

Document:-
A/CN.4/SR.1744

Summary record of the 1744th 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:-
1982, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

the expression “territory or control”, was difficult to define. Difficulties might arise in cases where the agency operating a plant or unit was owned by another State or State-owned corporation, or by a transnational company. In such cases, where did control lie? When injury resulted from the use of a plant, who was responsible? Was it the State that owned the plant, or the State in which the plant was operated?

46. The notion of “shared expectations” should also be clearly defined. The Special Rapporteur took the view that the occurrence of loss or injury was a question of fact depending on the circumstances of the case and warned that the notion was applicable only in the context of reparation. While the scope of the term “shared expectations” would be easy to determine where specific agreements existed between the States concerned, it would be difficult to infer from standard patterns of conduct normally observed. He supported Mr. Reuter’s suggestion (1742nd meeting) regarding the elaboration of a framework treaty. The schematic outline provided ample material for such a framework.

47. Mr. EVENSEN said he agreed with previous speakers that some modern technical activities, such as drilling for oil in marine areas, the operation of nuclear plants, the testing of nuclear devices and the operation of airlines, entailed dangers. But any attempt to preclude harmful consequences entirely would require total prohibition of the activities concerned. As applied to such activities, “prevention” and “prohibition” should be regarded as relative, rather than absolute terms. One possible approach would be to formulate the principle that States had an obligation to prevent injury or loss by establishing safety codes or codes of conduct. That was the situation emerging with regard to oil-drilling operations at sea, for which coastal States had an international obligation to establish and enforce reasonable safety codes precluding unnecessary loss or injury. The Special Rapporteur should adopt that approach in his future work on the topic.

48. Mr. LACLETA MUÑOZ said that the Commission should conclude the work it had undertaken, since it was required not only to codify international law but also to contribute to its progressive development. And the concept of strict liability was, precisely, a development in all sectors of law, internal as well as international: the international community must make every effort to ensure that the inevitable risks of acts not prohibited by international law were not always borne by the victims.

49. In addition to the polluting industrial processes already referred to, there were accidents that were absolutely unforeseeable. For instance, a few years ago an atomic bomb had become detached from a foreign aircraft which had received permission to fly over Spanish territory. It had never been possible to prove that there had been a wrongful act which had engaged the responsibility of the State in which the aircraft was registered. In law, there had been no obligation to make reparation for the injuries caused in a tourist area, but compensa-

tion had been paid *ex gratia*. On the basis of that example, the Commission could impose an obligation to make reparation on a State to which a wrongful act was attributed. But it should above all avoid seeking to identify the author of an act that was not wrongful; the principle of strict liability took on its full significance in that context, and it should be stated in the draft articles.

50. In the schematic outline proposed by the Special Rapporteur, section 7 was the heart of the topic, although paragraphs 2 and 3 of heading I did not come within the framework of the topic *a priori*. Nevertheless, those provisions could, and should, be included *a posteriori*. He thought the outline should begin with the provisions of section 7 and include rules regulating acts. Those rules could follow the model of the provision in section 7, heading II, paragraph 6, by completing it as follows:

“The test of the measure of compensation for loss or injury or the adoption of measures to prevent its continuation or repetition.”

He also thought that definitions should be given of an “act of the State” and of “attributability”, and that the possibility of extending the draft articles to cover acts of individuals within the territory or control of a State should be explored.

The meeting rose at 1 p.m.

1744th MEETING

Monday, 12 July 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

SCHEMATIC OUTLINE² (*concluded*)

1. Mr. QUENTIN-BAXTER (Special Rapporteur), summing up the discussion, said that the Commission’s debate had been very constructive and that he would carefully take account of all the comments made when he prepared his next report. At present, however, he would confine himself to a comparatively broad summary of the main conclusions reached, so that the Commission could proceed fairly quickly to the last substantive item on its agenda.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1735th meeting, para. 1.

2. He had noted that some thirteen members of the Commission thought he should proceed along the lines he had indicated in his third report (A/CN.4/360). One strong voice had said that there could be no doubt that the subject did indeed exist. A couple of other voices, however, while finding some merit in parts of the subject, believed that it could perhaps be more appropriately considered within the context of State responsibility. Four or five further voices, though displaying a measure of reticence, had not raised any special barrier to further consideration of the subject. Although at least twelve firm voices had spoken in favour of the ultimate obligation to make reparation, there had been a number of others which he had hesitated to count affirmatively, but which had certainly not reacted negatively. There had been some eleven firm voices in favour of rules to deal with the question of prevention, and some which had said that the rules he had set out in sections 2 and 3 of the schematic outline were not strong enough. A few had suggested that the question of prevention might interfere with the question of reparation. It seemed, on the basis of that assessment of the discussion, that the Commission, as a newly constituted and collegiate body, was capable of pursuing the goals, however distant and elusive they might seem.

