

Document:-  
**A/CN.4/SR.1735**

**Summary record of the 1735th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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tional law on responsibility for international crimes. Of course, measures did have to be taken against those crimes, but non-recognition of the wrongful situations they created was a primary obligation recognized by international law and affirmed, for example, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>9</sup>

46. Referring to article 4, he pointed out that, if a primary obligation was incompatible with a peremptory norm of general international law, that obligation was simply void under international law and could not be breached. But could obligations and rights provided for by international law be contrary to a peremptory norm of general international law? That did not seem possible, and that was why he did not understand the content of article 4.

47. Article 3 appeared to serve no purpose at the moment. The words "every breach by a State of an international obligation" could be replaced by the words "every internationally wrongful act of a State", since according to part 1 of the draft, it was such an act of the State that engaged its responsibility. The first clause of article 3 made it appear that all the provisions in part 2 of the draft would apply to internationally wrongful acts by States, whereas some of them would deal specifically with international crimes and delicts. The clause that followed seemed to refer to cases in which those concerned had agreed otherwise. It was, indeed, possible that the State which had committed the internationally wrongful act and the injured State could reach an agreement, either before or after the occurrence of the act. But it would be premature to provide for that possibility; the rules on the international responsibility of States should be established before specifying to what extent States could regard those rules as residual.

48. He was also perplexed by article 5. According to that provision, the States concerned should conform to the provisions and procedures embodied in the Charter of the United Nations. Yet the Charter contained nothing of the sort for States. It contained only provisions and procedures applicable to the organized international community, concerning the most serious crimes, such as aggression.

49. The Commission should begin by establishing the content, forms and degrees of State responsibility for international crimes, rather than the obligation not to recognize the wrongful situations.

*The meeting rose at 1 p.m.*

<sup>9</sup> See footnote 6 above.

## 1735th MEETING

*Monday, 28 June 1982, at 3.05 p.m.*

*Chairman:* Mr. Paul REUTER

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

[Agenda item 4]

### THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report (A/CN.4/360), which contained, in chapter II, an outline for a set of draft articles which read:

#### Schematic outline

##### SECTION 1

##### 1. Scope

Activities within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State.

[NOTES. (1) It is a matter for later review whether this provision needs to be supplemented or adapted, when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

##### 2. Definitions

(a) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(b) "Activity": includes any human activity.

[NOTE. Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?]

(c) "Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.

(d) "Territory or control" includes, in relation to places not within the territory of the acting State:

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight.

##### 3. Saving

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.

##### SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable and the remedial measures it proposes.

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury by an activity taking place within the territory or control of another State; the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable;

<sup>1</sup> Reproduced in *Yearbook ... 1981*, vol. II (Part One).

and the acting State has thereupon 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, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify a failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and, when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of, the inquiry; and, upon the establishment of the fact-finding machinery, Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(a) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications, and, to the extent possible, recommend solutions;

(b) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.

### SECTION 3

1. If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of reference; or (b) any State concerned is not satisfied with the findings or believes that other matters should be taken into consideration; or (c) the report of the fact-finding machinery so recommends, the States concerned have 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.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor including those set out in section 6; and may be guided by reference to any of the matters set out in section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles, and may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.

### SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury, unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State. Account may also be taken of any relevant factor including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, "shared expectations" include shared expectations which:

(a) have been expressed in correspondence or other exchanges between the States concerned or, insofar as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

### SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice in relation to activities within their territory or control as is compatible with adequate protection for the interests of affected States.

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, insofar as that is not possible, measures of reparation; but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.

3. Insofar as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be 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.

### SECTION 6

Factors which may be relevant to a balancing of interests include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);

2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);

3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);

4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;
5. The feasibility of carrying on the activity by alternative means or in alternative places;
6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);
7. The economic viability of the activity considered in relation to the cost of possible means of protection;
8. The availability of alternative activities;
9. The physical and technical capacities of the acting State (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);
10. The way in which existing standards of protection compare with:
  - (a) the standards applied by the affected State; and
  - (b) the standards applied in regional and international practice;
11. The extent to which the acting State:
  - (a) has effective control over the activity; and
  - (b) obtains a real benefit from the activity;
12. The extent to which the affected State shares in the benefits of the activity;
13. The extent to which the adverse effects arise from or affect the use of a shared resource;
14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;
15. The extent to which the interests of:
  - (a) the affected State; and
  - (b) the acting State
 are compatible with the interests of the general community;
16. The extent to which assistance to the acting State is available from third States or from international organizations;
17. The applicability of relevant principles and rules of international law.

#### SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation include:

##### I. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;
2. The establishment of procedural means for managing the activity and monitoring its effects;
3. The establishment of requirements concerning the structure and operation of the activity;
4. The taking of measures to assist the affected State in minimizing loss or injury.

##### II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;
2. A decision as to whether liability should be unlimited or limited;
3. The choice of a forum in which to determine the existence of liability and the amounts of compensation payable;
4. The establishment of procedures for the presentation of claims;
5. The identification of compensable loss or injury;

6. The test of the measure of compensation for loss or injury;
7. The establishment of forms and modalities for the payment of compensation awarded;
8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

##### III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations of the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions, the responsibility for making recommendations or taking decisions as to the matters referred to in I and II.

#### SECTION 8

Settlement of disputes (taking due account of recently concluded multilateral treaties that provide such measures).

2. Mr. QUENTIN-BAXTER (Special Rapporteur) said that in preparing his third report he had attempted to focus on the real substance of the topic and to eliminate differences that were attributable mainly to misunderstandings. In drafting the schematic outline of the topic he had taken into account specific suggestions made in the Sixth Committee at the thirty-sixth session of the General Assembly (A/CN.4/L.339, paras. 131-155). He hoped that, by the end of the current session, the Commission would be in a position to provide him with specific instructions so that deliberate progress could be made.

3. Initially, the topic had grown out of the Commission's work on part 1 of the draft articles on State responsibility. Mr. Ago, the previous Special Rapporteur on State responsibility, had said that, whereas his own draft articles dealt with obligations arising out of breaches of international obligations, there was clear evidence of the existence of obligations arising independently of prior wrongful acts. In the context of the topic under consideration, however, the ordinary rules of State responsibility could come into play only when the mechanism provided for in the draft articles failed to ensure the fulfilment of a duty of reparation. But to deal with the duties which arose and could be defined under the current topic, it was necessary to look back, in order to determine whether any established regime existed which provided a measure of the duty of the acting State in respect of loss or injury caused to another State.

4. One factor that gave rise to difficulty in dealing with the topic was the tendency to regard it as a series of scattered problems, which were not easily dealt with by the ordinary rules of State responsibility. Naturally, if an act by one State resulting in loss or injury to another State was prohibited by international law, the regime of State responsibility was automatically brought into play. But if the act itself was legitimate, it might fall within the area covered by the topic under consideration. Again, in the case of an accident occurring as the result of an activity conducted within the territory of a State, or in an area under its control, it would be impossible to conclude that that State's responsibility was automatically engaged. Nevertheless, it could be argued that, while the specific accident was not in itself

foreseeable, it formed part of a series of activities the nature of which was such that an accident of some kind might be expected to occur sooner or later. In that event, there was a tendency to believe that some reparation was called for.

5. When seen as consisting of a number of scattered problems at the edge of the regime of State responsibility, the topic gave rise to all kinds of conceptual difficulties. There were those, for example, who felt the need to draw a line between the area of State responsibility and the topic under consideration, or even to have it stated clearly that the acts dealt with were lawful. That, of course, had not been the intention of the Commission when it had decided on the title of the topic. The words "acts not prohibited" in the title meant acts, whether or not prohibited. Once that had been understood, it became clear that the topic dealt, not with scattered areas where the rules of State responsibility had worked badly or not at all, but with the very nature of modern international life.

