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Summary record of the 1739th meeting

Topic:
International liability for injurious consequences arising out of acts not prohibited by international law

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international crime and, in particular, of the consequence that an international crime entailed obligations for all States.

4. Some drafting changes would, in his opinion, help to make the meaning of the new article 2 clearer. It should be borne in mind that that provision dealt with the balance to be struck between the seriousness of an internationally wrongful act and the seriousness of the reaction to it. Indeed, every situation created by an internationally wrongful act was unique and the reaction to such an act would depend on the circumstances of the particular case.

5. He proposed that the Commission should refer the new articles 1 to 6 and the former articles 1 to 3 to the Drafting Committee, on the understanding that the latter would prepare framework provisions and decide whether an article along the lines of the new article 6 should have a place in those provisions.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed, on that understanding, to refer the new articles 1 to 6 and the former articles 1 to 3 to the Drafting Committee.

It was so decided.

The meeting rose at 10.25 a.m.

1739th MEETING

Monday, 5 July 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

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

[Agenda item 4]

THIRD REPORT BY THE SPECIAL RAPPORTEUR
(continued)

SCHEMATIC OUTLINE² (continued)

1. Mr. MALEK said he would confine himself to some preliminary comments on the Special Rapporteur's third report (A/CN.4/360), which was so complex that it could not be assimilated without reference to the two previous reports and to the Commission's debates on them. The Commission's study of the subject had made considerable progress, but was still in the initial stage. Members had expressed different and sometimes conflicting views on questions that were often fundamental

and called for prior general agreement in the Commission. None of them, however, had seemed to doubt the advisability or the necessity of persevering with the topic. Thus the Commission had not been discouraged when noting the complexity of the problems involved and discussing the difficulties inherent in solving them. After having devoted so much time and effort to studying the topic of State responsibility, the Commission could not leave in abeyance a subject that could not be separated from it, no matter what efforts were made to do so.

2. In his second report, the Special Rapporteur noted that "the regime of responsibility for wrongful acts and the regime with which the present topic deals are not mutually exclusive" and that "the regime described in the title of the topic is not, as has often been thought, an anomalous collection of limiting cases for which the regime of State responsibility for wrongfulness fails to provide" (A/CN.4/346 and Add.1 and 2, paras. 9 and 10). Serious doubts had, indeed, been expressed in the Commission as to whether the distinction between the two topics was justified. For instance, Mr. Reuter had said at the previous session that "certain lawful activities" which the Commission had in mind "were in the process of becoming wrongful".³ It might be asked what would become of the rules the Commission was to draw up if that prediction came true in the near future.

3. Doubts had also been expressed in the Commission as to the pertinence of the distinction between primary and secondary rules for the purposes of the topic under study, and as to whether the texts to be prepared would belong in either of those categories of rules. His own view was that the discerning comments made on that point by the Special Rapporteur in his first two reports, and during the Commission's discussions, were of undoubted scientific interest.

4. It seemed that the Commission ought to reach general agreement, preferably at the current session, on a number of basic questions. In particular, it should adopt a general approach for the continuation of its work and delimit the scope of the topic. It should also take decisions on certain concepts such as the balance of interests, the criterion of foreseeability or duty of care, and the criterion of causality. Not only did the third report deal with all those matters; it also contained proposals on each of them that took account of the views expressed both in the Commission and in the Sixth Committee. The report, which was of high scientific value, had the merit of putting forward a general plan which would be extremely useful for the drafting of articles.

5. Mr. RIPHAGEN reminded the Commission that, in introducing his own topic at the 1731st meeting, he had said that, represented graphically, the topic under consideration would be near the centre, while the topic of State responsibility would be more towards the periphery. In a way, the topic of international liability

* Resumed from the 1735th meeting.

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

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

³ *Yearbook ... 1981*, vol. I, p. 220, 1685th meeting, para. 27.

started with part 3 of the draft articles on State responsibility, on “implementation”, as shown in sections 2 to 4 of the schematic outline, which related to information and fact-finding, regime-building, and reparation respectively. Moreover, section 1 of the schematic outline corresponded to part 1 of the draft on State responsibility in that it dealt with what might be called the imputability of the conduct both of the acting State and of the affected State, and raised the question whether consideration should be given to “omissions” or “lack of activity”, which terms were similar to the term “related conduct” used in part 1 of the draft articles on State responsibility.⁴ The central theme of the topic under consideration was the “contribution/distribution” issue. Paragraphs 24 to 29 of the third report (A/CN.4/360) referred specifically to the distribution of costs and benefits, which corresponded to the notions of obligations and rights that were of such great importance in the topic of State responsibility.