3. He did not, however, wish to paper over the differences of emphasis that had been apparent throughout the discussion. If, as had been suggested, he did indeed have a tiger by the tail, it was probably only a paper tiger and, with a little assistance, it could be effectively dealt with. It was true that the Commission was perhaps entering areas where national interests might be sharply delineated and where different political notions and assessments might be hard to reconcile. When Mr. Kearney had presented the first report on the non-navigational uses of international watercourses,³ he had said that the Commission was embarking on a new aspect of its work; the same could be said of Mr. Sucharitkul's topic of jurisdictional immunities and Mr. Riphagen's subject of State responsibility. All three subjects presented a challenge. He did not, however, see his own subject as presenting difficulties of the same order, since its aim was not to force new situations upon the international community, but to increase the help which lawyers could give to policy-makers in dealing with acknowledged clashes of interest. It had been said that the rules which he was drafting were of a general procedural nature and he in no way disagreed. Their purpose was to ease the way to enable real differences of interest to be reconciled with the help of lawyers.

4. There was, however, a certain difference of direction within the Commission regarding the relative importance of prevention, using that word in the sense not of prohibition, but of insistence on safeguards in guaranteeing an activity—a certain pull between that kind of prevention and the desire for clear rules of reparation. There was also a certain pull between the

notion that the articles should be broad in scope and the notion that, even at that stage, they should be given a more confined direction.

5. The starting proposition was always that there was little point in rules of law that had no means of application to given situations. In the modern world, where resort to third party settlement was always the exception, particularly when policy interests were concerned, it was necessary to structure the procedures that Governments would use in dealing with one other. It was therefore also necessary to recognize from the outset that loss or injury of a transboundary nature could indeed arise without wrongfulness, and that such loss or injury had to be made good. It was idle to leave such issues to be settled simply in terms of a broad assertion that the action complained of was or was not wrongful. Almost inevitably the acting State was bound to take the view that, although it might have caused harm, it was acting lawfully, and the affected State was almost bound to take the view that the harm was caused wrongfully, if that was the only test articulated by the law. In their mutual contacts, however, States did not usually begin by accusing each other of breaking the law.

6. Reference had been made to the not infrequent preference of States for what might appear to be non-principled settlements, in which there was no admission of wrongfulness, but a certain willingness to make amends. A large part of the law on treatment of aliens was based on precedents of non-principled *ex gratia* payments. In the far more tenuous field covered by his own topic, practice was more limited, but the indications were there: often States would be prepared to settle their differences without reference to wrongfulness and, in the ordinary course of events, it might be virtually impossible to arrive at a satisfactory settlement by alleging wrongfulness. When a State had reason to believe that it was the victim of a wrongful act, it might, of course, base its case upon that act and request that the situation be rectified. But the more normal way of proceeding was for the affected State to inform the acting State that an accident had occurred and to request that the damage be repaired or, where appropriate, to request that the necessary precautions be taken to ensure that damage would not occur, or to secure a promise of payment if unavoidable damage did occur.

7. In connection with chapter V of part I of the draft on State responsibility,⁴ dealing with circumstances precluding wrongfulness, the Commission had discovered that there was some justification for the view that, even when wrongfulness was entirely precluded, payment should be made. There were two reasons for that view: the first was that liability could arise without wrongfulness in instances where it was accepted that the injury was the result of an activity such as the flying of military aircraft in bad weather, which involved a certain degree of risk; the second was that, when an acci-

³ Yearbook ... 1976, vol. I, pp. 268-269, 1406th meeting, paras 2-9.

⁴ Yearbook ... 1980, vol. II (Part Two), pp. 33 *et seq.*

dent caused heavy loss or injury, it was only right, unless there were factors that altered the equation, for the person who had taken the action, or the State in which it had been taken, to make good the loss, rather than the persons immediately affected by it.