6. It was virtually impossible for any State to exercise fully its freedom to engage in creative activity without creating a risk of loss or injury to another State across a physical or national boundary, the transboundary element always being present. The situations in which such problems—many of them closely connected with technological progress—could arise were numerous and their number was increasing daily. An activity conducted within the territory of a State could not be regarded as wrongful simply because it caused loss or injury elsewhere. Nor could a State that used its own territory in a way which caused vast losses and injury to another State be said to be acting lawfully. The topic under consideration was concerned with drawing the boundary line between those two areas, in order to determine the conditions under which an activity could be conducted without ever incurring a risk of wrongfulness. The topic involved another way of looking at the vast area of international interests and transactions, where progress was made, not by assertions or counter-assertions that an activity was wrongful or legitimate, but by an accommodation of interests.

7. Situations in which activities in one State, or in areas under its control, caused injury to other States were a common feature of contemporary international life. If the rules of general international law were to help in resolving such situations, they must provide guidance as to the duties of the States concerned. There was no lack of relevant State practice. At the global, regional and local levels, there was a fast-growing pattern of State practice which provided a series of concrete rules drawing the boundary lines between the interests of the acting and the affected States. On the basis of that practice, the Commission could provide general guidelines for the course to be followed by States in dealing with areas as yet unregulated. The articles on the topic would thus become the basis for an umbrella convention, as in the case of the articles on succession of States in respect of matters other than treaties. It was important to move away from the cut and dried rules of general interna-

tional law and to provide a set of norms based on a balancing of the interests of the States concerned. In that regard, encouragement was to be found in article 235 of the Convention on the Law of the Sea,<sup>2</sup> which dealt jointly with the concepts of responsibility and liability, and in the text of Principle 22 of the United Nations Conference on the Human Environment (Stockholm Declaration).<sup>3</sup>

8. In chapter II of his report, he had perhaps placed too much emphasis on bilateral situations where all the benefits accrued to one State while all the losses were incurred by another. Such situations in fact occurred infrequently, and in most cases there was a broader range of possibilities. Chapter II was intended to provide a very general and preliminary outline of the scope and content of the topic. The scope clause itself, contained in section 1, meant little unless read in conjunction with the definition of the expression "territory or control".

9. From the outset, it had been agreed not to deal with the treatment by a State of foreign persons or property within its territory. Such situations lacked the transboundary element essential to the topic. To define the topic in terms of territory alone would be simple, but consideration must also be given to areas outside the territory or control of any State. Ships in the course of innocent passage or aircraft in authorized over-flight, while technically within the territory of the State concerned, were really outside the territory of that State. The criterion must be a balance of responsibility. When an activity in the territory of a State was not understood by its authorities—as might be the case when an industry was exported from a developed to a developing country—safety standards might be relaxed, and an arrangement could be made for sharing responsibility for the industry between the two States concerned. The term "territory or control" excluded all questions affecting only the territory of the acting State, but included activities which took place under the control of one State, even within the territory of another.

10. The term "activity" was defined simply as including "any human activity". The use of that term indicated that the field concerned was not that of State responsibility as such, but one in which States engaged in free negotiation, balancing costs and benefits, rights and interests and taking all the relevant factors into account. If negotiations were unsuccessful, there would be mechanisms to assess what duties of reparation existed, on the basis of the activities of the State and the consequences of those activities. The only act of a State which could engage its responsibility for wrongfulness would be failure to make due reparation.

11. The term "loss or injury" was not given any restrictive meaning: the loss or injury might be material or otherwise. It was essentially a question of fact and in-

<sup>2</sup> See 1699th meeting, footnote 7.

<sup>3</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part 1, chap. 1.

volved no legal judgement. It was conceivable that a loss or injury could be incurred and no reparation be due, on the grounds that such loss or injury was accepted as part of the ordinary incidents of life. The legal significance of the term "loss or injury" could be derived from sections 2, 3 and 4 of the schematic outline.

12. The saving clause (section 1, para 3) was designed specifically to remind all concerned that the topic to be dealt with in the articles was not a substitute for any other rights or obligations. If loss or injury was caused in such a way that the affected State believed that the responsibility of the acting State was immediately engaged by virtue of the breach of an existing rule of international law, the affected State might rely on that rule, and the articles would not be invoked. Conversely, the affected State might deem it preferable to leave aside the question whether the loss or injury had occurred as a direct result of an unlawful act of another State, and take the position that it had been suffered in circumstances in which reparation ought to be made.

