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COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE

LEGAL SUB-COMMITTEE

Fourth Session

SUMMARY RECORD OF THE FIFTIETH MEETING

Held at Headquarters, New York,
on Tuesday, 28 September 1965, at 3.25 p.m.

CONTENTS

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)

PRESENT:

Chairman:

Members:

Mr. LACHS	(Poland)
Mr. NACO	Albania
Mr. COCCA	Argentina
Sir Kenneth BAILEY	Australia
Mr. ZEMANEK	Austria
Mr. LITVINE	Belgium
Mr. de MEDICIS	Brazil
Mr. YANKOV	Bulgaria
Mr. KINGSTONE	Canada
Mr. GOLSALA	Chad
Mr. PRUSA	Czechoslovakia
Mr. LEMAITRE	France
Mr. USTOR	Hungary
Mr. SAJJAD	India
Mr. ROSSI-ARNAUD	Italy
Mr. YAMAZAKI	Japan
Mr. FRANCOZ RIGALT	Mexico
Mr. GLASER	Romania
Mr. D. WILLIAMS	Sierra Leone
Mr. KELLBERG	Sweden
Mr. RYBAKOV	Union of Soviet Socialist Republics
Mr. IBRAHIM	United Arab Republic
Mr. SINCLAIR	United Kingdom of Great Britain and Northern Ireland
Mr. SOHIER	United States of America
Mr. SCHACHTER	Director, General Legal Division
Miss CHEN	Secretary of the Committee

Secretariat:

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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 consider the question of absolute liability and exoneration from liability as dealt with in the three proposals (A/AC.105/C.2/W.2/Rev.3, p. 5). Members might wish to discuss absolute liability first and then take up the question of exoneration.

Mr. ROSI-ARNAUD (Italy) said that his delegation had no difficulty in accepting the principle of absolute liability for damage caused by space objects, but it was aware that certain less advanced countries feared that the combined principle of absolute and unlimited liability might expose them to grave financial risks were they to participate in space activities. Those countries were likely to oppose the notion of unlimited liability if the principle of absolute liability was adopted.

Mr. FRANCOZ RIGALT (Mexico) said that the Sub-Committee seemed prepared to accept a notion which in one set of circumstances at least was completely absurd and unworkable. That notion was the absolute liability of the launching State for any damage caused by space objects. In the case of collision of space vehicles in outer space, the idea of the absolute liability of the launching State made no sense at all.

Mr. SOHIER (United States of America) said that he, like the Italian representative, appreciated the concern of many States that their relatively minor involvement in space activities might place them in a difficult position in the event of a space accident. But that problem related not so much to the principle of absolute liability as to the degree of involvement required for a State to be regarded as a launching State. He hoped that the Sub-Committee would leave the matter until it came to the definition of a "launching State", rather than weakening the principle of absolute liability.

Mr. RYBAKOV (Union of Soviet Socialist Republics) observed that all three of the proposals under consideration provided for absolute liability on the ground and in the air and his delegation saw no basic objection to the principle in question. Two different approaches were taken to the particular case of accidents occurring in outer space. The Hungarian proposal stipulated that if one space

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(Mr. Rybakov, USSR)

object was damaged by another space object, compensation would be paid only if the claimant State could prove that the other State was at fault. The United States proposal, on the other hand, provided for absolute liability even in that case. The Hungarian text was clearly preferable, for in a space accident two active parties were involved, either of which could be at fault, while in the case of damage on the ground it was clear where the responsibility lay. The argument which had been raised at past sessions against the Hungarian text - that it would be difficult to prove responsibility for an accident in outer space - was an argument of fact and not of principle; moreover its truth had not been demonstrated, since no situation of the kind had arisen. The Hungarian text also disposed of the problem of defining boundaries in space, for it concentrated on the relation between space objects and the launching States concerned rather than on the place where the accident occurred.

Mr. FRANCOZ RIGALT (Mexico) pointed out that article IV, paragraph 1, of the Hungarian proposal, which the USSR representative had just sought to defend, provided for the inconceivable contingency of two space objects of different States damaging each other while on the ground. In an attempt to side-step the issue of boundaries in space, the authors had declined to specify where the accident must occur. Article III of that proposal likewise did not specify where the damage occurred, although it was obviously on the ground and not in space. If article III were to refer explicitly to damage on the ground and article IV to damage in air space or outer space, both would be logical.

