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A/CN.4/334 and Add.1 & Corr.1 and Add.2

Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur

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

Extract from the Yearbook of the International Law Commission:-
1980, vol. II(1)

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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 7]

DOCUMENT A/CN.4/334 AND ADD.1 AND 2*

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by Mr. Robert Q. Quentin-Baxter, Special Rapporteur**

[Original: English]
[24 and 27 June and 4 July 1980]

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ABBREVIATIONS

ECE	Economic Commission for Europe
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILA	International Law Association
OECD	Organization for Economic Co-operation and Development
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments [to 1930]</i>
UNEP	United Nations Environment Programme

* Incorporating document A/CN.4/334/Add.1/Corr.1.

CHAPTER I

General Considerations

A. Introduction

1. As is usual, this preliminary report does not attempt a survey or assessment of State practice and doctrine in areas that may call for close study. It is concerned rather to identify such areas and their possible interrelationships, to provide in tentative outline a profile for the topic, and to assign it a provisional place in the larger scheme of the International Law Commission's work. Similarly, the sparse allusions to authority do not in themselves imply any judgement as to where the weight of authority may lie: they are intended only to accent or counterpoint propositions canvassed in the text. A preliminary report is a vehicle for the Special Rapporteur to share with his colleagues his early, imperfect perceptions of his task, so that their comments may make an immediate contribution to what should always be a collegiate enterprise.

2. The Special Rapporteur does not wish to qualify or supplement the short description of the topic contained in the report of the Working Group set up by the Commission at its thirtieth session, section II of which was reproduced as an annex to the Commission's report of that session.¹ Indeed, readers who find no easy pathway through the thickets of the present report may wish to revive their sense of direction by occasional reference to the way in which the topic was characterized by the Working Group. In this report it is intended, after the briefest possible introduction, to move directly to a consideration of the difficulties that beset the topic chosen for progressive development and codification, and that may be thought to call in question its timeliness or viability.

3. It should, however, first be recalled that this topic owes its place in the Commission's active programme to a conjunction of two circumstances. First, the Special Rapporteur for State responsibility (part I), Mr. Ago, in the course of establishing the boundaries of his own topic, had emphasized that that topic would deal only with the consequences of internationally wrongful acts, and would in no way prejudge the evolution or content of a separate regime dealing with international liability for the injurious consequences of acts not prohibited by international law.² The Commission had adopted that view.³ Secondly, the General Assembly of the United Nations, at the instance of its Sixth Committee, took note of the distinction, and has continued to urge that the present topic be taken up by

the Commission as soon as its existing programme would allow.⁴ In a sense, therefore, the General Assembly has returned a provisional verdict that the topic is viable and deserves priority.

4. The present title stems from the generic contrast between obligations that arise, respectively, from wrongful acts and others from acts which international law does not prohibit, but the specific context in which the topic is discussed has always been that of environmental hazard, caused by human activity and magnified by modern industrial and technological needs and capacities. In 1973, the year in which the Commission first gave passing attention to this spin-off from the seminal topic of State responsibility, the United Nations Conference on the Human Environment was only one year past; UNEP was in course of construction; treaty regimes of a universal character, dealing with acts not prohibited by international law, had been established in relation to space objects and to peaceful uses of atomic energy; questions of conservation in areas beyond national jurisdiction were under consideration in various international forums, including the meetings which gave rise to the Third United Nations Conference on the Law of the Sea; and there was a correspondingly high level of activity in relation to various regional, subregional and transboundary problems.

5. This torrent of activity, and the sense of urgency by which it is impelled, continue to grow. A particularly striking recent manifestation was the High-level Meeting, held in November 1979 within the framework of the Economic Commission for Europe and including Canada, the Soviet Union, the United States of America and the States of western and eastern Europe, on the Protection of the Environment.⁵ It is, however, a feature of much of this activity that questions of liability are almost a forbidden subject. The very important ECE Convention on Long-range Transboundary Air Pollution observes, in its only footnote, that "The present Convention does not contain a rule on State liability as to damage".⁶

The equally significant draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States,⁷ which was adopted in 1978 by the UNEP intergovernmental Working Group of experts on natural resources shared by two or more States, is prefaced by a comparable

¹ *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152, document A/33/10, chap. VIII, sect. C, annex.

² *Yearbook ... 1973*, vol. I, pp. 13-14, 120th meeting, paras. 1-5.

³ *Ibid.*, vol. II, p. 169, A/9010/Rev.1, paras. 37-39.

⁴ For a more detailed account, see *Yearbook ... 1978*, vol. II (Part Two), pp. 149-150, document A/33/10, paras. 173-175.

⁵ See ECE/HLM.1/2 and Add.1.

⁶ ECE/HLM.1/2, Annex I, p. 5.

⁷ UNEP/GC.6/17.

disclaimer.⁸ Even so, the General Assembly of the United Nations, in taking note of the draft principles, has chosen to stress their potential practical value while reserving any opinion about their legal implications.⁹

6. In these developments, the Commission can perhaps find broad indications of the path by which it should seek to travel and the peremptory challenges it may meet with on the journey.¹⁰ In situations of great novelty and complexity, it is always difficult for lawyers and other policy-makers to achieve a perfect understanding. In the field of the environment, which now attracts a large and increasing share of the attention of international lawyers, as well as of

⁸ The explanatory note which prefaces the draft principles reads in part:

"An attempt has been made to avoid language which might create the impression of intending to refer to, as the case may be, either a specific legal obligation under international law, or to the absence of such obligation.

"The language used throughout does not seek to prejudice whether or to what extent the conduct envisaged in the principle is already prescribed by international law. Neither does the formulation intend to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of international law—should be incorporated in the body of general international law."

⁹ General Assembly resolution 34/186 of 18 December 1979, the second and third operative paragraphs of which read as follows:

["*The General Assembly*]

"2. Takes note of the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

"3. Requests all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not adversely affect development and the interests of all countries, in particular the developing countries."

¹⁰ One such challenge seems to come from Jiménez de Aréchaga:

"The International Law Commission wisely decided not to codify the topic of State responsibility for unlawful acts and the rules concerning the liability for risks resulting from lawful activities simultaneously, for the reason that 'a joint examination of the two subjects could only make both of them more difficult to grasp'."

"Several members urged the Commission to embark as soon as possible on the codification of State responsibility resulting from risks originating in lawful but hazardous conduct.

"The difficulty of making such a codification is that this type of responsibility only results from conventional law, has no basis in customary law or general principles and, since it deals with exceptions rather than general rules, cannot be extended to fields not covered by specific instruments." (E. Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Alphen aan den Rijn, Sijthoff, 1979), vol. 159, p. 273.)

