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Summary record of the 1743rd meeting

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

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there were grounds for codifying the principle of strict liability. At the present stage, any general rule of strict liability could justifiably be criticized as being too abstract.

32. He had some difficulties in that respect with the scope of the topic as proposed in section 1, paragraph 1, of the schematic outline, and in particular with the definition of the term "activity" in paragraph 2 (b). That definition was too broad and too abstract, and could even apply to the economic, financial and monetary activities of Governments. It would be entirely impractical for such activities to be included in the scope of the topic. The Special Rapporteur and several members of the Commission had rightly stressed the need for the progressive development of international law, as envisaged in principle 22 of the Stockholm Declaration and in article 235 of the Convention on the Law of the Sea. However, it would be pointless to lay down principles that did not have good prospects of being accepted by the majority of the international community, and he did not think that the international community was ready to accept the principles of absolute or strict liability. At the present stage, therefore, the Commission should aim at proposing guidelines or a framework for the consideration, negotiation or arbitration of specific cases, and not a convention or principles of a legally binding nature. The scope of the guidelines should be more limited and more carefully defined than the scope of the topic as suggested in the schematic outline. They should in fact do no more than supplement or strengthen existing international legal regimes relating to the protection of the environment.

33. The Special Rapporteur had proposed the balancing of interests as a means of solving the problem of reparation under a regime of strict liability. It should be borne in mind, however, that although a balancing of interests could solve that problem in some cases, it could not be used in cases where claims were settled on an *ex gratia* basis, a device to which Governments resorted when they wanted to avoid legal or political difficulties or did not wish to explain the legal basis for their decision to settle a claim. The notion of shared expectations mentioned in section 4, para. 2, of the schematic outline was of great interest and warranted further consideration, but in the light of the international community's experience with strict liability regimes it was difficult to see how it would be interpreted in specific cases.

34. He would appreciate it if the Special Rapporteur could explain whether the question of exhaustion of local remedies came within the topic. For example, could it be said that, in the *Trail Smelter* case, the Canadian Government could have required the United States nationals who had suffered loss or injury to exhaust local remedies before the Canadian courts? If Japan and New Zealand concluded a fishing agreement and Japanese fishing vessels were prevented from fishing in New Zealand waters because of water pollution caused by New Zealand, would the New Zealand Government be entitled to say that the Japanese fishermen concerned

had to exhaust local remedies in the New Zealand courts before the matter could be taken up by the two Governments?

The meeting rose at 1 p.m.

1743rd MEETING

Friday, 9 July 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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 OF THE SPECIAL RAPPORTEUR (*continued*)

SCHEMATIC OUTLINE² (*continued*)

1. Mr. BARBOZA congratulated the Special Rapporteur on his third report (A/CN.4/360), which showed a great effort of will to discharge an extremely difficult task. Where the delimitation of the topic was concerned, what came to mind first was liability for risk as it existed in internal law, where legislative provisions requiring some degree of care and foresight were usually enacted concerning activities that involved risks but were at the same time necessary or useful. In the event of an accident, the persons engaged in such activities were required to make reparation, even if they had exercised all the care and foresight required by the law.

2. This would have been the proper field for the topic of the Special Rapporteur, but it so happened that States had preferred to conclude treaties relating to specific activities, such as the launching of objects into space, oil transport and nuclear operations. The Special Rapporteur had in fact drawn up an exhaustive list of the conventions relating to liability for damage caused by such activities. There was no doubt that the method followed thus far in international law had advantages. It consisted in laying down rules concerning prevention that were adapted to each kind of activity, and prescribing compensation procedures for each case. It might therefore be thought that the States members of the international community would not be much inclined to conclude a convention laying down general rules on dangerous activities, and consequently, this field does not appear as a promising one for the Special Rapporteur.