6. The ultimate normative basis of the entire regime of liability was to be found in what the Special Rapporteur had called, in section 4 of the outline, the “shared expectations” of the States concerned. The notion of “shared expectations” was not unlike that of the “general principles of law” referred to in Article 38 of the Statute of the International Court of Justice. It was interesting to note that according to section 4, subparagraph 4 (b), of the schematic outline, shared expectations could be “implied from common legislative or other standards” or, in other words, from internal law, and that section 5, paragraphs 2 and 3, referred to some of those shared expectations. Thus, in section 5, paragraph 2 required “measures of prevention” and paragraph 3 stated that “an innocent victim should not be left to bear his loss or injury”. He believed that meant that the activities with which the topic was concerned should somehow be governed at the internal level and that section 5, paragraphs 2 and 3, might serve as a kind of common internal regulation for the States concerned.

7. He wondered whether it would not be possible to go even further and require that, if there was a national regulation concerning the activities in question, it should be applied without discrimination to the effects of both activities conducted within and activities conducted outside “the territory or control” of the State concerned. It might even be possible to state the principle that the victims or prospective victims should have equal access to any administrative, quasi-judicial or even judicial machinery provided for in a national regulation.

8. The question arose, however, whether such an “extended” rule should not, as was so often the case in matters of national jurisdiction, be subject to the requirement of reciprocity. Some kind of reciprocity did seem to be implied in the notion of “shared expectations”. Indeed, there might be a rule that one State could not re-

quire another State to do more in the field of prevention and reparation than it was prepared to do itself within its own jurisdiction. The notion of reciprocity was obviously not a formal one, since national regulations could differ according to differences in national “environments”. It was global or overall reciprocity that counted. The Special Rapporteur, who had referred to the notion of “shared expectations” only in regard to reparation, should also refer to that notion in connection with the preventive aspects of the topic.

9. In dealing with “circumstances precluding wrongfulness” in chapter V of part 1 of the draft articles on State responsibility⁵ and, in particular, in article 31, paragraph 2, article 32, paragraph 2, and article 33, subparagraph 2 (c), the Commission had referred to the circumstances to which the author State contributed, but as that chapter was not exhaustive, it had not referred to the circumstances to which the victim State contributed, the victim State being the one against which the circumstance precluding wrongfulness was invoked. It had been pointed out during the Commission’s discussions on article 33 (State of necessity) that a “grave and imminent peril”, which was the first condition for invoking a state of necessity, might well be blamed on the injured State; in such a case, a plea of state of necessity might be more easily acceptable.

10. In the areas covered by the topic under consideration, the relationship between the acting State and the affected State was much closer than in classical State responsibility, as suggested in section 6, paragraph 14, of the schematic outline, which included, as a factor that might be relevant to a balancing of interests, the “extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury”. That paragraph established a close link between contributions to, and the distribution of, benefits between the States concerned. Both the acting State and the affected State might have technical means of preventing loss or injury caused by pollution. The co-ordination or lack of co-ordination of land use in border areas provided an example of the close connection between the conduct of the acting State and the conduct of the affected State. If State A planned to build an industrial area on its border with State B and State B planned to build a residential or recreational area on the opposite side of the border, the two States would inevitably face problems of transboundary pollution.

11. The treatment of third States was of great importance both in the law of treaties and in the law of State responsibility. Indeed, a bilateral approach was typical of classical international law and the Special Rapporteur had perhaps wisely given his schematic outline a bilateral slant, referring, as he had, to the acting State and the affected State. Unfortunately, however, there were often more than two States involved, and the balancing of interests then became even more complicated. According to section 1, paragraph 1, of the

⁴ *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁵ *Ibid.*, pp. 33 *et seq.*

schematic outline, activities within the territory or control of State A might give rise to loss or injury to persons or things within the territory or control of State B, through the territory or control of State C, the "transit State". What would be the legal position of the transit State in the regime provided for in the outline? That question would be of particular importance if the transit State was able to do something about the activities in State A which gave rise to loss or injury in State B. A simple answer would be that in such a case State C was not a third State, but although that answer might be correct as far as the physical use of the environment was concerned, it might not be valid in other fields covered by the topic under study.

12. Although the Commission had dealt with the question of the active attribution of conduct in articles 5 to 15 of part 1 of the draft articles on State responsibility,⁶ it still had not considered the question of passive attribution, which meant the factual circumstances in which a State was injured or considered to be injured. For the topic under consideration, the active and passive attributability of conduct had been covered by the words "within the territory or control of a State" in section 1, paragraph 1, of the schematic outline. The complications that might arise as a result of the use of those words had been discussed in paragraphs 44 and 45 of the third report. Whether or not those complications had to be dealt with in the context of the topic was, however, a matter for future consideration.

13. For the time being, it might simply be noted that the activities of one State could affect the activities of another State as a result of a pure relationship of fact. For example, the fact that, in France, large amounts of salt were dumped into the Rhine every day in the course of industrial activities meant that agricultural activities in the Netherlands could be carried out only at the considerable cost of "de-polluting" the Rhine water. There was no doubt about the factual relationship between those two activities; the main question to be answered was what legal consequences should be drawn from that factual relationship in terms of some kind of "shared management". In the present context, therefore the legal niceties of the meaning of the term "territory" or the term "jurisdiction", which were so important in other fields of international law, were hardly relevant at all. The example he had just given related to activities which were quite normal and which involved a fairly obvious chain of causation, but what it really involved was the use of a shared resource, which was only one of the seventeen factors mentioned in section 6 of the schematic outline.