Nevertheless, Jiménez de Aréchaga attaches this verdict to a hypothesis more narrowly conceived than the title of the present topic or its characterization by the Working Group requires.

economists and other social and political scientists, an interdisciplinary approach is indispensable—as has been shown by the long and productive travail of the Third United Nations Conference on the Law of the Sea. Environmental lawyers, whether engaged in negotiation or in academic appraisal, have displayed a noteworthy determination "to stay with the action", often redirecting their analytic skills from the study of a small and enigmatic body of recorded State practice to an examination, in the light of legal principle, of the needs and aspirations of the contemporary world community.¹¹

7. A concordance of legal and other policy elements is less difficult to achieve when, as in the Long-range Transboundary Air Pollution Convention, the main goal of the negotiation is commitment to a common course of action: it is more difficult when, as in the case of UNEP's draft principles, the major aim is to regulate in advance the conflicting interests that may develop among the parties. In such cases, even if there is no polarizing factor of the upstream-downstream kind, the will of Governments to reach agreement may be sapped in two main ways. First, it may be felt that, while guidelines are necessary to prevent the bruising that must occur when sovereign States act in disregard of each other's interest, it could prove even more painful to be bound by rules that cannot take into account the individuality and variety of the cases that will arise. Secondly, there may be a considerable psychological barrier to engagement in projects that seem to be directed to the aftermath of ecological disaster, rather than to its prevention.

8. As to the first of these grounds of discouragement, some balance must be struck. It is natural that Governments should feel their way towards solutions that will best accommodate separate, as well as joint, interests. Even informal guidelines, unless wholly disregarded, must provide evidence of concordant State practice; and in that degree they cannot, despite all disclaimers, be devoid of legal significance. At some point, therefore—and statements made in such forums as the recent ECE High-level Meeting leave no doubt that Governments now take a very serious view of man-made environmental hazards—the tacit and explicit elements of State practice must harden into new legal rules,

¹¹ This tendency has been authoritatively described by M.S. McDougal:

"The increasingly predominant theory ("jurisprudence" or "philosophy") about law today is explicitly sociological or policy-oriented in emphasis. In this conception, law is not some frozen set of pre-existing rules or arrangements that inhibits constructive action about environmental and other problems but, rather, a dynamic and continuous process of authoritative decision through which the members of a community clarify and implement their common interests." ("Legal bases for securing the integrity of the earth-space environment", in: *Environment and Society in Transition*, P. Albertson and M. Barnett, eds., *Annals of the New York Academy of Sciences*, vol. 184 (7 June 1971), p. 377.)

combining regard for present-day needs with respect for pre-existing legal principle. The search for draft articles that meet these criteria and assist this process must be the central purpose of the Commission's treatment of this topic.

9. There remains the question whether lawyers concerned with the problem of liability have to detach themselves from the mainstream of international endeavour in order to apportion responsibilities for human failure. It is submitted that there could be no more damaging misconception of the thrust of the present topic. The theme of accountability for acts not prohibited comes into prominence precisely because there is need for a new and imaginative effort to reconcile the widest possible freedom of action with respect for the rights of others, and with a justified apprehension that mankind may perish through undisciplined use of industrial and technological power. The primary aim of the draft articles must therefore be to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects. It is a secondary consideration, though still an important one, that the draft articles should help to establish the incidence of liability in cases in which there is no applicable special regime and injurious consequences have occurred.

B. Use (and non-use) of terms

10. Although definitions are not settled until a group of draft articles is complete, something must be said about the use of terms in the present report. The choice of the term "liability" in the English version of the title of this topic stems from an exchange of views in the Commission during its twenty-fifth session, in 1973. It was suggested by Mr. Kearney that:

the term "responsibility" should be used only in connection with internationally wrongful acts and that, with reference to the possible injurious consequences arising out of the performance of certain lawful activities, the more suitable term "liability" should be used.¹²

The Commission adopted this proposal without discussion.¹³ The Special Rapporteur for State responsibility (part I), Mr. Ago, said that:

the change was pertinent so far as the English text was concerned. The word "liability" implied the necessity to make reparation and was therefore the right word in that context; "*responsabilité*" appeared to be the only word available in French to express both notions.¹⁴

11. Indeed, the distinction made by Mr. Kearney was well established, at least by the mid-1960s, in the practice of the United Nations Committee on the

Peaceful Uses of Outer Space;¹⁵ and no change is now proposed. Nevertheless, if two terms are used in English where one serves in French and in other working languages, it is necessary for the Commission to be satisfied that the variation in English is a matter of idiom (like the use of the two English terms, "President" and "Chairman", to correspond with the single French term, "*Président*"), and that it imports no distinction of substance. This would seem to be the case. Within the Commission¹⁶ and elsewhere, the English terms "responsibility" and "liability" have been used interchangeably in relation to the regime of obligation in respect of the injurious consequences of acts not prohibited by international law. The term "responsibility", no less than the term "liability", implies "the necessity to make reparation", and in the English language literature of international law the term "liability" is commonly employed to refer generically to the consequences of any legal obligation.

12. In this report, therefore, the term "liability" is used, as far as possible, without nuance and in a sense very close to its ordinary meaning: a negative asset, an obligation, in contra-distinction to a right. It is not used to mean only the consequences of an obligation, but rather to mean the obligation itself, which—like "responsibility"—includes its consequences.¹⁷ It is perhaps a disadvantage that the term "liability" has sometimes been regarded in municipal law as an equivalent of the term "responsibility" in international

¹⁵ See for example, General Assembly resolution 2777 (XXVI) of 29 November 1971, third preambular paragraph:

"Recalling its resolutions 1963 (XVIII) of 13 December 1963, 2130 (XX) of 21 December 1965, 2222 (XXI) of 19 December 1966, 2345 (XXII) of 19 December 1967, 2453B (XXIII) of 20 December 1968, 2601B (XXIV) of 16 December 1969 and 2733B (XXV) of 16 December 1970 concerning the elaboration of an agreement on the liability for damage caused by the launching of objects into outer space."

¹⁶ See, e.g. *Yearbook . . . 1973*, vol. II, p. 169, A/9010/Rev.1, paras. 38–39.

¹⁷ In the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.2 and Corr. 2–5), three articles—139, 235 and 263—use the terms "responsibility" and/or "liability" in their titles in the English version, as well as in the text of those articles. These usages appear to draw upon the wording of relevant resolutions of the General Assembly—see, e.g., General Assembly resolution 2749 (XXV) of 17 December 1970, para. 14:

"Every State shall have the responsibility to ensure that activities in the area . . . shall be carried out in conformity with the international régime to be established. . . . Damage caused by such activities shall entail liability."

The usages appear also to draw upon the wording of Principle 22 of the Declaration of the United Nations Conference on the Human Environment (*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 One, chap. I) and on the relationship of that principle to Principle 21:

"Principle 21

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own

(Continued on next page.)

¹² *Yearbook . . . 1973*, vol. I, p. 211, 1243rd meeting, para. 37.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 38.

law.¹⁸ That is, no doubt, one reason why the title of the topic speaks of “international liability”; but in the body of this report the adjective is omitted, unless there seems a special need for its inclusion.

(Footnote 17 continued.)

environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

“Principle 22

“States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”

In the French version of draft arts. 139, 235 and 263 of the Informal Composite Negotiating Text/Revision 2, the term “*responsabilité*” is used in parallel with:

(a) the term “responsibility”—e.g., in the titles of draft arts. 235 and 263 and in para. 1 of art. 139;

(b) the term “liability”—e.g. in the title of draft art. 139 and in the para. 3 of art. 235;

and in para. 1 of draft art. 235 in French, the term “*responsables*” is used in parallel with the word “*liable*”. (cf. the second and third paras. of draft art. 263, where the term “*responsables*” is used in parallel with the words “*responsable and liable*”. See also, for example, art. 232, where there is a broadly similar correspondence both in the title and in the text.)