3. Undoubtedly, the cases covered by part I, chapter V, of the draft articles on State responsibility³

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

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

³ *Yearbook ... 1980*, vol. II (Part Two), pp. 33 *et seq.*

belonged to the present topic. They related to acts of the State not held to be wrongful because of certain circumstances. The relevant articles of the draft did not exclude the possibility of compensation if damage was caused. But cases of that kind were rare and constituted a very small field of study for the topic assigned to the Special Rapporteur. He asked himself what was then left as a substantial field for this topic. It was precisely in the face of that situation, that the Special Rapporteur had made a great effort of imagination. In his view, activities could be carried out in the territory or under the control of a State and cause loss or injury to another State, exceeding a certain limit, which must be assessed in accordance with the balance of interests concept. Beyond that limit, the activities that caused the damage were wrongful. But below the aforementioned limit, there was a certain amount of harm which had somehow to be tolerated by the injured State. The injury was then caused by a lawful act. It is here where the Special Rapporteur had chosen to place his topic, in a crepuscular zone where the sun of lawful conduct has set, but the obscurity of wrongfulness has not yet descended. In that twilight zone, there were obligations that were not real obligations, like the obligation to provide information, and interests that, strictly speaking, were not rights. The result was that the topic did not appear to be a really legal one. Perhaps the Special Rapporteur took a rather broad view. He personally had serious misgivings about the possibilities of developing the Special Rapporteur's topic in such a field.

4. In his third report, the Special Rapporteur rightly stressed the importance of prevention. But the breach of any obligations laid down concerning prevention would lead the Commission into the area of wrongful conduct, which was foreign to the topic under study. So the Special Rapporteur imagines a regime of prevention without obligations, which although having the advantage of encouraging co-operation between States, seemed to be ineffective. It must be acknowledged, unfortunately, that the Special Rapporteur had not succeeded in steering between the two reefs of prevention and wrongfulness.

5. The schematic outline proposed by the Special Rapporteur was excellent as a method of work and would certainly serve as a model. After all that other members of the Commission had said about it, few comments were required. It should, however, be noted that section 2, paragraph 1, which specified the acting State's duty "to provide the affected State with all relevant and available information", formed the mainstay of the entire prevention system developed by the Special Rapporteur. That duty to provide information obliged the acting State, in particular, to give details of the losses or injuries it considered to be foreseeable and to propose remedial measures. If those measures did not satisfy the affected State, a fact-finding procedure might be undertaken, in conformity with section 2, paragraph 4.

6. Generally speaking, he endorsed those provisions, although they seemed open to practical objections. For instance, the usefulness of the procedure was entirely

relative, since it might cause delays in a situation where speed was essential. A State wishing to engage in a certain activity should not be liable to be hindered by the opposition of the affected State. Moreover, in general, the sole consequence of the acting State's failure to provide the information required was the procedural disadvantage specified in section 5, paragraph 4, according to which the affected State was allowed "a liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury". That consequence was logical, but it constituted a procedural disadvantage which implied a sanction. There was thus a duty to inform, dereliction of which constituted wrongful conduct. In any case, the sanction provided for seemed insufficient. Ultimately, if the acting State did not take the measures required, no right of action arose, as was stated in section 2, paragraph 8. The obligation was thus minimal and non-fulfilment did not appear to give rise to a real sanction.

7. In the various cases referred to in section 3, paragraph 1, the States concerned had a duty "to enter into negotiations at the request of any one of them with a view to determining whether a regime is necessary and what form it should take". There again, nothing happened when a State would not co-operate. The wording of section 3, paragraph 4 was modelled on that of section 2, paragraph 8: failure to comply did not give rise to any right of action.

8. In his report (*ibid.*, para. 13), the Special Rapporteur had drawn broadly on the *Trail Smelter* case.⁴ That case was certainly of great interest, but it should be noted that a real regime of prevention had been imposed on the smelter by the court, and that it included duties of care. The reparation regime proposed by the Special Rapporteur rested instead on firmer foundations than the previous regime. The obligation to negotiate laid down in section 4, paragraph 1, derived from the obligation to make reparation. If the obligation to negotiate in good faith was not fulfilled, perhaps part 2 of the draft articles on State responsibility would become applicable.