8. As to the suggestion that the topic under consideration should be dealt with in the context of State responsibility, he reminded the Commission that a decision had been taken very deliberately and without any dissenting voice some years ago,⁵ and that Mr. Ago had repeatedly stated that the present topic was a separate one which he did not propose to examine in the context of State responsibility. In support of the Commission's decision it could be said that, if it was argued that it was immaterial whether the need to make reparation arose from a wrongful act or simply under the terms of a primary obligation, since the results were the same, it then became rather difficult to sustain the underlying thesis of the topic. Was there any point in the Commission's having spent so much time dealing with chapter V of part 1 of the draft on State responsibility if the same kind of obligation to make reparation arose irrespective of whether the act that caused the situation was wrongful? In point of fact, the rules which the Commission was now considering were governed by a far wider series of considerations. Wrongfulness would normally trigger its own consequence: a fairly clear obligation to make reparation. The situation had to be viewed as a whole in order to ascertain how the costs and benefits were distributed. It was necessary to consider the quality of the actions that gave rise to loss or injury and the quality of the responses made by the victim; only on a broad estimate of the balance between those factors was it possible to arrive at a conclusion. In that connection, he fully agreed that a State which suffered loss or injury had an obligation to mitigate the damage.

9. He had recently met an international expert on rice farming, who had said that he was keenly aware that each new rice paddy involved an increase in the risk of malaria and sometimes had clear transboundary implications. That was a good example of the kind of situation in which a beneficial activity could not be stopped simply because it involved an incidental risk of harm. It was not even possible to say, in any arbitrary manner, that the State which was increasing the number of its rice paddies must pay all the cost of ensuring that malaria did not cross its border. Nevertheless, the State whose people would be exposed to an increased risk of malaria certainly had a right to request the other State to co-operate in achieving the best possible balance between the need to provide enough food and the need to ensure freedom from disease. In that connection, he was conscious that he had rather underestimated the importance of broad community interests and the help to be obtained through international organizations in particular fields. All the support that could be obtained from the international community should be enlisted.

⁵ *Yearbook ... 1969*, vol. II, p. 233, document A/7610/Rev.1, chap. IV, paras. 83-84.

10. To take a somewhat different example, his own country, New Zealand, had some twenty-five or thirty years earlier been threatened by the oriental fruit fly; following negotiations with the United States Department of Agriculture, and with a contribution from New Zealand towards expenses, the necessary measures had been taken in Honolulu to ensure that the fly was not carried to New Zealand in aircraft. That was a small instance of the kind of situation in which co-operation between States might be covered by the draft articles. It was reasonable for a country so threatened to receive co-operation from the source of the problem; it was equally reasonable, in the particular circumstances, for the threatened country also to make a contribution to the cost of remedial action.

11. He felt bound to say that the draft articles would not provide for clear-cut and automatic rights of reparation. But neither would they weaken the protection that could be derived from the rules on wrongfulness; rather, they would introduce a degree of flexibility into those rules and provide for co-operation based on duties. He would, however, invite those who feared that the draft articles might place an enormous burden on the acting State to think again, particularly about the question of attribution. Attribution was the subjective element in State responsibility, which tied the unlawful act to the State that was its author. In his earlier reports, he had cited the "*Alabama*" arbitration⁶ and the *Corfu Channel* case⁷ as illustrations of the kind of obligations incurred by States. In both cases, the question at issue had been the State's knowledge of what happened in its territory and its corresponding duty as exclusive sovereign. It was the knowledge that imported the obligation. Mr. Ago would have said that, in such cases, the critical factor was not the secondary rule, but the extent of the primary obligation. He himself would postulate that it was a primary obligation in which the normal test of foreseeability was extended: States were required not only to have knowledge of what occurred within their territory or under their control, but also to provide safeguards against accidents which would not in themselves be wrongful, but which could be foreseen as a necessary or possible consequence of an activity over which they had control or which took place in their territory.

12. As he had said in his second report (A/CN.4/346 and Add.1 and 2), the extended test of foreseeability would take care of most of the topic, since there were very few situations that caused incidental damage or were likely to do so which could not be foreseen, even though the actual scale and nature of the damage could not necessarily be foreseen. He had even suggested that the question of responsibility for damage that could not be foreseen by the reasonable man—the case of pure accident—should be left aside for the time being. The Sixth Committee of the General Assembly had expressed some impatience at such a cautious approach; the Commission had been told that it should not shrink

⁶ See 1742nd meeting, footnote 6.