In the attempt to provide an exact balance between the English and French original texts, there are other variations correlated with, and designed to compensate for those already noted, e.g.:

(a) “Responsibility and liability” = “*responsabilités et obligations qui en découlent*”;
“liability” = “*obligation de réparer*”.

(b) “Responsibility and liability” = “*obligation de veiller au respect de la convention et responsabilité en cas de dommages*”;

“States are responsible . . .” = “*il incombe aux Etats de veiller . . .*”;

“international law relating to responsibility and liability” = “*droit international relatif aux obligations et à la responsabilité concernant l'évaluation et l'indemnisation des dommages*”.

There are other variants: see, for example, the English and French versions of the title and text of draft article 22 of annex III.

In general, the textual evidence seems consistent with the premise on which the Commission has acted; that is to say, the English terms “responsibility” and “liability” are merely facets of a single concept, rendered in French by the term “*responsabilité*”.

The terminology used in paragraph 14 of General Assembly resolution 2749 (XXV) and similar contexts, including the Declaration of the United Nations Conference on the Human Environment, was not designed to split the atom of “*responsabilité*” into its components. Rather it was influenced by the very considerations that moved the Commission in 1973, and that were accepted by the General Assembly upon consideration of the Commission’s report: that is to say, the progressive development of international law in regard to the responsibility (or liability) of States calls for separate examination of obligations that arise from wrongfulness, and those that may arise from lawful acts.

See also T. Treves, “Les tendances récentes du droit conventionnel de la responsabilité et le nouveau droit de la mer”, *Annuaire français de droit international*, 1975 (Paris), vol. XXI, p. 767.

¹⁸ *Ibid.*, p. 776.

13. The title speaks of international liability “for injurious consequences”. It is, of course, this phrase which in substance distinguishes obligations dealt with in the present topic from those that arise from wrongful acts. Once again, this phrase has its origin in the Commission’s 1973 debate: it signifies the fact that, while any wrongful act entails a duty of reparation, an act not prohibited does so only if loss or injury is caused. There is the further distinction, best dealt with in a later section, that an obligation in respect of an act not prohibited arises only when a primary rule of international law so provides.¹⁹

14. For compelling reasons, the Commission, at its 1973 session, abandoned the compendious phrases “lawful acts” or “licit acts” in favour of the awkward, but more accurate, periphrasis “acts not prohibited by international law”. A number of speakers at that time made the general point that the borderline between lawfulness and unlawfulness was often not easy to trace. Technology had allowed the creation of activities which bordered upon wrongfulness and which were perhaps on the way to becoming wrongful, but which at least carried with them an obligation to redress any loss or injuries of which they were the cause.²⁰ For the reasons then given, the phrase “acts not prohibited” is used throughout the present report; and, as there can be no onus upon an injured State to prove the lawfulness of the activities of which it complains, the phrase carries implicitly the enlarged meaning “acts, whether or not prohibited”.

15. It remains to notice the contrasted descriptions “fault” and “no-fault”, or “fault” and “risk”, often employed as a shorthand method of distinguishing the regime of responsibility for wrongful acts and that of liability in respect of acts not prohibited by international law.²¹ The antinomy of “fault” and “no-fault” may be regarded merely as labels—and unsuitable ones for the Commission’s purpose, because the great unruly concept of “fault” has been to some extent sublimated in modern international law; it nowhere makes an “on-stage” appearance in the Commission’s draft articles on State responsibility (part I),²² now nearing the completion of first reading. On the other hand, for some writers in this field, the antinomy of “fault” and “no-fault” constitutes the very nub of our problem, and it can yield a kind of *reductio ad*

¹⁹ See *Yearbook . . . 1973*, vol. I, p. 12, 1203rd meeting, para. 41 (Mr. Ushakov); p. 14, 1204th meeting, para. 4 (Mr. Ago).

²⁰ *Ibid.* See, for example, p. 7, 1202nd meeting, para. 23 (Mr. Kearney); pp. 7–8, para. 32 (Mr. Hambro); p. 10, 1203rd meeting, paras. 16–18 (Mr. Castañeda); p. 13, 1204th meeting, para. 3 (Mr. Ago).

²¹ For a full and recent examination of these concepts, see P.-M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (Paris, Pedone, 1976).

²² For the text of all the articles adopted so far by the Commission, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 91 et seq., document A/34/10, chap. III.

absurdum: if the practice of States in this area is in the end referable to a standard of care or due diligence, however “objectivised” that standard may be, what general need or place remains for an auxiliary regime of responsibility or liability not based on the duty of care?

16. In the present report, the expressions “fault” and “no-fault” are not used, because, above all other grounds of objection, they produce in the general reader, who is not yet an *aficionado*, a feeling of giddiness and a mistrust of experts. Are we really saying, he may ask, that sovereign States, which bend their necks so reluctantly to the yoke of the responsibility engendered by wrongfulness, owe an even higher standard of duty when performing acts that in principle are not prohibited? In the present report, the regime of liability in respect of acts not prohibited by international law is envisaged as being largely—though perhaps not entirely—the product of the duty of care or due diligence, the pervasive primary rule that is approved, and explained with equal facility, by the proponents of subjective and objective theories of responsibility.²³ At a certain point along the way, one must admit the influence of a modified principle, more closely connected with the era of interdependence; for the duty of care will have to acquire a new dimension before it can account convincingly for such phenomena as the limitation of liability or the *consideranda* embodied in Principle 23 of the Declaration of the United Nations Conference on the Environment.²⁴

17. The term “risk” is used, in the literature on this subject, in at least two senses, not always clearly distinguished. Each sense corresponds to a common English usage: “risk” may refer to an inherent danger, and may even imply an exceptionally high level of danger—a connotation more exactly expressed by the term “ultra-hazard”; or “risk” may simply indicate

²³ For a brief review of doctrine concerning the “fault theory” and the “objective theory”, see *Yearbook . . . 1978*, vol. II (Part One), document A/CN.4/315, chap. III, and in particular pp. 188–201, paras. 489–511.

²⁴ For reference, see footnote 17 above. Principle 23 is worded thus:

“Principle 23

“Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.”

where a burden of responsibility (or liability) lies, as in the customary notice that users of a private thoroughfare do so “at their own risk”. In this latter sense, the term “risk” is not needed at all; for there are more habitual and less emotive ways of describing the incidence of a burden of care or of responsibility. Yet, if we are to banish the term “risk” from our scientific vocabulary, we should first acknowledge that the interplay of its different meanings has greatly stimulated legal thought. If States create risks—or fail to prevent their creation within national territory, or, by national enterprises, beyond the territorial limits of any State—do those States in principle bear the created risk, or does international law leave other States without redress for the harmful acts of foreign man, as well as those of nature?