14. It was nevertheless clear from paragraphs 19 to 23 and 35 to 42 of the third report that the Special Rapporteur planned to apply the regime proposed in the schematic outline to other situations as well. One of those situations involved the co-existence of ultra-hazardous and normal activities, which often led to the enactment of special provisions of international law

relating to risk allocation and shifts in the burden of proof in relation to the chain of causality. Another situation to which the proposed regime would apply was that in which international economic and monetary action by one State caused loss or injury to persons or things in another State, through the medium of more or less predictable human behaviour. For example: devaluation of a national currency, a policy on interest rates followed by the central bank of a State, Government regulation of wage levels, or national legislation on quality standards—all of which could have a tremendous impact on economic activities in another State. It was quite clear from the practice of States, however, that virtually no degree of shared management in such areas was acceptable, at least by the States which "called the tune" in economic or monetary matters.

15. In paragraph 43 of his third report, the Special Rapporteur had said that "matters relating to the treatment of aliens are outside the scope of the present topic". In paragraph 45, he had added that "Quite conceivably, there are situations of this kind [situations involving exported industries] in which the 'exporting' State should be prepared to share with the receiving State authority and responsibility for the establishment and monitoring of appropriate technical standards". Although he fully agreed with that statement, he had to point out that it concerned the question of the treatment of aliens and that he was not sure that the words "should be prepared ..." reflected the practice of States. It was at that point that the question arose of what the Special Rapporteur had referred to, in paragraph 46 of his report, as the "natural boundaries of [the] topic". It was extremely difficult to ignore the fundamental difference between natural movement across political borders and human movement across those borders in the form of international trade in the broad sense of the term. Although an individual State could control the second kind of movement, it could not control the first. In the third sentence of paragraph 47 the Special Rapporteur had seemed to recognize the difference between natural and human movements. That important difference should be taken into account in section 1 of the outline, because the question whether it was materially possible for the affected State to prevent movement through which activities in the acting State might cause loss or injury in the affected State was of crucial importance for the structure outlined in the third report.

16. Another aspect of the question of movement, which had already been touched upon in connection with the criterion of "territory or control", was that of human transboundary movement which could be protected by conventional or customary rules of international law. A legal impossibility was thus created for a potentially affected State and it might be asked whether such a legal impossibility could be equated with a factual impossibility, thus bringing into play the regime of the schematic outline, which was a regime of "shared management". Such a regime did not seem to be in keeping with the practice of States, at least so far as the

⁶ *Ibid.*, pp. 30-31.

international movement of ships and aircraft was concerned. Indeed, existing international conventions on ships and aircraft provided for a division of jurisdiction, which always involved some degree of extraterritoriality of the *res in transitu*, since the movement itself was considered to be in the interests of the international community as a whole. He therefore had some reservations about subparagraph (d) (ii) of section 1, paragraph 2, of the outline, and thought the Commission would be well advised not to deal with the particular regime pertaining to ships and aircraft.

17. Mr. NI said that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was a difficult one, not only because it had not been explored in detail in the past, but also because it entailed an attempt to resolve the contradiction between a State's freedom to conduct creative activities within its own borders and the concern of other States to avoid harm resulting from such activities. The Commission's work on the topic would require a high degree of creativity, but not sheer speculation or conjecture. The available source materials were limited both in scope and in quantity, but they would have to suffice.

18. At the Commission's last two sessions, it had been said that the topic was concerned with "primary" rules of obligations and that it in no way affected the "secondary" rules of State responsibility. Various theories, such as "strict liability", "no-fault liability", the "duty of care" and the "special situation of ultra-hazards" had been advanced, but none seemed to be generally acceptable. Answers had also been sought in materials of jurisprudence such as the *Trail Smelter* arbitration,⁷ the *Corfu Channel* case,⁸ the *Lake Lanoux* arbitration⁹ and the *Nuclear Tests* case¹⁰ and in the Stockholm Declaration.¹¹ In view of the great complexity of interrelationships in the modern world, however, it had been found that different interests had to be carefully weighed and accommodated and it was thus that the balance of interests test had begun to take shape.

19. The Commission's task was to supplement the maxim *sic utere tuo ut alienum non laedas* by other relevant principles in the light of the requirements of the modern world. In paragraph 85 of his second report (A/CN.4/346 and Add.1 and 2), the Special Rapporteur had stated that:

The topic is the product of interdependence among States and peoples. They have to regulate their affairs with minimum resort to prohibition, but also without lawlessness. They need rules that persuade compliance, because observance will correspond with interest.

In paragraph 2 of his third report (A/CN.4/360), the Special Rapporteur had also said that the Sixth Com-

mittee had encouraged the Commission to pursue its work by "finding firm foundations in existing law and building creatively upon those foundations a structure that would serve the cause of interdependence in the modern world". The interests of different States and peoples would, of course, have to be taken into account if the idea of interdependence was to survive at all.