⁷ *I.C.J. Reports, 1949*, p. 4.

from situations in which causality should determine the outcome. One representative had suggested that the Commission should carry the duty of care as far as possible,⁸ but his own view was that it would probably be necessary to supplement that concept in the end.

13. Accordingly, the rules set out in his schematic outline did contain an element of causality inasmuch as, if all else failed and loss or injury occurred, the acting State should, in principle, be prepared to consider reparation. That element of causality did not, however, mean that there was any automatic duty of reparation, since there were too many situations in which such a duty would be totally unacceptable. The element of causality thus occupied a fairly small place in the rules, the emphasis being on the duty to avoid, minimize, or make provision in advance for, loss or injury. Only where there had been a lack of will to deal with a harmful situation would the question of applying the rules of section 4, governing reparation, arise.

14. In examining the liabilities that would be placed upon States by virtue of the rules, it had to be remembered that there was nothing in State practice to suggest that the burden would ultimately have to be borne by the State itself. The whole body of growing practice indicated that the State discharged its duty as territorial sovereign, redistributing the burden where it should fall within its own community. Everyone was acquainted with conventional regimes under which liability rested with the operator, there was a channelling of liability, the State might or not be a guarantor and there might be a limit of liability, but under which the State's responsibility was fairly redistributed in advance. That had an element of the internal law analogies which many members had rightly urged upon him, since in certain areas of the common law and, he understood, also of the civil law, the tendency was for the law of torts, or delicts, gradually to lose any penalty aspect and to become a sensible method of setting off future losses, redistributing costs and promoting social justice, with which the Commission was also concerned in the international sense.

15. The reason why such key terms as "activities" and "loss or injury" had been defined in general terms was that the rules were primarily concerned with promoting negotiation; it would serve no purpose arbitrarily to narrow the scope of the factors that might be relevant. But when it came to loss or injury that had actually occurred and to the rules in section 4, a more structured approach was essential.

16. While he agreed that the notion of "shared expectations" had not been adequately defined, he thought it was absolutely essential. For instance, the reservation to the ECE Convention on Long-range Transboundary Air Pollution, to the effect that that Convention did not contain a rule on State liability as to damage,⁹ could be

said to represent a "shared expectation" that would have to be honoured in any negotiations. In the *Trail Smelter* case,¹⁰ it was noteworthy that, at Canada's stipulation, the arbitral tribunal had been required to have regard to the jurisprudence of the United States Supreme Court in cases between States of the Union. That jurisprudence had been made applicable and had supplemented the meagre store of international precedent. Canada had thus found security in the expectation which it had shared with the United States and which the court had applied.

17. The intention of the saving clause in section 1, paragraph 3, of the schematic outline was, of course, that wherever regimes existed under which a balance of interest test was applied by agreement between the States concerned, the rules contained in the outline would not apply. It was also true that nothing would bring the rules into play except the occurrence of loss or injury.

18. A number of members had questioned whether developing countries were sufficiently well placed to take part in negotiations with more advanced States, either to establish a regime or to settle reparation for loss or injury. That was a difficult question to which he could not give any hard and fast answer; but it was reasonable to suggest that a convention with the necessary supporting material would be useful, since a State could rely on it as an indication of how similar matters had been settled in the past. A set of rules and principles would make for some degree of international solidarity, and international organizations could play their part in helping to maintain standards and to ensure that the interests of certain countries were not at odds with those of the international community as a whole.

19. On the question of scope, he agreed that the definition of the "affected State" could be spelt out and related to the definition of "territory or control". The latter definition merely followed the normal boundary line between matters that were regarded as territorial or quasi-territorial and matters that were at large. He had suggested that the topic should not include situations in which the origin of the harm and the victim of the harm were located in the same territory, with the sole exceptions of a ship in innocent passage and an aircraft in authorized overflight. In his view, those two exceptions fell notionally outside the territory and therefore within the scope of the draft articles, since there were two sovereignties, neither of which was subordinate. Fishing zones raised a similar problem. Applying the ordinary rules, he considered that fishing in the economic zone of a coastal State would involve a quasi-territorial situation and so would fall outside the scope of the rules: the passage of a ship of a foreign State through an economic zone would, however, have international transboundary implications. He was fully aware that ships and aircraft posed special problems and that in matters concerning their regulation the control of the coastal State was often much diminished. But there was

⁸ *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 45th meeting, para. 72* (United States of America).