Article II, paragraph 1, of the United States proposal imposed absolute liability on the launching State for any accident whatsoever. Thus, if a United States space object and a Soviet space object were to collide in space, both States would be absolutely liable, which was clearly absurd. Obviously, liability must rest with the party at fault. Paragraph 2 of that article suffered from the same lack of logic as article III of the Hungarian proposal and could be remedied in the same way.

Mr. SOHIER (United States of America) said that it was better to formulate a clear and simple rule than to allow the highly unlikely possibility of a collision in space to affect the statement of the principle of absolute liability. His delegation had deliberately disregarded remote possibilities and avoided such sweeping generalities as "unlawful activity in outer space" (article V of the

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(Mr. Sohler, United States)

Hungarian draft) in order to keep the principle of absolute liability as comprehensive and simple as possible. It was not unthinkable, moreover, that in the event of a collision in space the two launching States should be absolutely liable to each other. If some wilful or reckless act or omission was involved, the liability of one State would be wholly or partially extinguished, under the United States proposal.

Mr. LITVINE (Belgium) said that the Belgian proposal, unlike the Hungarian text, did not provide for exoneration from liability because of natural disaster, it being felt that the prime object of the convention was to safeguard the interests of persons on the ground. It was noteworthy that the Rome Convention on damage caused by foreign aircraft made no allowance for natural disaster. He could see no reason for denying a person's right to compensation because of natural disaster. Incidentally, he was not certain just what the English term "natural disaster" meant.

Article II, paragraph 2, of the United States proposal provided for full or partial exoneration in the event of "a wilful or reckless act or omission on the part of the presenting State". He wondered what criteria would be applied to determine the degree of exoneration, for he believed that such an act or omission normally resulted in complete exoneration.

Mr. RYBAKOV (Union of Soviet Socialist Republics) observed that the Hungarian proposal differed from the other two not only in including a provision covering natural disaster but also in stipulating that in certain circumstances the liable State was barred from any exoneration whatsoever. With regard to natural disaster, he had thought that the Hungarian formulation would be accepted on the same basis as the principle of absolute liability: both concepts were employed in many States and in international law.

He had thought, mistakenly perhaps, that the reference to "cause and effect" in the Belgian proposal was in fact a reference to natural disaster. It was particularly important to cover natural disaster in the present convention in view of the acceptance of the principle of absolute liability.

(Mr. Rybakov, USSR)

Both the Hungarian and Belgian proposals, using slightly different language, provided for exoneration in the case of gross negligence on the part of the party suffering the damage. The United States proposal, however, provided not only for gross negligence, but for simple negligence through omission, which was not in keeping with national or international practice or with the specific requirements of the convention.

Mr. SOHIER (United States of America) stressed that the expression "wilful or reckless act or omission" in article II, paragraph 2, of the United States draft did not mean mere negligence, but was rather tantamount to "gross negligence". The term "gross negligence" had been avoided because it was the kind of technical expression which might have slightly different meanings in different legal systems. It should be made clear that, in the expression which had been used, the words "wilful" and "reckless" governed the word "omission" as well as the word "act".

With regard to the question of "natural disaster" or "force majeure", he did not see why a State suffering damage caused by the launching of a space object should be unable to collect compensation merely because "force majeure" was involved. Such an exception would make a serious inroad into the concept of absolute liability. If a State chose to engage in a hazardous undertaking it must assume responsibility for all the consequences, and it would be inequitable for the State where the damage occurred to have to bear the costs in such cases.

The representative of Belgium had questioned the usefulness of providing for the possibility that the extinction of liability might be only partial. A case might arise, however, where a reckless act on the part of a person represented by the presenting State was a contributory cause of the accident. He did not think that it would be too difficult to decide the degree of extinction of liability in such cases; the same principle was applied regularly by United States courts in civil law.

Mr. ZEMANEK (Austria) observed that absolute liability was the principle applied in most national legal systems in similar circumstances. The principle was that hazardous activities were tolerated only on condition that the person engaging in such activities assumed responsibility for any damage resulting, whether attributable to fault on his part or to mere accident. It seemed natural to apply the same principle on the international level. The risk of a "natural disaster" was a risk which the launching State took, and he did not see why other States should share that risk and bear the costs of damage which they suffered. /...