9. Mr. McCAFFREY said it was quite clear that the Special Rapporteur was making every effort to achieve the primary objective of "capturing" the topic under consideration, which had been described as a "rogue elephant" (A/CN.4/360, para. 46), and confining it within manageable bounds. That objective was all the more important in that it would be difficult for the Commission to draw up guidelines, let alone rules or procedural mechanisms, unless it knew precisely for what situations guidance was to be provided. Once he himself had overcome the obstacle of trying to define the situations which the topic was intended to cover, it had been much easier for him to approach the answer to many of the other questions that arose. In any event, he was in substantial agreement with the basic approach

⁴ See 1739th meeting, footnote 7.

adopted by the Special Rapporteur, whether they both understood the topic in precisely the same way or not.

10. Although the title was quite complex, it did offer some clues as to the meaning and nature of the topic. In his view, the nub of the topic was the fact that an "act" or, more accurately, an "activity", which was not prohibited by international law could produce injurious consequences for which there was nonetheless international liability. In other words, a State might be liable for the injurious consequences of its acts even if such acts were not prohibited by international law.

11. The key to the understanding of the topic lay in internal law. Although he would refer to the United States version of common law, he believed that its features had counterparts in other States and systems. The theories of liability for nuisance and negligence and of strict liability were convenient starting points for trying to understand the topic. All three pertained to activities which were not prohibited. In the cases of nuisance and negligence, it was unreasonable or careless conduct in carrying out an activity that gave rise to liability; in the case of strict liability, the activity in question was usually one that was socially desirable, but involved risks against which it was nearly impossible to guard without discontinuing the activity.

12. The *Trail Smelter* arbitration was one of the best known examples of a case which, in a domestic context, would involve liability for nuisance, and which was a classic illustration of the principle *sic utere tuo ut alienum non laedas*, and could be said to involve activities carried out in the right way but in the wrong place. Since most of the principles that applied to liability for nuisance were also applicable in the field of riparian rights, there seemed to be a close link between the topic under consideration and the topic of the non-navigational uses of international watercourses.

13. Liability for negligence would, for example, be entailed if a factory was operated so carelessly that it emitted unreasonable quantities of toxic substances. In connection with strict liability, the Special Rapporteur had aptly referred to the example of the incident which had occurred in the United States, in March 1979, at the Three Mile Island nuclear power plant. Strict liability would also come into play in situations involving the explosives industry and in other industrial situations where problems of proof would create intolerable burdens for the victims of defective products.

14. The problem at the international level was that, generally speaking, there was no well-developed system of rules that corresponded to the rules relating to liability for nuisance and negligence and strict liability, that existed in the municipal law of most countries. At best, the international rules relating to such forms of liability were in the embryonic stage of development, as the Special Rapporteur had rightly pointed out in connection with strict liability, in paragraph 20 of his third report. The need for some kind of substantive or procedural regime at the international level was underscored by the fact that it was by no means clear

that private remedies would always be available. That had, for example, been the case in the *Trail Smelter* arbitration, in which a private suit in Canada by the United States plaintiffs had been precluded by a "local action rule" requiring that actions to recover for injury to land must be brought at the *situs* of the land, namely, the State of Washington, which, at the time, had had no "long arm" statute. It had therefore been impossible for action to be brought in that State, and the only recourse for the injured parties had been to take up their claim with the United States Government.

15. Thus, in view of the need for international rules relating to liability, he agreed with the members who had said that in carrying out its work on the topic under consideration the Commission would be engaged primarily in progressive development of international law. With regard to the approach to such progressive development, he thought the Special Rapporteur was quite right in considering his task to be the elaboration of a procedural framework designed both to enable individual States to settle specific conflicts regarding the use of natural resources and to give international law freedom to develop within controlled parameters.

