedents mentioned by the United Kingdom representative did not establish rules applicable to the present convention because of their age and their irrelevance to the space field.

The CHAIRMAN, summing up the discussion, observed that positions had been clarified and that the exchange should be helpful for further work on the question.

The meeting rose at 6 p.m.