20. The Special Rapporteur's basic aims of placing emphasis upon prevention and reparation and striking a balance between freedom to act and the duty not to injure, would serve as important guidelines for the Commission's work on the topic. Emphasis was not placed on prevention alone, because prevention would imply a duty of care and to establish enforceable rules of prevention would be to depart from the terms of reference laid down for the topic, which was not concerned with rules of prohibition. With regard to the question of the legal relationship between the duty of prevention and the obligation to make reparation, the Special Rapporteur had ingeniously suggested in paragraph 21 of his third report that:

Elements of reparation ... fall into their proper perspective as a commutation of the duty of prevention, when the prevention of all risks can be achieved only by desisting from the activity, or when the costs of the latter duty are punitive in relation to the magnitude of the risk and the added financial burden upon a beneficial activity,

thereby striking a balance between freedom to act and the duty not to injure. Instead of taking measures to prohibit an activity which was useful and beneficial, the acting State assumed the duty of reparation for risks when such risks might cause injury in the future. But what should be done if the risks became overwhelming? Could the operator of the activity go ahead without interference because it was able to assume, either in law or in fact, a blanket obligation to pay compensation? Such questions would require further consideration.

21. In practice, prevention and reparation occurred at different stages. Only when prevention had failed would reparation come into play. The Special Rapporteur had indicated that it would be better for the rights and interests of the States concerned to be regulated before loss or injury occurred. He had also stressed the point that the topic was ultimately concerned with the obligation to make reparation for a loss or injury actually sustained, with minimizing the risk of loss or injury; and with making appropriate provision for risks which could not be reasonably avoided. The acting State was encouraged, but not required, to minimize risks and arrange suitable coverage for them.

22. The most important aim was, as the Special Rapporteur had pointed out, to promote agreements between States in order to accommodate, rather than inhibit, activities which were predominantly beneficial. The first step towards reconciliation of the interests of States was, according to the Special Rapporteur, recognition of the duties to provide information, to consider representations, to negotiate in good faith and, in general, to co-operate. Failing agreement, the acting State would have the duty of establishing its own regime based on its own estimate of the dangers involved, but if

⁷ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁸ *I.C.J. Reports 1949*, p. 4.

⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281.

¹⁰ *I.C.J. Reports 1974*, p. 253, and *ibid.*, p. 457.

¹¹ See 1735th meeting, footnote 3.

loss or injury occurred, it could negotiate a settlement with the other State or States concerned. That was the main thrust of the primarily procedural rules to be developed, which would serve as guidelines for the negotiation of agreements. By proceeding empirically, examining materials, demonstrating principles that appeared to be consistently reflected in those materials and generalizing from the practice of States in reconciling and accommodating conflicting interests, it might be possible to find some rules that would justify the attempts made in the balance of interests test. Care must be taken, however, not to impair the interests of the developing countries, which lacked experience and technological skills and might therefore not be able, for some time to come, to meet the requirements and standards which were valid for the more advanced countries. That concern had been taken into account in Principle 23 of the Stockholm Declaration.

23. The approach to be followed was basically a gradual one. The Special Rapporteur had rightly noted that the best course was to suspend judgement about the unresolved question of scope until the content of the topic had been more fully explored (A/CN.4/360, para. 48). There should, however, be some idea of what would eventually be covered. For in the long term the Commission's work should not be limited to considering materials relating only to the physical use of the environment. Liability for risks from activities in outer space and for the adverse effects of economic activities were important issues in modern international life and they should be kept within the purview of the study, even though work on them might not be initiated immediately.

24. The schematic outline contained in the third report gave a comprehensive idea of what the Special Rapporteur had in mind, as well as of the questions that were relevant to the topic, which, in his own view, involved not only codification, but also progressive development of international law. The Secretary-General of the United Nations had indicated, in his introduction to the "Survey of International Law", that "the present needs of the world are such that a vastly more active attitude is now taken to the development of international law".¹² It had rightly been said in the Sixth Committee of the General Assembly that "the articles the Commission prepares on particular topics combine elements of both *lex lata* and *lex ferenda*" (A/CN.4/L.339, para. 225). And lastly, the late Judge Lauterpacht had said that, in most cases, the work of the Commission on a given topic partakes of the nature both of codification and of development of international law.¹³ Those statements were, in his view, particularly applicable to the topic under consideration.

¹² *Yearbook ... 1971*, vol. II (Part Two), p. 7, document A/CN.4/245, para. 19.

¹³ "Second report on the law of treaties", submitted to the Commission's sixth session (1954) by the Special Rapporteur, H. Lauterpacht (*Yearbook ... 1954*, vol. II, p. 131, document A/CN.4/87, para. 3 of the commentary to article 9).