⁹ Article 8 of the Convention, subpara. (f), footnote 1 (see 1743rd meeting, footnote 7).

¹⁰ See 1739th meeting, footnote 7.

nothing about them that added to the variety of matters which might arise within the limits of the draft articles and there was no respect in which he had felt entitled to depart from his standing instruction to develop principles of absolute generality.

20. Another question raised had concerned the physical use of the environment and the extent to which the draft articles would be applicable in other areas. In his view, it was abundantly clear that the rules would apply only within a framework in which they achieved real meaning. It was possible that in the economic field there were no inchoate norms that might permit a balance-of-interest test to be applied. Certainly, the practice on which his reports were based arose in the field of the physical use of the environment. The materials thus developed would not be easily translatable to other areas, but certain members of the General Assembly had requested that the Commission should not arbitrarily foreclose such use, since the rules might serve as examples for other developing fields of international law. It was possible that the point might be reached in economic affairs at which certain broad norms were evolved, and the same kind of rules that the Commission was now engaged in articulating would then be needed to make any balance-of-interest test work.

21. There were two choices in the matter of scope. Either the scope could be arbitrarily foreclosed before the materials were examined—a possibility already rejected by the General Assembly and the Commission—or the Commission could simply rely on the materials themselves. The Commission's work on the topic would henceforth be governed by the materials, which would be drawn almost entirely from what could broadly be termed the physical use of the human environment, although the Commission's attention would be drawn to anything else of interest that was discovered. The very nature of the practice on which the Commission had to rely would determine the immediate applicability of any rules adopted. Its duty to Governments, in his view, was simply to approach its work honestly, to assess the materials to see where they supported the rules, and to promote the idea of a law of co-operation.

22. Lastly, in reply to a question put by Mr. Malek, he drew an analogy with civil liberties within a country, where certain prohibitory rules were drawn up out of a sense of law and order at a given time and in a given society. Subject to those rules, individuals had freedom of action, provided they did not trample unduly on the freedom of others. He agreed that there would always be activities that could not be unlawful, even though they had a potential for harm; and in his view there would always be fresh applications for a set of rules of the kind being drafted. He trusted that, ultimately, there would be no grounds for asserting, at least in regard to the physical use of the environment, that the means for reconciling conflicting interests were non-existent.

23. Mr. USHAKOV said he was still convinced that the subject under consideration was entirely artificial. It was obvious that there was no obligation to make reparation for injury caused by acts not prohibited by international law—except, of course, if so agreed by the author of the act, in which case only a secondary obligation would arise. A comparison had been made with the Convention on the Law of the Sea, which contained a provision to the effect that States must not damage the marine environment,¹¹ but that was a primary rule, even though for the time being it was far too general and difficult to apply, and a breach of that rule would entail the responsibility of the State committing it. That, however, was the topic with which Mr. Riphagen was concerned.

24. To continue consideration of the topic would not enhance the Commission's prestige. Instead, it should inform the General Assembly that there was no general rule of customary international law on international liability for injurious consequences arising out of acts not prohibited by international law.

25. Mr. THIAM pointed out that, from the beginning, some members of the Commission, including himself, had asked Mr. Ago not to make too sharp a distinction between responsibility for wrongful acts and liability for acts not prohibited by international law; Mr. Ago had considered, however, that the subject was far too big to be dealt with in that way, though he had not said that there was a watertight division between the two kinds of responsibility.

26. In his third report (A/CN.4/360), the Special Rapporteur had tried to find new ground, because the position he had previously taken was difficult, and he had dealt mainly with prevention. He (Mr. Thiam) was not opposed to the study of preventive measures, but they had no connection with the topic as its title was worded. The Commission could, of course, draw up, perhaps in the form of a model convention, a code of conduct to be followed in order to prevent injurious consequences of acts not prohibited by international law. But then it would not be dealing with the topic as such, namely, injurious consequences, since it would only be concerned with the stage at which harmful consequences had not yet occurred. If it was to deal with liability for injury caused by acts that were not wrongful, it would have to determine the injurious consequences and, hence concern itself mainly with the question of reparation; and that, precisely, was Mr. Riphagen's subject. But if it wished to deal with prevention, it should adopt a different approach and, in any event, state its intention unambiguously.

27. Mr. DÍAZ GONZÁLEZ said that, despite his imaginative efforts, the Special Rapporteur had not been able to convince him that the topic under consideration was viable. As Mr. Ushakov had rightly said, the Commission should at least report the doubts expressed to the General Assembly.