13. Paragraph 1 of section 2 of the outline enunciated the rule that a State conducting an activity in the territory of another State had a duty to inform the other State of any risk of loss or injury to which it might be exposed as a result of that activity, and of any course of action proposed for dealing with the matter. Paragraph 2 dealt with the right of the affected State to seek such information when it believed that loss or injury might be incurred as a result of the activity of another State within its territory. The acting State had a duty to consider such representations and to provide such information as circumstances allowed. Paragraph 3 recognized the ineluctable fact that there were questions of such importance to the security of States that no pertinent information could be provided. In such situations, the interests of security could not justify concealment from the affected State of the fact that it was exposed to danger. Moreover, if information was limited on grounds of security, the affected State was not bound to be satisfied with a blanket assurance from the acting State, and was entitled to take the worst possible view of its situation and call for an appropriate regime to be drawn up. When information had been exchanged, either State could propose fact-finding machinery to assess the nature of the danger involved. State practice indicated that neither State should be committed to accepting the findings of such machinery, unless otherwise agreed. Paragraph 8 provided that failure to take any step required by the rules contained in section 2 would not in itself give rise to any right of action. If that were not the case, the rules of State responsibility would immediately come into play. Unless it had been agreed otherwise, however, the acting State continued to have a duty to take any measures necessary to protect the interests of other States.

14. Section 3 dealt with the question of negotiations entered into by States with a view to drawing the boundary lines between what could be done and what must be endured. Such negotiations could be initiated if it seemed that fact-finding machinery would never be set

up, that it would not be possible to agree on its terms of reference or that its conclusions were inadequate, or if the fact-finding machinery recommended such negotiations. The negotiations would apply the basic principles set out in section 5, would take account of any relevant factor, including those set out in section 6, and would be guided by the methods provided for in section 7. Section 3, paragraph 3, made it clear that if a regime was established by the States concerned, that regime would supersede any further application of rules relating to international liability. It was, after all, the basic aim of the articles to promote harmony between the activities of States through agreements which took particular account of the circumstances of each State and struck a balance between the freedom of each State to act and its right to be protected against undesirable consequences of another State's actions. An agreement reached pursuant to section 3 would also provide for the settlement of disputes arising in connection with international liability.

15. Section 4 dealt with the stage at which a regime had not been established and an actual loss or injury had occurred. In those circumstances, the expectation was once again that the existing duty of reparation would be determined by setting up a regime retrospectively and considering the rights and obligations of the parties by reference to the provisions for establishing a regime. With regard to the assessment of loss or injury, section 4 differed substantially from sections 2 and 3 in that, if the stage of reparation had been reached and there was no applicable regime, there had to be a threshold of loss or injury. It would not be enough for a State to say that transboundary pollution had caused loss or injury. Even if the facts of such loss or injury were not in doubt, the acting State could still say that they had been the result of a situation which had existed for a long time and that there was nothing in the shared expectations of the States concerned to suggest that reparation was payable. The question of shared expectations thus became a governing consideration when there was actual loss or injury and no established regime. There might, however, be an uncompleted negotiation which gave an indication of the expectations of the parties in a particular respect. "Shared expectations" were defined in paragraph 4.

16. Section 5 embodied the essential principles of the entire topic. Paragraph 1 emphasized the aim of reconciling the activities and interests of the parties with a view to avoiding conflict. Paragraph 2 contained basic provisions for the test of a balance of interests and stressed that prospective loss or injury should be dealt with by prevention rather than by reparation. If prevention was not possible, a regime providing for reparation was the alternative, but both prevention and reparation must be kept in balance with the importance of the activity and its economic viability. Paragraph 3 stated the obvious principles that an innocent victim should not be left to bear his loss or injury; that it was a reasonable test of protection that its costs should be distributed in accordance with the benefits of the activity; and that

standards of protection should take account of those currently applied in the affected State and in regional and international practice. Paragraph 4 provided that if the acting State had not made full information available to the affected State, the affected State should be allowed recourse to inferences of fact and circumstantial evidence to demonstrate its entitlement to reparation.