25. Mr. BALANDA said that the report before the Commission was lucid and the Special Rapporteur had taken care to reflect the comments made by members at the previous session. The idea of submitting a schematic outline attested to the foresight of the Special Rapporteur, but that method of work had the disadvantage of being slow, since after the Commission had decided on the broad content of the draft, it would still have to consider the wording of the articles and integrate them into the general structure.

26. In his second and third reports, the Special Rapporteur had often used the word "wrongful". His own view was that that word was not appropriate for the topic under consideration, which related only to acts "not prohibited" by international law. The same applied to the idea of the point at which liability was incurred. According to the Special Rapporteur, any activity that went beyond a certain point would become wrongful. But the topic under consideration did not seem to come within the field of liability for wrongfulness.

27. As was clear from its title, the topic was concerned *inter alia* with the position of international organizations, which were not only subjects of international law but could, like States, carry out activities that came within the scope of the topic. If harm was done, would the international liability incurred be that of an organization, of all its member States, or of the State on whose territory the harmful activity was carried out?

28. With regard to the term "acting State", he noted that in reply to a question put by Mr. Ushakov, the Special Rapporteur had explained at the previous session that the words "acts" and "activities" referred both to positive acts and to omissions.¹⁴ During the discussion on article 1, submitted in his second report (A/CN.4/346 and Add.1 and 2, para. 93), the Special Rapporteur had said that the word "activities", in the sense in which it was used in that article, "referred not to the acts of the State itself, but to the activities within the State, or within the jurisdiction or control of the State, in respect of which the State itself had obligations". He had added that the word "activities" referred to "what people did within the territory of the State".¹⁵ In paragraph 42 of the third report (A/CN.4/360), the Special Rapporteur confirmed that point.

29. He (Mr. Balanda) therefore wondered whether the draft was intended to make the State liable for the consequences of activities which it did not itself carry out; it would thus be presumed to derive benefit from an activity that took place on its territory. That was a very questionable presumption, particularly from the economic viewpoint, considering the case of multinational companies which, in order to benefit from a more favourable tax regime or because they were looking for new markets, set up in business outside their territory of

¹⁴ *Yearbook 1981*, vol. I, p. 224, 1686th meeting, para. 18.

¹⁵ *Ibid.*, pp. 219 and 220, 1685th meeting, paras. 17 and 22.

origin. By doing so, not only did they export high risks, especially in regard to pollution, but they also made enormous profits which were then repatriated. The establishment of such industries benefited from favourable treatment, including exemption from customs duties, and the selling price of their products was often left to the discretion of the manufacturer. So what benefit did the new countries derive from such situations? In those circumstances, one could hardly speak of a balance of interests. Moreover, the idea that the State would be responsible for the consequences of activities carried out by individuals in its territory or under its control, seemed to conflict with the definition of the expression “territory or control”, given in the schematic outline (sect. 1, para. 2), according to which it included “any activity which takes place within the substantial control of that State”. Could States, at any rate those of the third world, claim to exercise substantial control over the activities of transnational companies in their territory? That part of the definition also meant that the State would only be responsible for activities which it carried out itself, as was clear from the word “substantial”. The proposed text, however, sought to establish the contrary. Similarly, if only the activities of individuals were to be considered, the expression “acting State” should not be used.

30. In his second report the Special Rapporteur expressed the view that, as an almost invariable rule, the conventional regimes did not distinguish cases according to whether the activities were carried out by individuals or by agencies of the State (A/CN.4/346 and Add.1 and 2, para. 71). He also referred to the Convention on International Liability for Damage Caused by Space Objects,¹⁶ which defined the term “launching State” as a State which “launches or procures the launching of a space object”, as well as a State “from whose territory or facility a space object is launched”. Nothing in that definition said that the State would be responsible for the acts of individuals. The activity could indeed be carried out by individuals, provided that the State assumed responsibility for it either by prior authorization of the launching from its territory or by allowing its facilities to be used for the purpose. The State thus accepted the risk of injurious consequences of activities it authorized and might conceivably assume responsibility for them. On the other hand, commercial companies did not necessarily receive such authorization. Their legal framework was laid down by law and, once they had adopted one of the prescribed forms, they acquired legal personality.

31. With regard to causality, the Special Rapporteur had said the previous year that he had not urged that causality, as such, should be adopted as a basic generating force.¹⁷ Where reparation for injury was concerned, however, that concept could not be entirely discarded. It would increase the burden of reparation if a State were to be held liable for all the consequences of

an activity carried out on its territory. Internal law held that in regard to compensation for damage, only the direct or immediate consequences must be taken into account, and the Commission could be guided by that principle.

32. As to the concept of foreseeability, he noted that the Special Rapporteur had said that the problem of strict liability was limited to cases in which damage could not be foreseen.¹⁸ If it was really implicit in the idea of strict liability that damage could not be foreseen, he wondered why the Special Rapporteur had dwelt on the duty to foresee in his third report.