16. His own ideas on the scope of the topic were obviously defined to some extent by his view that it dealt largely, if not exclusively, with situations involving either conflicting uses of the natural environment or injurious consequences transmitted through the medium of the natural environment. It would therefore seem wise to limit the scope of the topic to transboundary environmental problems. He agreed with Mr. Riphagen (1739th meeting) and Sir Ian Sinclair (1742nd meeting) that the Commission should be very cautious about extending the scope of the topic beyond what the Special Rapporteur had referred to in his report as "dangers arising out of the physical use of the environment" (A/CN.4/360, para. 46). Such a limitation of scope seemed especially justified in the light of the fact that, as noted in the report (*ibid.*, para. 48), "the materials on which the Special Rapporteur must rely would largely be found in the area of the use of the physical environment". Clearly, rules relating to the harmful effects of, for example, drugs or economic, trade or financial measures would be difficult, if not impossible, to elaborate on the basis of materials relating to the use of the physical environment. He also endorsed the conclusion stated by the Special Rapporteur (*ibid.*, para. 49) that "it makes very good sense to proceed empirically, examining materials and demonstrating principles which appear to be consistently reflected in those materials".

17. The schematic outline should, in his view, contain a reference to principles such as those of non-discrimination and equal access embodied in the Nordic Convention on the Protection of the Environment⁵ and in the OECD Guiding Principles concerning the Interna-

⁵ Convention done at Stockholm on 19 February 1974, between Denmark, Finland, Norway and Sweden (*International Legal Materials* (Washington, D.C.), vol. XIII, No. 3 (May 1974), p. 591).

tional Economic Aspects of Environmental Policies.⁶ With regard to section 1, he shared Sir Ian Sinclair's reservations (1742nd meeting) concerning the potentially unlimited scope of the topic and, in particular, the problem of attributability. Empirical work would be of great value in dealing with those problems.

18. In section 1, paragraph 2, the term "acting State" appeared to refer only to an activity carried out by the State itself, not to a private activity carried out within the State. That term might therefore be replaced by the term "source State". In his view, it would be better for the term "activity" not to relate also to "a lack of activity to remove a natural danger". Reference might rather be made to other types of omission. A question that came to mind in connection with the definition of the term "loss or injury" was whether the words "property of a State" covered the air. Was air pollution covered only when it caused a demonstrable and legally recognizable loss to private persons, or was a mere deterioration of air quality sufficient? Such questions would undoubtedly be answered at a later stage. The definition of the expression "territory or control" raised questions, especially because of the words "substantial control", to which careful consideration would have to be given in order to determine whether they covered, for example, activities carried out under licence of the "acting" or "source" State. That problem was, to some extent, covered in section 6, paragraph 11.

19. Sections 2 and 3 contained a framework for a regime of prevention. In that connection, he fully agreed with the aim, which the Special Rapporteur had stated in paragraph 9 of his third report, of giving "pride of place" to prevention. He also agreed with Sir Ian Sinclair (*ibid.*), that acceptance of the rules contained in section 2, paragraph 8—which might, moreover, be either rules, principles or standards—would depend on the scope of the topic. Such rules would apply to environmental problems, but not to other types of problem, and failure to comply with them would not engage State liability or give rise to any right of action.

20. Section 2, paragraph 2, made him wonder what the effect of acquiescence by the affected State would be, and what would happen in a situation where the threat was within the knowledge of the State to be affected and it failed to inform the source State or to request that State to take action. Ample precedent for the duty to inform was to be found in the ECE Convention on Long-Range Transboundary Air Pollution,⁷ in the Nordic Convention on the Protection of the Environment, in title B of the OECD Guiding Principles and in internal United States legislation such as the Clean Air Act amendments and the Federal Water Pollution Con-

trol Act amendments.⁸ In section 2, paragraph 5, it would be useful to provide for some kind of time frame, perhaps by adding the words "within a reasonable time" to that paragraph.