18. The delineation of “ultra-hazardous” activities will always be associated with the brilliant pioneering lectures of C. Wilfred Jenks.²⁵ At about the same time that Jenks was calling for exceptional measures to contain exceptional dangers, L. F. E. Goldie broke new ground in an influential article that stressed the continuum of human situations and of matching legal experience, of the potential for legal adaptation, and of the range and gradation of available solutions.²⁶ From these and other initiatives, there emerge definitions containing elements of magnitude. “Ultra-hazard” is perceived as a danger that rarely materializes, but that may, on those rare occasions, assume catastrophic proportions: it is seen also to include dangers, such as air pollution, that are insidious and may have massive cumulative effects.²⁷ Equally, it has been noted that possible regimes of liability in respect of acts not prohibited may vary from those that are merely “strict” to others that are “absolute”, in the sense that they admit no ground of escape from liability when a chain of causality has been established. The need to make such distinctions, and their possible relevance to the Commission’s work, are not in question; but in the preparation of the present report they have been set aside, because they turn upon an analysis that is quantitative rather than qualitative.

²⁵ C. W. Jenks, “Liability for ultra-hazardous activities in international law”, *Recueil des cours . . . , 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 105.

²⁶ L. F. E. Goldie, “Liability for damage and the progressive development of international law”, *International and Comparative Law Quarterly* (London), vol. 14 (October 1965), pp. 1189 *et seq.*

²⁷ Jenks, *loc. cit.*, pp. 107 *et seq.*; Goldie, *loc. cit.*, pp. 1200 *et seq.*

CHAPTER II

Comparisons with responsibility for wrongful acts

A. Primary and secondary rules

19. For historical reasons,²⁸ the present topic has often been presented as if it were a challenger, in certain areas, to the traditional regime of State responsibility for wrongful acts. Being conscious of a duty of neutrality in this matter, the Commission, in its 1973 report to the General Assembly, observed:

Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp.²⁹

Care has ever since been taken not to burden the present topic with precedents drawn from the regime of responsibility for wrongful acts. Article 1 of the draft articles on State responsibility (part I)³⁰ was expressly designed not to "lend itself to an interpretation which might automatically exclude the existence of another possible source of 'responsibility'";³¹ and even the rules of attribution contained in Chapter II of those draft articles were thought unlikely to be applicable to the case of obligations arising in respect of acts not prohibited by international law.³²

20. Nevertheless, this scrupulous desire not to prejudice future lines of development could falsely encourage the belief that a régime of liability in respect of acts not prohibited can exist quite independently of the regime of State responsibility for wrongful acts. That would be to disregard the implications of the distinction that the Commission has already drawn between "primary" and "secondary" rules. The 1973 report noted that:

The Commission has generally concentrated on defining the rules of international law which . . . impose specific obligations on States, and may, in a certain sense, be termed "primary". In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules, which . . . may be described as "secondary" inasmuch as they are concerned with determining the legal consequences of failure to fulfil obligations established by the "primary" rules.³³

21. The distinction is best illustrated by the archetypal conventional regime contained in the

Convention on International Liability for Damage caused by Space Objects (1971).³⁴ Article 2 of this Convention provides that:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

That provision establishes for the States parties a "primary" obligation to pay compensation for injurious consequences arising out of acts not prohibited by international law. By virtue of a "secondary" rule, failure of a State party to meet its liability to pay compensation constitutes a breach of an international obligation of that State, thereby entailing its international responsibility. It can thus be seen that the regime of liability in respect of acts not prohibited does not detract from the universality of the regime of responsibility for wrongful acts, because the two regimes exist upon different planes. Obligations arising in respect of acts not prohibited are the product of particular "primary" rules: the violation of these or any other "primary" rules brings into play the "secondary" rules of State responsibility for wrongful acts.

22. The distinction here made is, of course, by no means a new one: it was clearly within the Commission's contemplation during its 1973 debate.³⁵ The same question arose—this time in the context of obligations relating to the treatment of aliens—during the Commission's 1977 discussion of the draft articles on State responsibility (part I), when the Commission was considering draft article 22 (Exhaustion of local remedies).³⁶ While there were differences of opinion on other points, there was no disagreement about the distinction put most succinctly by Mr. Ushakov, who pointed out that there were two categories of indemnification: indemnification in consequence of international responsibility and indemnification in consequence of a primary rule.³⁷ The question arose again, though more obliquely, during the Commission's 1978

²⁸ See above, paras. 3–4 and para. 15.

²⁹ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 38.

³⁰ See above, footnote 22.

³¹ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 39.

³² See *Yearbook . . . 1974*, vol. I, p. 29, 1257th meeting, para. 25.

³³ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 40.

³⁴ General Assembly resolution 2777 (XXVI) of 29 November 1971, annex.

³⁵ See for example *Yearbook . . . 1973*, vol. I, p. 12, 1203rd meeting, para. 41 (statement of Mr. Ushakov), and p. 14, 1204th meeting, para. 4 (reply of the Special Rapporteur, Mr. Ago):

"Mr. Ushakov had rightly said that there was a general principle linking responsibility for a wrongful act with any breach of rules of law, whereas a lawful act generated responsibility only if a substantive or primary rule so provided. If injury caused by a lawful activity—that was to say, one that was not prohibited, such as activities in outer space—entailed an obligation to make reparation, that was not, strictly speaking, a matter of responsibility, but of a guarantee . . ."

³⁶ *Yearbook . . . 1977*, vol. I, pp. 250–255 and 259–277, 1463rd and 1465th to 1468th meetings.

³⁷ *Ibid.*, p. 275, 1468th meeting, para. 14.

discussion of draft article 23 (Breach of an international obligation to prevent a given event).³⁸ A distinguishing feature of this type of obligation is that it may require of the State which is the subject of the obligation a standard of behaviour more exacting than that of due diligence, though still not an absolute standard.³⁹

23. To put the matter in a longer perspective, the Commission in 1963 decided, with the approval of the General Assembly, not to renew its earlier efforts to study the topic of State responsibility in the particular area of responsibility for injuries to the person or property of aliens, nor to take up the study of that topic in any other particular area. Instead, the Commission would study the "secondary" rules governing international responsibility as a general and independent topic, divorced from any systematic treatment of the "primary" rules whose breach entails responsibility for an internationally wrongful act.⁴⁰ The distinction between "primary" and "secondary" rules is therefore an analytic device, and the three sets of draft articles on State responsibility—under construction or projected—are designed to be multiple-fitting, so that they will repay their cost many times when applied to the various subject areas of international law. The present topic concerns one such subject area.

24. In the preceding paragraphs, the terms "primary" and "secondary" have been placed in quotation marks as an acknowledgement that they are abstractions and have only the validity one chooses to assign them as a method of clarifying issues. For many, injurious consequences—that is, loss or damage, material or non-material—are a third constituent element essential to the establishment of responsibility for wrongful acts.⁴¹ For some, on the other hand, even the factor of attribution—that is, imputability to the State as a legal person—is wrongly placed among the constituent elements.⁴² Both of these conceptions may be of some importance in testing the relationship between the regime of liability for acts not prohibited and that of responsibility for wrongful acts.

25. There is, however, one irreducible sense in which the terms "primary" and "secondary" may be permitted to escape their quotation marks: secondary rules

are merely an empty matrix in which primary rules—rules of obligation—can produce their substantive effect. So, Quadri observes:

That is why, from the point of view of method, we have always criticized the almost general tendency of learned authors and in diplomatic practice to regard most problems concerning the treatment of aliens as problems of responsibility. We refer in particular to the international obligation of the State to protect the person or property of aliens. In general textbooks on public international law, this topic is treated in the chapters concerning responsibility, with particular emphasis on denial of justice, which is regarded as typifying the international delinquency. But denial of justice is in reality only one of the ways of violating the obligation to protect aliens and hence ought to be discussed in the chapter concerning the treatment of aliens.⁴³

This comment is equally applicable to the subject-matter of the present topic—the only other substantive area of law which is persistently represented as an aspect of secondary rules.