33. The concept of the balance of interests was an *idée force* of the third report. It applied to legally protected interests—a notion that had not been defined. It should be specified whether those interests were protected by international law or by internal law. Furthermore, the idea of balance postulated the existence of reciprocal interests; but in the case of transboundary damage, were reciprocal interests of States always involved? Since, according to the Special Rapporteur, the activity to be considered was not that of the State, but that of persons acting on its territory, very few interests of the State in whose territory the activity was carried out would be directly affected. The beneficiaries of the activity would certainly be the persons carrying it out, so that one could not speak of interests of the State in whose territory the activity was carried out. The neighbouring State, on the other hand, had an interest in being protected against the possible consequences of harmful activities. In the event of damage, loss or injury, it also had a right to reparation.

34. The Special Rapporteur was inclined to be guided by the situation existing in regard to environmental protection. But in that sphere, everyone had an interest in benefiting from protection that was as effective as possible, whereas in the case of transboundary damage, all the parties concerned did not necessarily have an interest, so that it was not possible to speak of a balance of interests. In the absence of definite reciprocal interests, could one speak of “distribution of costs and benefits” and require a State to participate financially in the fact-finding machinery if it had suffered injury?

35. He also noted that the Special Rapporteur said, in his third report (A/CN.4/360, para. 14), that:

To give effect to such a rule, a balance of interest test has to be applied to find the point of intersection of harm and wrong.

Any idea of wrong should be excluded from the draft articles, however, because they applied to activities not prohibited by international law. The balance of interests, if there were interests, should be assured at the outset, that was to say, before the activity in question was undertaken, since in the field considered, injury was assumed to be always unforeseeable and possible. In addition, the balance of interests should also—and mainly—be determined in terms of the benefit derived by the author of the activity and the harm it might cause.

¹⁶ United Nations, *Juridical Yearbook*, 1971 (Sales No. E.73.V.1), p. 111.

¹⁷ *Yearbook ... 1981*, vol. 1, p. 222, 1686th meeting, para. 7, *al fine*.

¹⁸ *Ibid.*, p. 217, 1685th meeting, para. 3.

36. If, as appeared from paragraphs 21 and 24 of the third report, a State could be made to suffer loss or injury, it would also be advisable, in the name of the balance principle, to recognize that the acting State should sometimes be dissuaded from undertaking an activity, even if it could derive benefits therefrom, in cases which entailed grave risks for man or his habitat.

37. Referring to section 2 of the schematic outline, he observed that compliance with the provisions of paragraphs 1 and 3 would depend solely on the goodwill and good faith of the acting State, which, in the event of loss or injury, had a duty to provide "all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable ...". But there was every reason to believe that for fear of increasing the burden of reparation, the acting State would minimize the losses. It would thus be both judge and a party to the case.

38. The provisions set out in paragraph 2 would be difficult for new States to apply, because they often lacked the technology and, in particular, the personnel to inform them in good faith of the degrees of loss or injury which, according to their estimate, could result from an activity carried on in the territory of another State. For such information the new States would be practically compelled to apply to foreign technicians who, out of solidarity with the foreign enterprise whose activities they were investigating, would tend to minimize the effects, in order to protect the interests of their compatriots.

39. With regard to paragraphs 4 and 5, he wondered how fact-finding requirements provided for there could be reconciled with the reasons of national or industrial security mentioned in paragraph 3. The affected State might find that, on the pretext of national or industrial security, it was disarmed and powerless to establish as accurately as possible the nature and extent of the possible or actual loss or injury. The effects of the fact-finding machinery were virtually obliterated by the terms of subparagraph 6 (b), which provided that its report would not be binding on the States concerned. Paragraph 7 recommended a rule that was bold, to say the least, since it provided that the affected State would contribute to the costs of the fact-finding machinery, although it had not contributed to causing the harm.

40. The whole edifice which section 2 was intended to build by laying specific duties on the State that caused the actual or possible loss or injury was demolished by the provisions of paragraph 8, as also by those of section 3, paragraph 4, which stipulated that "Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action". He would rather have expected the statement of a duty which would have made it possible to establish some sort of link between strict liability and responsibility for wrongful acts, in the sense that failure to fulfil the obligations laid down in section 2 would constitute an internationally wrongful act. The State which was, or might be, affected was at the mercy of the acting State,

since according to section 2, paragraph 8, the affected State's right of action was paralysed whereas the acting State had complete freedom to decide on the kind of action it would condescend to take in order to limit the loss or injury.

41. Section 3, paragraph 1, of the outline also stated a weak rule, imposing a duty on the States parties to a dispute to enter into negotiations if it did not prove possible to establish fact-finding machinery within a reasonable time. In other words, the paragraph established the obligation to settle disputes peacefully, and the fact-finding procedure was one way of doing so. But although that obligation was laid down in the Charter of the United Nations, it had never prevented States from resorting to force to settle their disputes. Why did section 2 limit the freedom of States to a procedure for establishing the facts and circumstances relating to the loss or injury? It would be wiser not to impose a single type of procedure on States: it was for them to decide, in each specific case, on the procedure that they considered most appropriate.