21. With regard to section 3, he agreed with Mr. Calero Rodrigues (1739th meeting) that prior fact-finding should not be a condition for the duty to negotiate. Section 4 dealt with the situation in which no regime had actually been established, but loss or injury had occurred. Paragraphs 2 to 4 related to the rather controversial notion of "shared expectations", which would be quite useful if it was not taken too far. Although the idea of "shared expectations implied from common legislative standards ..." referred to in subparagraph 4 (b) would require further refinement, it seemed to represent an attempt to identify the standards, values or factors with which the States concerned were in agreement. It would thus be a useful way of determining the amount of reparation due. The only danger was that a State might have "expectations" imputed to it on the basis of its internal legislation which it would never have had in an international situation. "Shared expectations" might be a proper goal, but it would not be an acceptable criterion for the settlement of specific international disputes. What the Special Rapporteur seemed to have had in mind, however, was that the reparation made should not do great violence to the reasonable expectations of the source State or affected State; in that sense, the idea of "shared expectations" was a useful tool.

22. He agreed with the principle stated in section 5, paragraph 2, that "standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability". In that connection, he noted that paragraphs 24 and 25 of the third report (A/CN.4/360) proposed that the balance of interests test should be used to harmonize the interests of the States concerned; paragraph 24, in particular, stressed the "common interest" of those States. Although an activity might be of great importance to the economy of a border region, for example, the criterion of economic viability should not be taken too far. It was sometimes tempting to give undue emphasis to easily quantifiable factors, such as economic indicators, at the expense of other, more subtle factors, such as the despoliation of a pristine natural area. Economic viability was a factor listed in section 6, paragraph 7; but it was only one factor among many, and in the present context it should be borne in mind that some of the persons affected by an activity might also benefit from it. The affected State would therefore have to take economic viability into account in deciding whether it would be wise to stop the activity or to seek crippling damages. It might well be that additional prevention or reparation would make the activity unprofitable without appreciably enhancing the remedy.

⁶ Recommendation adopted by the OECD's Council on 26 May 1972 (*OECD and the Environment* (Paris, OECD, 1979), pp. 25 *et seq.*).

⁷ Convention signed at Geneva on 13 November 1979 (ECE/HLM.1/2, annex I).

⁸ United States Public Law 95-95 of 7 August 1977 and Public Law 95-217 of 27 December 1977, respectively (*United States Statutes at Large, 1977* (Washington, D.C., U.S. Government Printing Office, 1980), vol. 91).

Sections 6 and 7 would serve as useful points of departure and contained much grist for the Commission's mill in the coming years.

23. It was clear that there was ample justification for the topic under consideration; that was to say there was a need to develop means of accommodating conflicting interests in the use of natural resources. At the present stage, he agreed with those members of the Commission who had suggested that the Commission's objective should be a set of guidelines or a framework agreement. The Special Rapporteur's third report would give the Commission a firm base from which to pursue that objective.

24. Mr. KOROMA said that, although the Special Rapporteur had rightly acknowledged in his third report (A/CN.4/360, para. 9) that:

To establish independently enforceable rules of prevention would be to depart entirely from the cardinal principle that the present topic is not concerned with rules of prohibition,

there seemed to be general support in the Commission for the idea of establishing a preventive regime. But since the maxim *sic utere tuo ut alienum non laedas* was permissive, in that it allowed States to do what they liked so long as they caused no injury to other States, he feared that if the Commission attempted to construct a preventive regime as a framework for the topic under consideration, it would not only be laying itself open to the criticism that it was stifling creativity, but would also be negating the very idea embodied in the title of the topic, which referred specifically to "acts not prohibited by international law". In that connection, he stressed that internal law and international law were both concerned with acts, not with activities.

25. It would also be quite unrealistic to try to construct a regime relating to ultra-hazardous activities; such a regime would not come into play until loss or injury had occurred. Indeed, a State could not be told what kind of activities it could carry out in its own territory, and its international liability would be engaged only if its activities actually caused loss or injury to another State.

26. He suggested that, in future work on the topic, account should be taken of the principle of good neighbourliness, to which Mr. McCaffrey had referred indirectly, as well as of acquisitive rights, to which he himself had referred at the previous meeting, and of the duty of States to respect the territorial integrity and sovereignty of other States.