B. The avoidance of wrongfulness

26. The shift in perspective from secondary to primary rules places this topic in a less unnatural setting. The regime of reasonable care, required of a State that engages in or permits an activity the harmful effects of which may be felt outside its own borders, might—for example—include obligations to collect and furnish information, to seek agreement upon methods of construction or operating procedures or tolerable levels of contamination, and to provide guarantees of reparation in case all precautions should fail to prevent injurious consequences. Depending upon the circumstances, the standard of reasonable care or due diligence may well require a standard more exacting than its own as part of a special regime of protection that includes guarantees of redress for the potential victims of any hazard that cannot be wholly eliminated. The general regime of State responsibility for wrongful acts will yield criteria for the classification of the various obligations that make up the special regime of protection; but the extent of any obligation will be determined by the primary rule itself.⁴⁴ Thus, the regime of absolute liability provided in the Convention on International Liability for Damage caused by Space Objects⁴⁵ may be regarded not only as an applicable conventional rule, but also as evidence of the standard of care which the authors of the Convention believed to be reasonable in relation to that particular activity.

27. One should immediately qualify the foregoing statement by noting that conventional regimes determining liability are almost always silent as to their

³⁸ *Yearbook ... 1978*, vol. I, pp. 4–19, 1476th to 1478th meetings.

³⁹ *Ibid.*, vol. II (Part Two), pp. 82–83, document A/33/10, chap. III, sect. B.2, paras. (4) and (6) of the commentary to art. 23 of the draft articles on State responsibility.

⁴⁰ See in particular *Yearbook ... 1969*, vol. II, pp. 231 *et seq.*, document A/7610/Rev.1, chapter IV., paras. 71 *et seq.*

⁴¹ See for example E. Jiménez de Aréchaga, "International law in the last third of a century", chap. X, "International responsibility" (*loc. cit.*), p. 267.

⁴² See for example R. Quadri, "Cours général de droit international public" (chap. IV: Responsabilité et garantie), *Recueil des cours ... 1964-III* (Leyden, Sijthoff, 1966), vol. 113, pp. 457–459: "Le lien de causalité est tout. La question de l'imputabilité reste du domaine exclusif du droit interne ...". (*Ibid.*, p. 459).

⁴³ *Ibid.*, p. 456.

⁴⁴ See for example remarks of Mr. Ago, Special Rapporteur, in reference to art. 23 of the draft articles on State responsibility (part I): *Yearbook ... 1977*, vol. I, p. 232, 1457th meeting, para. 21; *Yearbook ... 1978*, vol. I, p. 10, 1477th meeting, para. 5.

⁴⁵ See above, footnote 34.

relationship with customary law, and that in cases not governed by any conventional regime, settlements are usually effected upon a non-principled and *ex gratia* basis. In this may be found an essential clue to the nature of the present topic. To use metaphorically language borrowed from the law of the continental shelf, the sovereignty of each State has its "natural prolongation", which will in principle determine the delimitation of its rights and obligations vis-à-vis each other State, and vis-à-vis the areas held in common not subject to the sovereignty of any State. In practice, however, a mere invocation of principle does not readily reveal the location of each boundary line; an approximation must be agreed upon, by reference to principles of equity but also in a spirit of pragmatism, accommodation and compensating for the legitimate preoccupations, as well as meeting the just demands of each of the States that has an interest.⁴⁶ This theme is reopened in the next chapter.

28. In the field of the environment, because most dangers are new or newly perceived, the need for international regulation is widely admitted and conventional regimes are continuously under construction at universal, regional, sub-regional and transnational levels. In some areas—notably those concerning outer space, the peaceful uses of atomic energy and the sea carriage of oil—the obligations that States have undertaken (or the liabilities that they have acknowledged) include a duty to compensate, or to provide a scheme of compensation for, the victims of accidents that have not been prevented.⁴⁷ In other areas, as we

have seen, the lack of a conventional rule as to liability for injurious consequences has been specifically recognized, whether by way of disclaimer or of assertion that the gap should be filled.⁴⁸ The common thread of all the discourse is that in principle the innocent victims of an activity that entails some danger should not be left to bear their loss, even if the actor's conduct is without taint of wrongfulness.

29. In the much older field of responsibility for the treatment of aliens, customary law long ago provided for situations that can without extravagance be analysed in a similar way. In this field also, both the boundaries of lawfulness and the extent of liability when unlawfulness is not alleged are disputed. Sørensen has stated the two kinds of responsibility (or liability) as follows:

First, the State is under the obligation not to exercise its power of expropriation in an arbitrary manner. . . .

Secondly, the expropriation must not be discriminatory. . . .

If an expropriation is carried out in breach of these conditions, it exceeds the limits imposed by international law on the territorial competence and thus constitutes a wrongful act, which involves a duty of reparation. . . .

If, however, the expropriation is not wrongful, it nevertheless entails the obligation to pay compensation, but it is compensation for a lawful act and therefore less extensive.⁴⁹

For our immediate purpose, it is enough to note the underlying theme. International law does not needlessly restrict the freedom of action of States; if their aims are legitimate, and if the means of achieving these aims pay reasonable regard to the separate interests of other States and to community interests, injurious consequences that are incidental to their activities do

⁴⁶ This generalization appears to be as true of a great multilateral consultation such as the Third United Nations Conference on the Law of the Sea as of a bilateral negotiation to establish maritime boundaries. Thus, even when the assistance of the International Court of Justice is sought to clarify the principles relevant to a negotiation of the latter kind, as in the *North Sea Continental Shelf* cases, the range of applicable criteria which the Court itself adduces cannot be as definitive as its analysis of the positions taken by the respective parties. See W. Friedmann, "The North Sea continental shelf cases: A critique", *The American Journal of International Law* (Washington, D.C.), vol. 64, No. 2 (April 1970), p. 229.

⁴⁷ See for example:

Convention on the international liability for damage caused by space objects (1971) (see footnote 34 above);

Vienna Convention on Civil Liability for Nuclear Damage (1963) (United Nations, *Juridical Yearbook*, 1963 (United Nations publication, Sales No. 65.V.3, p. 148);

Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960) with Additional Protocol (1964) (United Kingdom, *Treaty Series* No. 69 (1968), Cmnd. 3755 (London, H.M. Stationery Office, p. 14);

Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (United Nations, *Juridical Yearbook*, 1972 (United Nations publication Sales No. E.74.V.1), p. 100);

Convention on the liability of operators of nuclear ships and Additional Protocol (Brussels, 1962) (Belgium, Ministry of Foreign Affairs and Foreign Trade, Service des Traités, *Conventions on Maritime Law (Brussels Conventions)* (Brussels, 1968), p. 85);

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 1969) (United Nations, *Juridical Yearbook*, 1969 (United Nations publication, Sales No. E.71.V.4, p. 174);

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (United Nations, *Juridical Yearbook*, 1972 (*op. cit.*), p. 103);

Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1977) (United Kingdom, *Final Act of the Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations* Cmnd. 6791 (London, H.M. Stationery Office, 1977, p. 7).