42. Although the principle of reparation for loss or injury was stated in paragraph 2 of section 4, it was given a very minor role in paragraph 2 of section 5; there, the initial emphasis was on measures of prevention, and the duty to make reparations arose only to the extent that, despite the precautions taken, loss or injury occurred. Thus the very concept of liability seemed to be minimized, whereas once it existed, liability entailed the duty of reparation, even in the form of token compensation. The duty to make reparation for injurious consequences of activities not prohibited by international law should be affirmed and laid down in a fundamental rule.

43. According to section 5, paragraph 2, of the outline, "the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability". He supposed that a State might thus decide to discontinue any preventive measure if it was likely to disrupt the financial balance of the enterprise concerned. In those circumstances, a State or group of States might be exposed to a permanent danger on the pretext that measures to prevent the harm were too costly; but that would be overlooking the balance principle which, according to the Special Rapporteur, lay at the very centre of the mechanism of strict liability. It therefore seemed that the interests of the State carrying out the harmful activity were preferred to those of the victim. For how long would the affected State continue to put up with that state of affairs?

44. Section 5, paragraph 3 introduced, for the first time, the idea of an innocent victim, which implied that there was also another kind of victim. He was inclined to believe that in the context of the general mechanism of international liability for injurious consequences of activities not prohibited by international law, any State that suffered injury should, by definition, be regarded as an innocent victim. Indeed, any consideration of participation in causing the harm should be excluded. He also considered that the fact that the victim had agreed

that the acting State could carry out the harmful activity if it took measures to prevent loss or injury would not deprive the affected State of the character of an innocent victim.

45. In the light of the Special Rapporteur's remarks in paragraph 10 and 41 of his third report, he thought the principle of reparation could be worded on the following lines:

“Any injury resulting from an activity of a State carried on outside the territory of the said State or within the limits of its jurisdiction must give rise to fair reparation.”

That wording would avoid any reference to liability; for, in the context of the draft articles, the element of imputability did not have to be either discussed or proved: it could be assumed to exist, because the author of an activity which had caused, or which could cause, loss or injury was known. The only elements to be taken into consideration would be the activity and the injury or the reparation, without, of course, forgetting prevention.

46. The notion of reparation for injury and the modalities of compensation should be further developed later. As some members had said at the previous session, the idea of automatism should not be entirely rejected, and that applied in all cases. Despite the difficulties of defining the term “exceptional risks”, the notion of automatism could perhaps be retained, if only in that particular case, since certain human activities, by their very nature, obviously involved a greater or lesser degree of danger. After all, the Special Rapporteur himself was in favour of the principle of reparation, for he had written in his second report (A/CN.4/346 and Add.1 and 2, para. 47):

Can it really be true that States ... are content to regard the existing law as requiring them to endure the harmful consequences of activities conducted with due care within the territory or jurisdiction of other States?

47. Mr. USHAKOV said that the Special Rapporteur's third report (A/CN.4/360) strengthened his conviction that the topic under study was, for the time being, entirely artificial. There was, indeed, no general rule of international law that imposed a duty on a State to indemnify its nationals, another State or the nationals of that other State for injury suffered as the result of an activity not prohibited by international law which it had carried out. Such an obligation existed only by virtue of the agreements in force: it bound the States parties to those agreements in any case, and perhaps also States that were not parties to them. That was equally true in internal law: harm caused by human activities which were not prohibited by law—and all human activities, agricultural or industrial, could ultimately be harmful although they were essential to progress—could not give rise to compensation. Moreover, he considered that the Commission should not concern itself with environmental protection, which hardly fell within the scope of the topic under consideration.

48. The international community was currently engaged in drawing up agreements to govern the conduct of harmful activities that were not prohibited by international law, so presumably such activities could only be restricted in the future, not prohibited: only then would primary obligations come into being, which would entail international responsibility in the event of violation. For the time being, it would be utopian to draw up general rules of international law on international liability for injurious consequences arising out of acts not prohibited by international law.

49. Mr. CALERO RODRIGUES said that the acts or activities referred to in the title of the topic differed from those dealt with in the context of State responsibility in that they did not constitute breaches of international obligations and that they included acts not only of States but of State organs or agencies, as well as of private individuals and juridical persons. He understood the fact that only States were referred to as meaning that States would be made accountable for the consequences of any such acts or activities and would enjoy special powers to simplify any reparation, or even prevention, procedures.

50. In the final analysis, the term “international liability” meant an obligation of compensation. It was the task of the Commission to endeavour to define the content, forms and degrees of such liability. While the acting State was unquestionably accountable for any loss or injury caused, it was by no means certain that it could be held accountable in respect of preventive measures. Such measures could be applied in some cases, but not in others, and the possibility of unforeseen consequences always existed.

51. In his second report (A/CN.4/346 and Add.1 and 2, para. 92) the Special Rapporteur had referred to the necessity of avoiding the monster of strict liability and giving pride of place, in the draft articles, to the concept of prevention. In his own view, it might not be possible entirely to avoid all reference to the concept of strict liability. Nor was he convinced that the emphasis should be placed on the concept of prevention.