¹¹ Art. 192 of the Convention (see 1699th meeting, footnote 7).

28. Sir Ian SINCLAIR said that he approached the topic as one on which the Commission need not necessarily consider itself bound to propose rules for adoption in an international convention. A new kind of approach should be worked out; perhaps the Commission could prepare guidelines for recommendation to the General Assembly covering prevention as well as reparation. The Chairman (1742nd meeting) had indicated a similar approach when he had spoken as a member of the Commission.
29. The topic was a difficult one in all conscience, and there might indeed be some disagreement as to the extent to which it could be separated from the law of State responsibility as such. He believed, however, that the Special Rapporteur would agree that the object was not to provide a complete set of cut and dried rules, but to propose guidelines that would operate both in the sphere of prevention and in that of reparation for loss or injury which had actually occurred.
30. Mr. KOROMA said that he would have agreed with Mr. Ushakov that the topic under consideration was artificial if it was concerned with activities. The law was concerned with acts, however, not with activities; whenever an accident occurred, there was a need for reparation. The Commission was attempting to work out guidelines for such liability and reparation, but they need not take the form of a convention or a strict regime.
31. Mr. SUCHARITKUL said that, as he had pointed out at the beginning of the debate (1735th meeting), the question of liability must cover not only remedial measures, but also prevention of injury. In connection with accidents that had occurred in the Malacca Strait to which he had referred earlier (*ibid.*), the riparian States, including Japan, had been active in devising preventive measures.
32. Mr. BARBOZA said that he too had had doubts from the outset about the viability of the topic under consideration. Like Mr. Thiam, he thought that, in terms of strict liability, the Special Rapporteur had not managed to assemble many elements, and the schematic outline submitted—although it had received unanimous praise—could only strengthen the doubts expressed. He thought the Commission should take a decision on the way in which it intended to deal with the topic and inform the General Assembly accordingly. It could either adopt the course indicated by Sir Ian Sinclair or prepare a kind of framework agreement, as Mr. Reuter had suggested (1742nd meeting).
33. Mr. McCAFFREY said that none of the remarks made at the meeting in progress were being made for the first time, nor did they contradict the Special Rapporteur's summing up. He associated himself with Sir Ian Sinclair's view that it would be premature to attempt to define the nature of the end-product of the topic under consideration. Although he himself had said (1743rd meeting) that the final product could take the form of guidelines, he agreed that it was too soon for the Commission to commit itself.
34. Mr. FRANCIS remarked that, having been closely associated with the work of the United Nations system since 1963, he was sensitive to the response of the General Assembly to action taken by the Commission. On the question whether guidelines or rules were to be prepared, he thought it would be premature to debate the ultimate outcome of the work. Any determination by the Commission as to how it would proceed should come after the Sixth Committee had had an opportunity to examine the Special Rapporteur's third report. In any event, he did not see how the work on which the Commission was now engaged could be avoided.
35. Mr. DÍAZ GONZÁLEZ said he had been convinced, both by the Special Rapporteur's presentation and by the general debate that had followed it, that the topic was not viable. It was quite clear that, after having examined three successive reports, the Commission still did not know what the topic included; and even the schematic outline submitted by the Special Rapporteur was based on a number of highly questionable and not very convincing concepts, such as that of "shared expectations", and lacked a reasoned foundation for liability.
36. As Mr. Barboza had said, the Commission should therefore inform the General Assembly of the progress of its work, so that the Assembly could take a decision. The Commission could perhaps consider adopting Mr. Reuter's suggestion and prepare a framework agreement containing general recommendations for States, which would conclude bilateral and multilateral agreements on that basis.
37. Mr. THIAM, referring to Mr. McCaffrey's remarks, observed that the arguments put forward by those who had doubts about the viability and substance of the topic were certainly not new. Some members of the Commission had expressed doubts when the first report had been considered, and he had himself done so at the previous session. The Commission had been exploring the subject for three years without making any progress, and it was high time to take a decision.
38. Mr. CALERO RODRIGUES said he shared the view that the Commission was not in a position to take a final decision on the difficult topic under study. Like Mr. Thiam, he considered the topic before the Commission to be that of liability for damage; but the Special Rapporteur had, from the very beginning, placed the emphasis on prevention. He himself had believed that it would be difficult to accommodate those two concepts; but in his third report the Special Rapporteur had submitted a plan by which that could perhaps be done.
39. Despite the doubts of many members concerning the topic, the schematic outline did represent progress, and if the Commission reported its results to the General Assembly they would show that it had found some grounds on which to proceed. It might later be found impossible to draft satisfactory provisions, either on prevention or even on reparation. In that case, as he

himself had said in the Sixth Committee,¹² the Commission should not hesitate to end consideration of the topic. At the present stage, however, in light of the progress made, it would be premature to say that the topic did not deserve further study. The Commission should indicate that it had doubts about the final result of its efforts, but should ask the Special Rapporteur to continue exploring the possibility of making a presentation to the General Assembly based on his schematic outline.