27. Mr. RAZAFINDRALAMBO said it was most important to define the place of the topic under study in relation to that of State responsibility. It might be asked whether it was not a particular aspect of State responsibility, where the wrongfulness of the State's conduct was excluded as an exception. Such a view would be normal for anyone tempted to establish a parallel with the regime of civil liability in the internal law of States. In his opinion, the fact that the special regime of strict or no-fault liability was at present established only by agreements, in no way detracted from the finding that

the basis of a State's international liability was the existence of an obligation to make reparation for loss or injury actually sustained as the result of activities not prohibited by international law. However, the effect of a breach of that primary rule was to bring into play the regime of secondary rules of State responsibility, which showed the relationship between the normal regime of responsibility and the special regime of liability with which the Commission was currently concerned. It was from that starting point that the Special Rapporteur developed his two main concerns: to give precedence to prevention over reparation, and to ensure a balance between freedom to act and the duty not to injure. It was on those two main themes that the Special Rapporteur intended to base strict liability.

28. In regard to prevention, the Special Rapporteur advocated the elaboration of a regime, the elements of which he had stated in detail in section 2 of his schematic outline. His efforts were commendable, but it seemed that the acting State's failure to comply with the requirement of prevention incumbent on it had a direct effect on the obligation to make reparation. For in the event of actual loss or injury, a whole procedure was provided for in sections 2 and 3, but only to establish the kinds and degrees of loss and injury. It was difficult to see the practical value and effectiveness of the provisions laying down prevention measures. It was true that under section 2, paragraph 2, the affected State could itself take the initiative of informing the acting State of the risks of loss or injury; but if the affected party was a developing country, such an initiative on its part might not carry much weight with an industrialized acting State. Conversely, as the Special Rapporteur had observed (A/CN.4/360, para. 23), developing States had only limited means of knowledge about industries established in their territory. Ultimately, all the precautions taken to ensure effective prevention might remain a dead letter.

29. The concept of balance of interests appeared to be warranted only in so far as the forces in play were equal. Who could claim that a powerful multinational corporation, established in an acting or affected State, was not in a position to dictate to that State, when it considered the corporation's activities to be of vital economic importance for its development? In such a situation, it would be difficult to readjust the balance of the rights and interests of the parties without interfering in the internal affairs of States.

30. Moreover, in seeking to establish the balance of interests, one might come up against considerable difficulties arising from the major differences existing in many spheres between advanced countries and developing countries. Those differences were not unlike the differences to be observed in the awards damages by the national courts of certain countries: the amount of compensation was proportionate to the position of the injured parties in the social hierarchy. The developing countries might also suffer the fate often reserved for persons of modest condition in internal law. It was therefore to be feared that the assessment of interests

might not be made in the same way for advanced countries as for poor countries. It was open to question whether the advanced countries were prepared to take account of cultural and moral injury, and of delay in economic development, which was undoubtedly an element of the future injury to which Mr. Evensen had alluded (1741st meeting). In that regard, certain statements in the report might be disquieting in so far as the actual principle of reparation was not proclaimed unequivocally. The conditional tense was used in section 5, paragraph 3 of the outline, in stating that "In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury".

31. The Special Rapporteur should nevertheless be congratulated on his schematic outline, which contained a precise and comprehensive statement of the principles and modalities of international liability in the field under study, and formed a catalogue of provisions for the future articles. Like Mr. Calero Rodrigues (1739th meeting), he wondered whether the purely descriptive and procedural elements in the schematic outline, appearing in sections 6 and 7, would not be better placed in an annex, a recommendation or a kind of code of conduct, leaving only the primary rules to form the elements of a convention like the international labour conventions, which were often accompanied by recommendations. The suggestion was similar to Mr. Reuter's idea of a framework agreement (1742nd meeting).