⁴⁸ See para. 5 and footnote 8 above. See also Principle 22 of the Declaration of the United Nations Conference on the Human Environment (footnote 17 above) and art. 235, para. 3, of the Informal Composite Negotiating Text/Revision 2 (*ibid.*):

"With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance or compensation funds."

⁴⁹ M. Sørensen, "Principes de droit international public" (chap. IX: Limitations de la compétence territoriale), *Recueil des cours* . . ., 1960-III (Leyden, Sijthoff, 1961), vol. 101, pp. 177-178.

not of themselves entail responsibility for a wrongful act, provided that the loss is recompensed.⁵⁰ It is a further question, also considered in the next chapter, to what extent the duty of recompense may itself be subordinated to the imperative interests of the acting State.

30. The Commission has recently had occasion to consider a third type of situation in which an obligation may arise to make good a loss without wrongfulness—that is, the case in which a State acts in breach of an international obligation by which it is bound, giving rise to injurious consequences, but the wrongfulness of its action is precluded by an exceptional circumstance such as *force majeure*, a fortuitous event, distress or a state of necessity.⁵¹ As the Special Rapporteur for State responsibility (part I), Mr. Ago, has observed, in connection with the state of necessity:

The preclusion would . . . in no way cover consequences to which the same act might give rise under another heading, in particular the creation of an obligation to compensate for damage caused by the act of necessity that would be incumbent on that State on a basis other than that of *ex delicto* responsibility.⁵²

Indeed, the Commission has acted upon that view, pointing out, in relation to the questions of *force majeure* and fortuitous event, that the preclusion of wrongfulness:

does not exclude the possibility that different rules may operate in such cases and place upon the State obligations for total or partial compensation that are not connected with the commission of a wrongful act.⁵³

⁵⁰ *Ibid.* (chap. X: Limitations de la compétence territoriale (cont.)), pp. 197–198; and Jiménez de Aréchaga, *loc. cit.* (chap. VII: Subjects of international law—the State and its territory), pp. 194–195.

⁵¹ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 135 *et seq.*, document A/34/10, chap. III, sect. B.2, arts. 31 and 32; and p. 51 above, document A/CN.4/318/Add.5–7, para. 81, draft art. 33.

⁵² Page 21 above, document A/CN.4/318/Add.5–7, para. 18.

⁵³ *Yearbook . . . 1979*, vol. II (Part Two), pp. 132–133, document A/34/10, chap. III, sect. B.2, para. (39) of the commentary to art. 31.

Thus, even in the extreme case in which, by hypothesis, the actor was presented with no choice and had no possibility of avoiding the injurious consequence, the Commission has endorsed the view expressed by some of its members that it was not right for all of the burden to “fall on the State which suffered the damage either itself or in the person of its nationals”.⁵⁴

31. In summary, the pattern which appears to emerge is that, as States become aware of particular situations in which their activities, or activities within their jurisdiction or control, may give rise to injurious consequences in areas outside their territory, they take steps to reach agreement with the States to which the problem may extend about the procedures to be followed and the levels of protection to be accorded. In some cases, these measures include regimes of liability; in others, it is noted that the question of liability has not been covered. Even in the former cases there is seldom, if ever, a conscious attempt to identify a customary rule of law, but States discharge their duty of care, and ensure that they are not exposed to allegations of unlawful conduct, by defining and observing the rules relevant to any given situation. Even in the extreme situation in which any attribution to the State of wrongful behaviour is excluded, there is a disposition to recognize in principle an equitable obligation at least to share the burden of injurious consequences sustained by an innocent victim through the agency or instrumentality of that State. Nevertheless, conventional regimes, including those that establish a rule of liability, may of course have objectives other than the prevention or redress of injurious consequences: their function is to ensure that international law plays its part in accommodating and harmonizing the full range of beneficial creative activity.

⁵⁴ *Ibid.* See also *Yearbook . . . 1979*, vol. I, p.197, 1571st meeting, para. 4 (Mr. Riphagen).

CHAPTER III

Limitations of sovereignty

A. “*Sic utere tuo . . .*”: the criterion of “harm”

32. In order to understand better the hesitancy of Governments to commit themselves to specific formulations of rules as to liability in new or changing areas of the law, it is necessary to have regard to history. Until the twentieth century, there were relatively few contexts in which conflict was likely between a State’s freedom of action within its own borders and its duty towards other States. In the field of sovereign immunities, as State activity extended to

areas of trade and commerce, there were some ingredients for a reassessment of legal policy. The law of the sea was still preponderantly concerned with ensuring freedom of navigation, and the right of innocent passage through the territorial sea did not yet give rise to any active question about the balance of the flag State’s and coastal State’s interest. Similarly, though the law relating to the treatment of aliens at all times gave rise to hard cases, it did not yet present an aspect that might be seen to restrict unduly the freedom of a sovereign State to govern its own affairs. The pressures

of the twentieth century have brought these matters to the fore.

33. In the field of the environment, the navigational use of international rivers was before 1900 beginning to develop on the basis of mutual concessions; but the Harmon doctrine, first enunciated by the United States of America in 1895, denied any obligation to use non-navigable watercourses consistently with the interest of another riparian State. Although the doctrine was not explicitly abandoned by the United States until as recently as 1960, in the context of arrangements made with Canada for the management of the Columbia river, the United States had acted upon other principles in arranging with Canada the terms of reference of the tribunal jointly established by the two countries in 1935 to settle the dispute relating to the *Trail Smelter* case.⁵³ That tribunal was authorized to apply the principles both of international law and of the jurisprudence developed by United States courts in disputes between states of the Union. In its award, (1941) the tribunal declared that, in accordance with the principles both of international law and of the law of the United States:

... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁵⁶

34. Curiously, the question of balance between a State's freedom of action within its own territory and its duty towards other States arose in the jurisprudence of the Permanent Court of International Justice in a context which has not often given rise to disputes—that is, the question of the extent of a State's right to bring an alien to trial for an offence alleged to have been committed outside the territory of that State. In the "*Lotus*" case,⁵⁷ although the decision turned on a narrower point, and although the Court was much preoccupied with maritime law and the character of ships as State territory, the members of the Court were

almost equally divided about the nature of State sovereignty. For the dissenting judges, it was a revelation that the sovereignty of a State could be construed so narrowly and literally that it would permit another State to pry into the first State's affairs by applying its criminal laws and procedures to the conduct of a foreigner who had no design to harm that State and could not have supposed himself to be subject to its laws.⁵⁸

35. Even so, the majority of the Court in the "*Lotus*" case made a sharp distinction between the absence of right to exercise the State's power outside its own borders and its freedom to do so as it chose within those borders—provided that, in so doing, it did not act in breach of an international obligation.⁵⁹ It was not necessary for the Court to pursue to an ultimate conclusion the question whether there was any rule of customary international law that would impose such an obligation in the field of criminal jurisdiction—and that question has not again arisen before an international tribunal. Nevertheless, the principle adduced by the Court in the case of the *Lotus* governs the development of the present topic: limitations upon the sovereignty of States depend upon the existence of primary rules of obligation, and these are to be proved, not presumed. Equally, the deep division within the Court as to the unresolved major issue reflects the same preoccupation that gives the present topic its sense of urgency: the sovereignty of States becomes derisory unless it is limited in the interests of the sovereignty of other States and in the interests of the international community.