52. In his third report (A/CN.4/360), the Special Rapporteur had set a very useful course. His schematic outline of the topic was of particular importance to the Commission for determining whether the approach adopted was viable. The Commission should now indicate whether it considered that the schematic outline constituted a basis for further work on the topic. In an area which was so ill-defined, a definition of the scope of the topic was of particular importance. While he agreed in general with the definition proposed by the Special Rapporteur in section 1, paragraph 1, of his outline, he had difficulty with the words “which give rise or may give rise to loss or injury”. He was glad to note that the Special Rapporteur had decided not to retain the concept of potentiality referred to in his second report and had reached the conclusion that, in relation to the establishment of a regime of prevention, all injury was prospective, whereas, in the context of reparation,

all injury was actual (*ibid.*, para. 35). In that connection, he noted that in paragraph 27 of his third report the Special Rapporteur described the occurrence of loss or injury as "a pure question of fact", whereas in paragraph 34, he referred to loss or injury as being "material or non-material". In his own view, what distinguished liability from responsibility was, precisely, that liability was concerned with material loss or injury, whereas responsibility was concerned, first and foremost, with a legal loss or injury resulting from the breach of an obligation. With those reservations, he found the definition of the scope of the topic proposed by the Special Rapporteur generally acceptable.

53. In section 2 of his schematic outline, the Special Rapporteur proposed a regime for prevention. Paragraph 1 of that section contained a reference to loss or injury: it should be made clearer that whereas a regime of compensation applied if a loss or injury actually occurred, a regime of prevention could apply only with respect to continuation of the activity concerned. In the same paragraph, the Special Rapporteur had emphasized the duty of the acting State to take remedial or preventive measures in order to avoid future loss or injury. While that was an essential part of any regime of prevention, the Special Rapporteur had perhaps given too much prominence to the procedures to be followed in adopting such measures. It was most important to recognize that the international responsibility of a State was not engaged if it failed to follow the recommended procedures. It might, in fact, be possible for a State to determine the remedial measures to be taken without any reference to those procedures.

54. In section 3, paragraph 3, of the outline, the Special Rapporteur referred to the rights and obligations of the States parties under the draft articles. In that context it would be more appropriate to speak of satisfying interests than of satisfying rights and obligations. The regime of reparation proposed by the Special Rapporteur in section 4 appeared somewhat limited. In paragraph 3 of that section, it was stated that the reparation due was to be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5, taking into account the factors set out in sections 6 and 7. The concept of shared expectations was unsatisfactory. In section 4, paragraph 4, it was defined as a sort of consensus between the States concerned, expressed in exchanges between them or implied by common legislative or other standards or patterns of conduct observed by the States concerned or even by the international community. That definition raised the problem of the different stages of development of different countries. The standards applied in industrialized countries might not be applicable in developing countries. In any event, the concept of shared expectations contributed little to a regime of reparation.

55. One of the main principles set out in section 5, to be applied in ascertaining the reparation due to the affected State, was that an innocent victim should not be left to bear his loss or injury. While he considered the

word "innocent" to be more literary than legal, the principle itself was essential. However, a number of other concepts referred to, such as those of adequate protection, freedom of choice compatible with adequate protection and liberal recourse to inferences to establish whether an activity did, or might, give rise to loss or injury, seemed somewhat questionable.

56. It was difficult to see what role could be played by the factors set out in sections 6 and 7 in determining reparations. A number of the provisions in those sections could be better developed as specific provisions of the regimes of prevention or compensation, or as general principles to be placed at the beginning of the draft. Alternatively, if they were to serve merely as guidelines, they could be included in an annex to the articles. Part II of section 7, for example, could be developed as an aspect of the regime of reparation or compensation.

57. He found the schematic outline proposed by the Special Rapporteur generally acceptable.

The meeting rose at 6.10 p.m.

1740th MEETING

Tuesday, 6 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/L.341)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
DRAFTING COMMITTEE

ARTICLE 2, subparas. 1 (*c bis*) and (*h*), ARTICLE 5, ARTICLE 7, para. 4, ARTICLE 20, para. 3, ARTICLES 27 to 36, 36 *bis*, 37 to 80 and ANNEX.¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts of article 2, subparagraphs 1 (*c bis*) and (*h*); article 5; article 7, paragraph 4; article 20, paragraph 3; articles 27 to 36, 36 *bis* and 37 to 80 and the annex, as well as the titles of the corresponding parts and sections of the draft, adopted by the Drafting Committee (A/CN.4/L.341).

2. The texts and titles proposed by the Drafting Committee were the following:

* Resumed from the 1728th meeting.

¹ For the texts of draft articles 2, 7 and 20, adopted on second reading, and the original text of draft article 5, see *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.* For the text of draft articles 27 to 80 and the annex, adopted on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 71 *et seq.*