40. Mr. LACLETA MUÑOZ said he substantially endorsed the comments made by Mr. Calero Rodrigues. He reiterated his view that the subject-matter did exist, and the Commission should make a determined effort before concluding that it did not. The substance of the topic lay mainly in section 7 of the schematic outline; perhaps what was involved was not international liability arising out of lawful acts, but international liability arising out of lawful acts that caused harm. For his part, he considered that the Special Rapporteur should continue his efforts without prejudice, for the time being, to the form the draft would finally take—a convention or a code of conduct.

41. The CHAIRMAN, speaking as a member of the Commission, said that the views expressed by Mr. Calero Rodrigues were very close to his own. In his explorations, the Special Rapporteur had not come up with “dry holes”; he had really found something. Furthermore, the Sixth Committee itself seemed to be very interested in the work done so far. Nevertheless, it could legitimately be held that the Commission should not go any further because Governments would never agree to liability in any of the numerous areas explored. If that was the Commission’s opinion, it should be frankly expressed. In his opinion, Governments had already accepted and would accept more responsibilities, but the Commission did not seem to be dealing with a group of fixed primary rules concerning State liability for all sorts of activities. Nor did he think that draft articles should be prepared on a particular activity, which would be subjected to prohibitions in future years.

42. It could also be held that the Commission should go no further because its task was to prepare draft articles that could form conventions; if it was not sure of being able to elaborate such a draft on a certain subject, it should abandon the study of that subject. That was not his own opinion; he believed those views would lead the Commission to give up the study of several subjects. Moreover, if the General Assembly had shown some interest in the work on the subject under examination, that was precisely because it often produced texts which did not contain real legal rules, but only indications, directives or standards. Perhaps those members of the Commission who maintained that it was always necessary to draft articles that could serve as the basis for a convention would, unfortunately, no longer hold that opinion when the Commission prepared articles on responsibility for crimes.

43. The report under examination (A/CN.4/360) was extremely valuable and deserved more thorough discussion. Since he had not had time to examine it in detail, he intended to submit written comments to the Special Rapporteur.

44. Speaking as Chairman, he observed that the discussion had dealt mainly with three questions: the content of the Commission’s report to the General Assembly, the wording of the topic, and the instructions to be given to the Special Rapporteur. With regard to the content of the report, it was essential to give a faithful account of the opinions expressed in the Commission. The members did not really differ very widely in their views. The Commission was in the position of an oil prospecting company which had discovered a small deposit, but did not quite know what to do with it. Perhaps it was dealing with a non-marketable product and would say that it could not draft a convention, or guidelines, or even a framework agreement. He was not sure the Commission would solve the problem, but neither was he sure that it would not. It remained to be seen whether the Commission intended to convey its doubts to the General Assembly and inform it that in spite of disagreements the Commission believed that it was worth continuing the work, in the hope of arriving at a clearer position the following year. With regard to the wording of the topic, he agreed with Mr. Thiam that the situation should be put frankly to the General Assembly. Perhaps the present wording was awkward and should be slightly broadened. On the instructions to be given to the Special Rapporteur, he suggested that, faced with a subject needing fuller consideration, each member of the Commission should answer in writing the questions raised by the excellent schematic outline drawn up by the Special Rapporteur. On the basis of those answers, the Special Rapporteur should be able to pronounce on the direction the Commission’s work should take.

45. Mr. USHAKOV said he wished to emphasize that the Special Rapporteur was not responsible for the situation in which the Commission was placed and that, on the contrary, he should be commended for his meritorious efforts.

46. The CHAIRMAN said that Mr. Ushakov had expressed the unanimous feeling of the Commission. As a member he believed that the Commission should take a small risk: that of ending up with a result that did not satisfy it.