32. In view of the increase in activities likely to cause loss or injury through the use of insufficiently tested new techniques, he wondered whether, in solving the problems connected with full reparation for injury, the Commission should not, in certain cases, be guided by the concept of collective guarantee or insurance of the STABEX type,⁹ which, in the relations between the EEC member States and the ACP States, provided compensation for losses due to a fall in the prices of certain primary commodities, by payment of a special indemnity. In section 6, paragraph 16, of the outline the Special Rapporteur alluded to international assistance, but, strangely enough, he seemed to restrict the benefit of the provision to the acting State.

33. In the present state of the world, so long as the international community did not manage to establish a new international economic order, the developing countries would always be in a position of inferiority in relation to countries that were technologically and economically far more advanced. It would be essential to bear that in mind when preparing the draft.

34. The CHAIRMAN, speaking as a member of the Commission, said he wished to congratulate the Special Rapporteur on his tireless efforts to identify the bases, content and scope of the topic, from data that were cer-

tainly very unreliable. Transposing to international relations the aphorism that one man's freedom ended where another's began, he emphasized that an activity not prohibited by international law could not entail liability for its author if it did not cause injury to another or to other States. Liability thus derived not from the act which was not prohibited by international law, but from the consequences of activities carried out by States in the exercise of their rights, and only in so far as those activities were likely to cause injury to another State. Thus, the problem was to determine the modalities for reparation of the injury caused, or to prevent such injury.

35. In its report to the General Assembly on the work of its thirty-second session the Commission had stated that:

*two principles that should be involved in the construction of any regime, and in the ascertainment of liability when no regime applied, were a standard of care commensurate with the nature of the danger, and guarantees related to the occurrence of injury rather than to the quality of the act causing injury.*¹⁰

That statement appeared to be highly logical, but raised certain difficulties—for example, the problem of how to determine the degree of care and to impose on States a norm specifying that degree and its variations. And how was the relation between the degree of care and the nature of the danger to be determined when the nature and scope of that danger were not known in advance? It would be necessary to create a new kind of lawful act, the future commission of which could be foreseen.

36. He would not revert to the comments he had made on the topic in the Commission and in the Sixth Committee of the General Assembly. He wished to point out, however, that in his third report, the Special Rapporteur centred the topic on the environment. At best, his draft articles would duplicate the work in progress in other United Nations bodies, or the principles of the Stockholm Declaration¹¹ and the recent Convention on the Law of the Sea.¹² But to base the draft articles on those two instruments would be to disregard the fact that the former was no more than a statement of principles and the latter had not yet entered into force.

37. As Mr. Reuter had indicated at the previous meeting, the Commission had reached a crossroads and must now take concrete decisions. But in the absence of practice and doctrine it would be extremely difficult, as the debate had shown, to extract from the "twilight zones" the raw material for drawing up practical and effective rules to limit or control State activities not prohibited by international law. Moreover, what could be said about the harmful activities which the colonial powers could lawfully carry out in their colonies?

38. He therefore agreed with Mr. Reuter and Sir Ian Sinclair that the Commission should rather try to draw up a framework agreement consisting of a series of very general principles that would serve as guidelines for States drawing up bilateral or multilateral agreements

⁹ System of Stabilisation of Export Earnings, set up by the first Lomé Convention concluded between the ECE and the ACP States in February 1975, and expanded by the second Lomé Convention, concluded in October 1979 (see 1707th meeting, footnote 4).

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), p. 160, para. 137.

¹¹ See 1735th meeting, footnote 3.

¹² See 1699th meeting, footnote 7.

on liability for injurious consequences of acts not prohibited by international law.

39. Mr. THIAM said that as he had already had occasion to point out, he did not really understand how the subject differed from that of State responsibility. Indeed, it had not yet been shown that there was a firm dividing line between what was lawful and what was wrongful. An activity considered lawful was often wrongful because of the way it was carried out, and vice versa. Besides, assuming that a firm dividing line could be drawn, the treatment of the injurious consequences of a lawful act would be the same as the treatment of the injurious consequences of a wrongful act. For ultimately, whether an act was lawful or wrongful, as soon as it caused injury it entailed reparation. So what was the difference, as to the nature of the reparation, between the consequences of a wrongful act and the consequences of a lawful act? There was none: injury required reparation, whether it resulted from a lawful or a wrongful act.