(Mr. Zemanek, Austria)

All three drafts, though using different terminology, provided for exoneration from liability in the event of wilful acts or gross negligence on the part of the State suffering damage. He was not quite sure whether it was technically correct, as in article 1 (c) of the Belgian draft, to couple together the concepts "rashly" and "in full knowledge that damage will probably result" as if they meant almost the same thing.

While the concept reflected in article IV, paragraph 1, of the Hungarian proposal was logical, he was uncertain in practice how a claimant State could produce evidence of fault on the part of the other State, since it would not have access to the relevant files. There would be little purpose in introducing a principle which was not workable.

Mr. LITVINE (Belgium), in reply to the representative of Austria, said that he was not sure whether the English translation of the Belgian article 1 (c) was quite accurate. The explanation of "faute lourde", or "wilful misconduct", was based on The Hague Protocol of 1955, in the Belgian draft.

Mr. USTOR (Hungary) said that he suspected that the concept of exoneration in the event of natural disaster, though not openly mentioned as in the Hungarian draft, was in fact implied in the other two proposals. The Belgian proposal provided in article 1 (b) that proof must be given of a "relationship of cause and effect between the damage, on the one hand, and the launching, motion or descent of all or part of the space device, on the other hand". If damage resulted because the space ship, during its descent, was struck by lightning, counsel for the defence would surely argue that the cause of the damage was the lightning, since that was the main factor which had led to the damage. The question was whether that was a correct interpretation, or whether the Belgian representative would accept an amendment to make it clear that natural disaster did not exonerate the launching State.

He could see the cogency of the Austrian representative's argument that it was natural for the risk of force majeure to be borne by the entrepreneur. On the other hand, it might also be said to be normal that the consequences of a natural disaster should be borne by those affected by it.

With regard to article IV of the Hungarian draft, he agreed that proof of fault in such cases would be difficult, and it might be unlikely that the exception would be often invoked; nevertheless, it still seemed right to provide for such a possibility.

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Mr. SINCLAIR (United Kingdom) said that his delegation was in favour of the principle of absolute liability and took the view that the Sub-Committee should give careful and critical thought to any proposals for exonerating clauses. On the question of wilful or reckless acts and gross negligence, there was considerable common ground between concepts reflected in the various drafts, though the actual terminology presented certain difficulties. With regard to the question of total or partial exoneration, his delegation tended to agree with the United States delegation that there might be cases where contributory negligence would justify partial exoneration.

The policy considerations involved in determining the scope of exceptions to the principle of absolute liability depended upon the concept of apportionment of risk. Against this background, the possibility of natural disaster was, in his view, a risk which should be borne by the launching State. There might be differences in the interpretation of "causation", but he would consider that, in the example mentioned by the Hungarian representative, the question to be asked was the following: but for the launching, would the damage have occurred? If that test was applied, the launching State would clearly be liable.

He was in general agreement with the Austrian representative regarding article IV of the Hungarian draft. If possible, the rules in the convention should be simple: the provision in article IV concerned a rather special case.

Mr. LITVINE (Belgium) noted, in reply to the question raised by the representative of Hungary, that the English translation of his draft spoke of the "descent" of all or part of the space device, whereas the original text used the word "chute", which meant a violent descent. In the case mentioned by the Hungarian representative, whatever the cause of the violent descent of the space object might be, the cause of the damage would clearly be the falling of the space object. In his understanding, the Belgian article 1 (b) implied absolute responsibility. As he had pointed out, under the Rome Convention concerning damage caused by foreign aircraft force majeure did not exonerate the State of registry from liability if an aircraft crashed.

Mr. GLASER (Romania) said that there were still many issues involved in the question of liability for damage which were unclear. The discussion which had resulted from some of the questions raised by the Hungarian proposal had undoubtedly helped to clarify matters. On the question of possible exoneration from liability, he thought that the key to the problem lay in article V of the Hungarian draft. /...