36. In the *Corfu Channel*⁶⁰ case, the International Court of Justice heavily underlined both aspects of the matter. "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."⁶¹ not even grave provocation may excuse an injured State for resorting to a policy of intervention. On the other hand, the security within their own borders which respect for international law can offer States is a charter of liberty, not of licence. The Court reaches out for a principle reminiscent of that enunciated in a different context by the *Trail Smelter* tribunal, and refers to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".⁶² It should be noted, however, that the Court is dealing with the breach of an undisputed rule of international law, the right of innocent passage, and that the Court here refers to "acts contrary to the rights of other States",

⁵³ United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1911.

As to the Harmon doctrine, see for example Jiménez de Aréchaga, *loc. cit.*, pp. 188–192. But see also memorandum of the Department of State of 21 April 1958 (United States of America, Congress, Senate, "Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay River System under customary international law and the Treaty of 1909" (Washington, D.C., 85th Congress, 2nd session, Senate, Document No. 118) pp. 66 *et seq.*, which records that evidence presented on behalf of the Department of State to the Senate Committee on Foreign Relations in 1945 rejected the Harmon doctrine. Mr. Frank Clayton, counsel for the United States Section of the United States–Mexican International Boundary Commission, at that time testified: "Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware . . .".

⁵⁶ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1965.

⁵⁷ Judgment No. 9, 1927: *P.C.I.J.*, Series A, No. 10.

⁵⁸ *Ibid.*, Judge Loder, pp. 34–35; Judge Weiss, p. 44; Judge Lord Finlay, pp. 56–57; Judge Nyholm, p. 60; Judge Moore, pp. 92–93.

⁵⁹ *Ibid.*, pp. 18 *et seq.*

⁶⁰ *Corfu Channel*, Merits, Judgement: *I.C.J. Reports 1949*, p. 4.

⁶¹ *Ibid.*, p. 35.

⁶² *Ibid.*, p. 22.

not to acts which "harm" or "cause injury to" other States.⁶³

37. The question that was latent in the case of the *Lotus* remains at large; the criterion of "harm" is a variable, which does not readily serve the double purpose of establishing the existence of a wrong, as well as measuring its magnitude. Moreover, there are now new questions. When substantial injury has been established, there is little disposition to deny in principle a duty to compensate, unless the injury is the consequence of an activity which the States concerned have expressly or tacitly agreed to tolerate;⁶⁴ and—except in that last contingency—it is therefore of comparatively small importance to determine whether injury is the product of a wrongful act or of an act not prohibited by international law. When, in 1954, the United States of America exploded a hydrogen bomb on Eniwetok atoll in the Marshall Islands, some Japanese fishermen on the high seas were injured and a fishing resource customarily exploited by Japan was contaminated by radioactive fall-out. The United States, as well as expressing concern and regret, tendered "*ex gratia* to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained", but expressed its understanding that the tendered sum would be accepted "in full settlement of any and all claims".⁶⁵

38. The most acute problem arises when the harm is potential—that is, a more or less foreseeable consequence of a particular course of action. In this situation, the criterion of "wrongfulness" or "illegality" may offer only the choice between prohibition of the activity or its acceptance as a legitimate manifestation of State sovereignty.⁶⁶ It is at this point that doctrine

⁶³ The brevity of the references in this chapter to the Trail Smelter arbitration, the Corfu Channel case and the Lake Lanoux arbitration should not mislead the reader. A large and distinguished literature surrounds these three celebrated cases. Analysts find in them either a gleam of encouragement for the evolution of a new, unfettered law of the environment or reassuring proof that respect for treaties and the classical rules of State responsibility still encompasses the whole province of international law. It would be impertinent to attempt to review this literature within the compass of the present preliminary report.

⁶⁴ See for example the Lake Lanoux arbitration:

"But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which to-day are found all over the world." (United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 303.)

⁶⁵ United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XXXII, No. 812 (4 January 1955), pp. 90–91).

⁶⁶ In the Nuclear Tests case, when the International Court of Justice granted the Request for the Indication of Interim Measures, one of the six dissentients, Judge Ignacio-Pinto, seemed to touch both of the forbidding extreme positions:

"I see no existing legal means in the present state of the law which would authorize a State to come before the Court asking

falters and parts company with State practice. The simple dichotomy of what is allowed or not allowed by the general rules of customary international law fails to account for the diversity of rights and interests that must be reconciled in the regime of any international river or of any intrinsically beneficial, but dangerous, activity that has transnational effects. Legal theory chokes upon the sheer variability of the concept of "harm" as a determinant of illegality; but State practice testifies to the potency of that concept as a principle governing legal development. The maxim "*sic utere tuo ut alienum non laedas*" describes the other face of the coin of sovereignty. It has become the mainspring both of developments in customary law and of a hundred intergovernmental negotiations in a dozen different fields. Indeed, McDougal's and Schlei's description of the process of development of customary law relating to the uses of the high seas is no less applicable to the treaty-making activity of the Third United Nations Conference on the Law of the Sea, a quarter of a century later:

It is a continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers, external to the demanding nation-state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and the rival claimants, and ultimately accept or reject them.⁶⁷

To find an accommodation between doctrine and practice, it is necessary to develop the theory of international liability for injurious consequences arising out of acts not prohibited by international law, admitting the relevance in appropriate contexts of legitimate interests and multiple factors.

B. Legitimate interests and multiple factors

39. In the preceding paragraphs, and in Chapter II,⁶⁸ it has been emphasized that, in the modern world,

it to prohibit another State from carrying out on its own territory such activities [atmospheric nuclear testing] which involve risks to its neighbours."

And later:

"The point is that if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their territorial sovereignty." (Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, pp. 131 and 132.)

See, more generally, the opinion of Judge Ignacio-Pinto (*ibid.*, p. 128), and, for example, the dissenting opinion of Judge Badawi Pasha in the Corfu Channel case (Merits): *I.C.J. Reports 1949*, especially pp. 65–66.

⁶⁷ M. S. McDougal and N. A. Schlei, "The hydrogen bomb tests in perspective: Lawful measures for security", *The Yale Law Journal* (New Haven, Conn.), vol. 64, No. 5 (April, 1955), p. 656. See also, as to matters discussed in this section, G. Handl, "An international legal perspective on the conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 7 (1978), No. 1, especially pp. 6–15.