47. Mr. FRANCIS said that, according to his understanding, the Chairman had suggested that members should convey to the Special Rapporteur in writing their thoughts on how he should proceed. There was nothing wrong with that suggestion in principle, but he believed the content and range of the discussions had provided the Special Rapporteur with the necessary guidance. The Commission should not depart from its traditional practice; the Special Rapporteur should continue his work on the basis of his response to the debates, taking the General Assembly’s attitude into account.

¹² *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 43rd meeting, para. 34.*

48. The CHAIRMAN said that the members of the Commission were free not to submit written comments to the Special Rapporteur, but that it would be desirable for those who had not sufficiently expressed their views to do so.

49. Mr. DÍAZ GONZÁLEZ said he had nothing against the suggestion that written comments should be submitted to the Special Rapporteur, but pointed out that it was for the Commission, not the Special Rapporteur to make a decision on whether to continue the work. The Commission's report to the General Assembly must in no way allow the seriousness of the Commission to be called in question. It was absolutely essential to present the situation as it appeared from the debates. Several members of the Commission believed that its lucubrations could continue, but others thought they must be ended now that three reports had been examined. It was clear from the schematic outline that the subject did not have a solid foundation. Reverting to the example of the oil company, he said the Commission was most unlikely to find a large deposit. Hence it was important for the General Assembly to have a clear view of the situation, so that it could decide what the Commission was to do.

50. The CHAIRMAN noted that the report should indicate that some members of the Commission believed that further work on the topic could not lead to positive results.

51. Sir Ian SINCLAIR said it was clear that the report would have to indicate that views in the Commission were divided as to the future pursuit of the topic. In the Sixth Committee, he had expressed scepticism concerning the nature and value of the product which might emerge,¹³ but at the current session, after careful study of the Special Rapporteur's three reports, he had come to a conclusion similar to that of the Chairman. The topic did contain something worth pursuing, though it might not yield to the treatment the Commission usually applied to the drafting of articles for eventual incorporation in an international convention. The Commission had a duty, not only to itself, but also to the international community, not to be constrained by past practice into thinking that no other solution existed. He believed there would be injurious consequences for the Commission's reputation in the Sixth Committee and perhaps in the international community as a whole if it concluded at that stage that there was nothing in the present topic to which its work could make a useful contribution.

52. Mr. BARBOZA also believed that the Commission should confine itself to indicating that divergent opinions had been expressed on the viability of the topic, and that the report should faithfully reflect the position of each member. It was necessary to dispel the doubts expressed in the Commission. Sooner or later, members would have to reach agreement on what they intended to do. The Commission could not simply

restrict itself to drafting articles, without knowing whether it was to produce a work of codification or of progressive development of international law, or even prepare a practical guide for States.

53. Mr. KOROMA said he would like some clarification of Mr. Ni's reference (1739th meeting) to private law analogies in the elaboration of the topic under consideration. It was not clear to him whether that observation should be understood as meaning that there were no private law analogies or sources, as it were, on which the topic could be constructed.

54. In his opinion, the Commission should continue to explore the topic; if, at an appropriate stage, it concluded that the work should be discontinued, it could do so. For the moment, however, he believed that sufficient sources did exist, both in private law and in international conventions, to justify further exploration.

55. Mr. USHAKOV urged the need for making a decision. Perhaps the Commission could indicate that some members had doubts about the viability of the topic and that it would take a final decision on that question at its next session. Personally, in the light of his long experience of the Commission, he was convinced that the topic was not viable, but perhaps some new members had not yet fully grasped that point.

56. Mr. RIPHAGEN suggested that the Special Rapporteur should be asked to continue his work along the lines indicated in his third report. In his own view, there was no great difference between a convention, a framework convention and recommended practice. It was a question of degree, which could be decided at the last minute. But the Commission should point out that the topic, as worded by the General Assembly in terms of reparation for injurious consequences, was not one with which it could deal. The Commission could consider the topic only within the framework of a system of prevention and negotiating procedures.

57. The CHAIRMAN said that the Commission now had a complete picture of the situation and would no doubt be able to reproduce it faithfully in its report. It was because their hope factors were not the same that the members of the Commission had different positions.

The meeting rose at 6.05 p.m.

1745TH MEETING

Wednesday, 14 July 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Co-operation with other bodies (concluded)* [Agenda item 11]

¹³ *Ibid.*, 40th meeting, para. 9.

* Resumed from the 1726th meeting.