17. Section 6 listed some of the factors that might be of importance in assessing a balance of costs and benefits between parties, whereas section 7 listed procedures which States could use to establish regimes for prevention and reparation.

18. In drafting sections 5 to 7, he had received valuable assistance from the Codification Division in the preparation of materials relating to State practice. The time would come when the content of the schematic outline would have to be completed by detailed references to those materials, which would be of great benefit to the Commission in its study of the topic.

19. Mr. SUCHARITKUL said it was clear from the title of the topic that there were three elements to be taken into account, namely, international liability, injurious consequences and consequences of acts not prohibited by international law. The element of liability had a specific connotation in the common-law tradition, which distinguished it from the notion of "State responsibility". The liability under discussion was not civil or criminal liability under internal law, but international liability, which could be attributed or traced to a State—to which the Special Rapporteur had chosen to refer as the "acting State"—and which always involved some element of strictness or absoluteness.

20. When the Commission came to study the topic in greater depth, it would also have to consider the question of joint liability, which might, for example, arise in the case of transboundary pollution caused by an industry which had been established in a developing country by a private company based in a developed country. In such a case, it would have to be decided whether it was the developed country or the developing country that would be liable, or only the private company concerned. The Special Rapporteur had referred quite usefully in section 1, paragraph 1, of his schematic outline to activities "within the control" of the acting State. It must, however, be borne in mind that, compared with developed countries, countries that were in process of expanding their industrial capacities had less experience of, and less abundant legislation on, technical means of evaluating the risks involved in certain industrial activities. Liability could be attributed to those countries only if it could be assumed that they had been aware, or ought to have been aware, of the consequences of their acts. Such liability would then be known in the common-law system as either strict, absolute or vicarious liability. Japan had, for example, assumed vicarious liability for the damages suffered by Malaysia, Indonesia and Singapore when oil had spilled into the Malacca Strait from the *Nippon Maru*, a vessel flying the Japanese flag.

21. Although he approved of the scope of the topic as defined in section 1, paragraph 1, of the schematic outline, he thought that further consideration would have to be given to the definition in section 1, paragraph 2, of "territory or control... in relation to places not within the territory of the acting State". In that connection, he referred to the nuclear-weapons tests carried out by the United States of America in the 1950s. Although the aircraft carrying out the tests had not been flying within United States territory, they had been under United States control. The losses and injuries resulting from those tests had, however, occurred on the high seas, and it was Japanese fishermen and fishery resources that had been affected. Although no liability had been attributed to it, the United States had ultimately decided to pay compensation *ex gratia* to the nationals of the affected State. That case, to which the Special Rapporteur had referred in his second report (A/CN.4/346 and Add.1 and 2, para. 65) as a specific example of an act or activity of a State not prohibited by international law; it was thus the type of case on which the Special Rapporteur had recommended the Commission to focus its attention.

22. When a State was liable—or "answerable"—for injurious consequences arising out of an act not prohibited by international law, it was also actionable, provided, of course, that a remedy was available. The Special Rapporteur had, however, rightly pointed out that more emphasis should be placed on the prevention of loss or injury than on reparation. One of the primary duties of States was thus to prevent loss or injury; that duty was very similar to the "duty of care", a term which the Special Rapporteur had, regrettably, decided not to use in his third report (A/CN.4/360, para. 19).

23. Although he endorsed the approach and general principles, particularly that of the duty of co-operation, proposed by the Special Rapporteur in his third report, he thought the terms "acting State" and "affected State" would have to be defined with greater precision.

24. Mr. JAGOTA said that the topic under consideration, which was one of current and practical interest, was bound to take more definite shape as State practice developed in specific areas. One question that had continually arisen, both in the Sixth Committee and in the Commission, was that of the relationship between the topic of international liability and the topic of State responsibility. His own view was that international liability could be seen as a species of the genus State responsibility and that its consideration would be much easier once the Commission had completed its work on State responsibility. In the meantime, however, the Commission should concentrate on defining the elements of the two topics, without worrying too much about the relationship between them.