(Mr. Glaser, Romania)

Where a space object has been launched for unlawful purposes, surely there could be no question of exoneration. It was surely unthinkable that, in such cases, an innocent State suffering damage should bear any part of the burden. Similarly, if two space objects collided, the fact that one of them had been engaged in an unlawful activity would completely alter the legal situation. Then there was the question of possible exoneration in the event of force majeure. Surely it was clear that, in the case of unlawful activities, one must apply the test mentioned by the United Kingdom - "but for the launching, would the damage have occurred" - and in that case there could be no exoneration. Even wilful misconduct on the part of the victim could hardly be used as an argument to exonerate States perpetrating activities which were against the interests of peace; in such cases, the very concept of "gross misconduct" by a victim seemed absurd.

There were many questions which still required further reflection. It was natural that a country like his own, which was not yet in a position to launch space objects, would tend to favour the principle of absolute liability, just as it would also tend to favour the principle of unlimited liability. At least in the case of unlawful activities, as he had said, there must be no possibility of exoneration. It might be claimed that to be unduly strict towards launching States would delay the advance of science; on the other hand, there was something to be said for discouraging States which, owing to a lack of resources, might take greater risks, from engaging in space exploration. He doubted whether many Governments would be willing to conclude a convention under which they would agree, in effect, to share the risks assumed by launching States.

Mr. KINGSTONE (Canada) said that in light of the Romanian representative's remarks on the question of absolute liability in relation to activities of an unlawful nature, it would be appropriate to focus attention on the nature of the Sub-Committee's task in respect to the concept of absolute liability. In his delegation's view, the Sub-Committee was concerned with absolute liability in the context of the peaceful uses of outer space, and within that context it was dealing essentially with the question of civil liability for handling a very dangerous or potentially dangerous object. The different national legal systems all contained provisions for dealing with that kind of liability and the general rule had perhaps

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(Mr. Kingstone, Canada)

been most explicitly defined by the Austrian representative: namely, that anyone undertaking a dangerous activity had to accept absolute liability for the results. In that connexion, he wished to associate himself with the statement by the United Kingdom representative, which set forth in clear and positive terms his delegation's understanding of the concept.

Article V of the Hungarian draft introduced a new element. The question arose of what was meant by the expression "while exercising an unlawful activity in outer space". The Romanian representative had said that that meant an activity contrary to the peace. If that was the meaning of the expression, he suggested that the concept was not pertinent to the Sub-Committee's considerations.

Sir Kenneth BAILEY (Australia) agreed with the Canadian representative's comments on the statement by the representative of Romania. On the main issue of absolute liability and exoneration from liability, he was becoming increasingly convinced that the Sub-Committee was very close to reaching agreement. Differences arose, as they had at the previous session, whenever the Sub-Committee departed from describing factual situations and addressed itself to legal concepts, such as gross negligence, contributory negligence, etc. Although all such expressions were translatable, they tended to have different legal implications in systems other than those in which they originated. It was preferable, as the United States had done, to describe factual situations which excluded liability rather than to employ legal concepts, which so often divided members of the Sub-Committee. If the Sub-Committee were to draw up a questionnaire which was factual in character, it might well discover that there was substantial agreement on the question.

All three draft proposals were based on the concept of cause and effect, although the Belgian text was perhaps the clearest and most explicit in that regard. Once it was agreed that the basic consideration was whether damage had occurred and whether it was a result of the launching of a space object, three questions arose. Firstly, should liability be excluded if the process of cause and effect had been affected by natural disaster? Secondly, should liability be excluded if the process had been affected by some activity on the part of the presenting State? Lastly, were there any other circumstances in which, because they affected the

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(Sir Kenneth Bailey, Australia)

chain of causation, liability should be excluded?] The answers that had emerged to those questions in the course of discussion were not widely divergent and the sponsors of the three drafts could perhaps consult with one another and produce a simple draft, which answered yes or no to the first two questions. The situations involved were factual and there was no real problem in stating them explicitly and in non-technical terms.

Mr. RYBAKOV (Union of Soviet Socialist Republics) said that his delegation had studied article V of the Hungarian draft in the context of the Declaration of Legal Principles and in the context of generally recognized principles of international law. In his delegation's view, the principle stated in that article - that States were liable for damage resulting from unlawful activities in outer space - was based on the concept of an international unlawful act and was of fundamental importance. Activities in outer space had a direct bearing on the sovereignty of States, because such activities were particularly open to abuse and provided an unparalleled opportunity for interference in the affairs of other States. It was for that reason that the Declaration provided that States should bear international responsibility for national activities in outer space. In view of the particularly dangerous nature of unlawful activities in outer space, it was proper that the convention should provide that the State responsible should assume absolute liability and be barred from any exoneration whatsoever, so that no State could claim exemption under the convention. His delegation therefore considered that the Hungarian proposal, based as it was on the internationally recognized principle of non-interference in the affairs of other States for any reason whatsoever, was the correct approach to the problem.