40. He did not see the need to make the topic a separate one. Nevertheless, he appreciated the concern caused in a fast developing world by the progress of research and technology, and the desirability of studying the injurious consequences of activities regarded as lawful. He therefore accepted the Special Rapporteur's presentation of his subject substantially under two aspects: that of prevention and that of reparation. But did prevention really come within the framework of a topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law"? According to that title the Commission should concern itself with the injurious consequences of acts, not the prevention of acts. It should not study measures to prevent acts which in any case were permitted by international law, but should concentrate solely on the consequences those acts could entail. He was not unaware of the importance of the problem of prevention in the interests of humanity; but that problem could be dealt with by agreements, regional or international conventions, as the case might be, and in any event, it was not within the competence of the Commission, any more than the procedural mechanisms proposed by the Special Rapporteur.

41. For all those reasons, he thought it would be well to consider drawing up a model framework agreement, to which States could refer when they needed to prevent or regulate acts not prohibited by international law. In conclusion, he said that he had strong reservations on the topic—not concerning its interest, which was considerable, but concerning the advisability of making it a separate topic from that of State responsibility.

42. Mr. EL RASHEED MOHAMED AHMED commended the Special Rapporteur for the very valuable work he had done on a difficult topic; with skill and erudition, he had given it a comprehensible shape. The topic was a timely one and covered an area in which there was a generally agreed need for regulation. Examples had been given by members of the Commission

of the problems that nations faced and would continue to face as a result of technological developments. It was the fate of man that his tools, though useful, were at the same time harmful in some respects: factories could emit harmful fumes and nuclear energy entailed the danger of radiation.

43. Seen from the point of view of State responsibility, the topic involved a variety of conceptual difficulties, stemming from the fact that a State could not be held liable for activities carried out within its own territory. On the other hand, injury or harm should be avoided. The topic fell within the area of *de lege ferenda*, and there was no reason for the Commission not to carry out progressive development of international law if there was clear evidence of the existence of a framework of rules established by administrative action. Efforts were already being made to regulate the transfer of technology, as evidenced by the Programme of Action on the Establishment of a New International Economic Order, which called for a code of conduct to cover the commercial and economic aspects of the transfer of technology.¹³ That could indicate that the other side of the question, too, was ripe for treatment.

44. In his report (A/CN.4/360), the Special Rapporteur had described the topic as an undefined area; but while it undoubtedly held all sorts of surprises, he had no doubt that the Special Rapporteur was equal to the task. He noted that the Special Rapporteur had decided not to retain the notion of a duty of care (*ibid.*, para. 19) and had also dropped the use of the word "harm" in favour of the words "loss or injury" (*ibid.*, para. 34). In that connection, he pointed out that a cardinal rule of Islamic law was that no harm or injury was permissible. That principle applied at both the national and the international levels and was the basis of a whole body of case law similar to that of England. In the famous case of *Donaghue v. Stevenson*,¹⁴ Lord Atkin had said that the rule that you are to love your neighbour becomes, in law, "you must not injure your neighbour". The evolution of international law was, however, more or less predicated on the rules regulating the conduct of individuals; for Governments, which were composed of individuals, acted under certain restraints dictated by their mutual and national interests. Accordingly, injury must not be permitted to go without remedy or redress. The Special Rapporteur, conscious of the fact that he was dealing with the acts of States, had emphasized the notion of prevention of injury, rather than reparation or compensation for the damage that would otherwise result from a given act. In general, he agreed with that approach.

45. He commended the Special Rapporteur on his proposed schematic outline of the topic. The term "activity" was too general, however, and should be kept within specific limits. The term "control", as used in

¹³ General Assembly resolution 3202 (S-VI) of 1 March 1974, sect. IV.

¹⁴ United Kingdom, *The Law Reports, 1932, House of Lords, Judicial Committee of the Privy Council, 1932* (London), p. 562.

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.