25. The element of the scope of international liability, for example, had not yet been defined clearly enough. In the topic of State responsibility, "acts" meant acts of the State, whereas, in the topic under consideration, "acts" or "activities" could mean acts or activities of

the nationals of a State, and it still had to be determined whether such acts or activities could be attributed to the State.

26. Account must also be taken of the fact that, although certain acts were not prohibited by international law, they could be deemed to constitute a kind of wrong, thereby entailing liability. Examples of such acts were to be found in cases of damage resulting from nuclear activities, damage caused by space objects or damage caused by ships carrying ultra-hazardous substances, which entailed absolute liability and to which a separate section of the study should, in his view, be devoted.

27. With regard to the material aspect of the topic, he disagreed with the Special Rapporteur (*ibid.*, para. 46) that the rules to be drafted by the Commission would apply only in respect of damage to the physical environment. Those rules would also apply to matters such as disputes concerning the joint exploitation and management of resources, industrialization and the law of the sea.

28. The rules to be worked out would thus relate to normal activities which caused loss or injury and entailed international liability, but not to activities which entailed absolute liability, in regard to which the international community was very reluctant to accept the idea of the payment of compensation. The Special Rapporteur had therefore been right to place less emphasis on reparation than on the duty of prevention, which States could, for example, discharge by exchanging information or establishing fact-finding machinery. Sections 5 to 7 of the schematic outline, which stressed the duty of prevention and co-operation between States, went straight to the heart of the matter and made a major contribution to the development of the topic of international liability.

*The meeting rose at 6 p.m.*

## 1736th MEETING

*Tuesday, 29 June 1982, at 10 a.m.*

*Chairman: Mr. Paul REUTER*

### Visit by a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, a member of the International Court of Justice, a former member of the Commission and, in the latter capacity, the Special Rapporteur for part 1 of the draft articles on State responsibility.

**State responsibility (continued)** (A/CN.4/342 and Add.1-4,<sup>1</sup> A/CN.4/344,<sup>2</sup> A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

### *Content, forms and degrees of international responsibility (part 2 of the draft articles)*<sup>3</sup> (continued)\*

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)

#### ARTICLES 1 to 6<sup>4</sup> (continued)

2. Mr. RIPHAGEN (Special Rapporteur), replying to some of the questions raised by members of the Commission, said that discrepancies between the different language versions of the third report had perhaps given rise to some of the questions raised during the Commission's discussion. For example, in the English text of the new article 1 the word "right" should be replaced by the word "rights", and in the French text the words "*les autres Etats*" should be replaced by the words "*d'autres Etats*" (A/CN.4/354 and Add.1 and 2, para. 145).

3. His preliminary report<sup>5</sup> had simply been an exploration of part 2 of the topic of State responsibility. It had led to the rather vague conclusions stated in paragraphs 97 to 100 of that report and repeated in paragraph 6 of his third report (A/CN.4/354 and Add.1 and 2). That preliminary report had introduced three parameters for the possible new legal relationship arising from an internationally wrongful act of a State, as well as the idea of proportionality. The second report (A/CN.4/344) had dealt largely with the first parameter, namely the new obligations of a State whose act was internationally wrongful. Paragraphs 51 *et seq.* had set out three rules of a preliminary nature, while in paragraph 164 he had proposed the original articles 1 to 3 and two further articles. The Commission had not received those five articles with great enthusiasm, as he had indicated in paragraphs 19 to 23 of the third report. In view of that, he had decided that for the time being the old articles 4 and 5 should be set aside and that the old articles 1 to 3 should be reviewed and amended. In chapters II and III of the third report, after focusing attention on the variety of regimes of State responsibility that existed, he had approached the general principles and rules set out in the second report from a fresh standpoint and had discussed the over-all problem underlying the drafting of part 2 of the topic.

4. The third report expressed the view that the topic of State responsibility could not be dealt with exhaustively

\* Resumed from the 1734th meeting.

<sup>1</sup> Reproduced in *Yearbook ... 1981*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> For the texts, see 1731st meeting, para. 2.

<sup>5</sup> *Yearbook ... 1980*, vol. II (Part One), pp. 107 *et seq.*, document A/CN.4/330.