Mr. FRANCOZ RIGALT (Mexico) said that, having analysed article V of the Hungarian draft, his delegation had reached conclusions contrary to those in that draft. The article was unacceptable because it confused the question of the application of the convention with that of the principle of responsibility and was outside the Sub-Committee's terms of reference. It should be established that the convention should not apply to damage resulting from unlawful activities, because it was abundantly clear that, if the activities were military activities, the

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(Mr. Francoz Rigalt, Mexico)

convention would not apply at all. Article V of the Hungarian draft was attempting to apply a convention on peaceful activities in outer space to activities which did not come within that category. It was, moreover, ambiguous to speak of lawful and unlawful activities in that connexion, because military vehicles could be engaged in lawful activities which were not peaceful, and the convention could not be applied to such cases. At the 48th meeting, he had proposed a simple solution based on the Rome Convention concerning damage caused by foreign aircraft, suggesting that the present convention should contain a provision excluding from its application vehicles not engaged in peaceful activities in outer space.

Mr. USTOR (Hungary) said that, in his view, the problem could be solved by adopting a provision either on the lines of his delegation's proposed article or on the lines suggested by the Mexican representative. But to set the question aside and say nothing would be completely unacceptable.

Mr. YANKOV (Bulgaria) said that for his delegation the words "unlawful purposes" and "unlawful activity" did not refer merely to military activities in outer space, which were not the object of the convention.

Item 6 of the Declaration of Legal Principles referred to activities which might "cause potentially harmful interference with activities of other States in the peaceful exploration and use of outer space". Although no relevant positive law yet existed, the Declaration gave some indication that generally recognized principles of international law should to some extent apply, because "potentially harmful" activities would be qualified as unlawful under those principles.

The essential purpose of article V was to protect countries against unlawful activities in outer space, activities which were not in accordance with international law, with the Declaration of Legal Principles or with the Charter of the United Nations. Possibly some more precise formulation was advisable, but a convention of the kind under consideration should, however great the difficulties involved, define and differentiate between liability for damage caused by lawful activities and liability for damage caused by unlawful activities. The idea should not be rejected out of hand merely to avoid the problems it raised.

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Mr. SOHIER (United States of America) agreed with the Canadian representative that article V of the Hungarian draft concerning unlawful activities in outer space was inappropriate in the present convention, which should be considered solely in the context of the peaceful uses of outer space. He also agreed with the Australian representative that it was preferable to consider the factual aspects of the problem. If there were no exceptions to the principle of absolute liability, then the difference between lawful and unlawful would be irrelevant. In his delegation's proposals there were two exceptions to that principle: where there was a contributing wilful act on the part of the presenting State and where two objects collided in outer space. Only in the latter case, which was extremely unlikely to arise, did the question of lawful or unlawful activities affect the question of liability. The Sub-Committee was unnecessarily introducing a difficult, polemical issue into the discussion.

Mr. LITVINE (Belgium) said that the wording of the Hungarian article V was ambiguous. It stated that a State should assume liability for damage "if the damage occurred while exercising an unlawful activity in outer space"; was one therefore to conclude that the State would not be liable if the damage occurred while exercising a lawful activity? Furthermore, in municipal law it was possible to determine whether or not an activity was unlawful; it might also be possible in international law, but only on the basis of legal texts and, in the case of activities in outer space, there were no such texts. On the other hand, the Hungarian text mentioned "exoneration". Would that mean that in case of a so-called unlawful activities, "limitation" of liability would be appropriate?

The CHAIRMAN, summing up, said that the Sub-Committee had reached a preliminary agreement on the principle of absolute liability, in contrast to the principle of "where there was no fault, there was no liability". On the question of exclusion or reduction of liability, however, a number of problems required further consideration before agreement could be reached; in particular, the question of natural disaster or act of God; the question of damage occurring as a result of a collision between two space ships, where the damage was limited to one of the ships; and the question of unlawful activity.

The meeting rose at 5.45 p.m.