⁶⁸ See para. 26 above.

practical problems regarding the delimitation of sovereign interests can seldom be resolved merely by application of a simple governing rule. Thus, in giving judgement in the *Fisheries* case (United Kingdom v. Norway),⁶⁹ the International Court of Justice rejected the view that the rule of the mean low water mark was the only criterion for fixing the baselines of the territorial sea. In many circumstances that rule might yield an appropriate result, but not in all circumstances. In the case of Norway's deeply indented coast-line, it was a sufficient compliance with the requirements of customary international law that baselines should "not depart to any appreciable extent from the general direction of the coast", taking into account "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them", and "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage".⁷⁰

40. In the *North Sea Continental Shelf* cases,⁷¹ the factors ultimately adduced by the International Court of Justice as those that might guide the parties in their search for an agreed solution are not dissimilar to the Court's criteria in the Anglo-Norwegian *Fisheries* case: the geographical configuration; the domination of the sea by the land; the unity of any natural resources; the measurement of sea frontages according to the general direction of the coasts.⁷² When these or other agreed criteria yield no certain result, there is a further invocation of the principles of equity—or, in this case, equality within the given framework of legitimate interest.⁷³ The first emphasis, however, is on the duty to negotiate: the applicable rule of law itself requires the parties "to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement".⁷⁴

41. These enlargements in legal perspectives are not achieved without protest. In the Anglo-Norwegian *Fisheries* case, Judge McNair, dissenting, comments:

In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of

such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.⁷⁵

Similarly, in the *North Sea Continental Shelf* cases, Judge Koretsky, also dissenting, distinguishes the political, economic and related factors which may properly guide the parties in reaching an agreement from those appropriate to the judicial function:

The assessment of such considerations is a political and subjective matter, and it is not for the Court as a judicial organ to concern itself with it unless the parties submit to it a dispute on a question or questions of a really legal character.⁷⁶

Despite the protests—and the understandable yearning for a world in which everything was simpler and law and politics were more easily separated—there is no doubt that in these two cases a watershed was crossed. The reluctant acceptance of multiformity within the sphere of operation of a single rule of law is marked by the barrage of individual concurring and dissenting opinions, of formidable proportions and great legal value, accompanying the Court's judgement in the *North Sea Continental Shelf* cases.

42. The moral is one that suits well enough the disposition of States in the late twentieth century. Wherever possible, States should, in exercise of their treaty-making power, meet problems before they arise, substituting, for the uncertain limits of the right of each to go its own way, agreed boundary lines that are easily observable or joint enterprises with defined objectives and operating procedures. As in the *North Sea Continental Shelf* cases situation, agreements reached cannot bind those who are not parties and who have a legal interest in the issue; but, as in that situation, the duty to negotiate "with a view to arriving at an agreement, and not merely to go through a formal process of negotiation" is itself an expression of a binding rule of customary law, even though the rule is of great generality. In so far as this rule concerns the conservation and utilization of the physical environment, it is reflected in the famous dictum of the *Trail Smelter* arbitral award,⁷⁷ evoked in the corresponding passage of the *Corfu Channel* judgement,⁷⁸ and confirmed in Principle 21 of the Declaration of the United Nations Conference on the Human Environment.⁷⁹ It in no way detracts from the legal force of that Principle that it is accompanied by a call for the further development of international law regarding liability and compensation (Principle 22)⁸⁰ and by an emphasis upon an especially important general category of legitimate interests (Principle 23).⁸¹

⁶⁹ *Fisheries*, Judgment [of 18 December 1951]: *I.C.J. Reports 1951*, p. 116.

⁷⁰ *Ibid.*, p. 133.

These criteria are codified in art. 4 of the 1958 Convention on the Territorial Sea and Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205) and in art. 7 of the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.2 and Corr.2-5).

⁷¹ *North Sea Continental Shelf*, Judgment: *I.C.J. Reports 1969*, p. 3.

⁷² *Ibid.*, pp. 51-52.

⁷³ *Ibid.*, pp. 48-52.

⁷⁴ *Ibid.*, p. 47.

⁷⁵ *I.C.J. Reports 1951*, p. 169.

⁷⁶ *I.C.J. Reports 1969*, p. 155.

⁷⁷ See para. 33 above.

⁷⁸ See para. 36 above.

⁷⁹ See footnote 17 above.

⁸⁰ *Ibid.*

⁸¹ See footnote 24 above.

43. It is possible to approach the problems of the environment either from the standpoint of disentangling the separate interests of sovereign States, so that the interest of each achieves its maximum extension and minimum impairment, or from the standpoint of the equitable user of a common resource. The tendency has been to reserve the expression "shared resources" for smaller situations, such as those in which political boundaries do not correspond with the geomorphological unity of terrain.⁸² Nevertheless, the concepts of shared and separate interests are always complementary. Thus, for example, the Third United Nations Conference on the Law of the Sea is engaged in settling the maximum permissible seaward extensions of State sovereignty and sovereign rights; in reconciling the separate interests of flag States and of coastal States concerning such matters as the right of innocent passage through the territorial sea, including international straits, and jurisdiction beyond territorial limits; in balancing the mixed regime of shared and separate interests in the management and exploitation of the exclusive economic zone; and in developing the shared interest in the area of the seabed and ocean floor beyond the limits of national jurisdiction.⁸³

44. The Commission's own recent studies of the law of the non-navigable uses of international water-courses have stressed that the world's supply of water is finite—that a given and unchangeable quantity of water is constantly recycled by nature, but that nature's laundering cannot contend with levels and kinds of contamination that are now occurring.⁸⁴ The Long-range Transboundary Air Pollution Convention⁸⁵—apparently the first treaty instrument to include a recital of Principle 21 of the Declaration of the United Nations Conference on the Human Environment—underlines much the same point, pledging (art. 3) the contracting parties:

by means of exchanges of information, consultation, research and monitoring [to] develop without undue delay policies and strategies which shall serve as a means of combating the discharge

of air pollutants, taking into account efforts already made at national and international levels.

Air and water and the filtered light and warmth of the sun, each a pre-requisite for human survival, are threatened with irreversible degeneration as a by-product of human activity.

45. Under compulsions of this order—whether they are related to the protection of the environment, to the quest for peace, or to any other objective that vitally affects the human condition⁸⁶—the duty of reasonable care or due diligence acquires both a greater intensity and a new dimension.⁸⁷ In making effective dispositions to protect the environment, equal solicitude has to be shown for the varied circumstances of States and of their peoples. That is the purport of Principle 23 and other provisions of the Declaration of the United Nations Conference on the Human Environment, but practical illustrations are not lacking. For example, the proposals before the Third United Nations Conference on the Law of the Sea relating to production objectives and policies in the seabed area pay special regard to:

the protection of developing countries from adverse effects on their economies or on their export earnings, resulting from a reduction in the price of an affected mineral, or in the volume of the mineral exported . . .⁸⁸ Additionally, a system of compensation is envisaged "for developing countries which suffer adverse effects on their export earnings or economies . . ."⁸⁹

46. To put the matter in another way, the duty to have regard to all interests that may be affected can be seen as arising directly from the obligation to take reasonable care, but it may also be seen as arising out of an equitable principle that supplements and informs the discharge of that obligation. A State that undertakes or allows an activity that in fact causes substantial injurious consequences beyond its own borders may, despite any other precautions it has taken, be found to have failed in its duty of care, if it has not provided (or has not done everything incumbent upon it to provide) an adequate and accepted regime of compensation. If, however, the same injurious consequences occur in circumstances the possibility of which not even a vigilant State could have been expected to envisage, equity may still suggest that the State which took or allowed the action should

⁸² See for example General Assembly resolution 3129 (XXVIII) of 13 December 1973, and the valuable report on co-operation in the field of the environment concerning natural resources shared by two or more States, presented in consequence of that resolution to the Governing Council of UNEP by the Executive Director in April 1975 (UNEP/GC/44 and Corr.1 and 2 and Add.1). See also the reports of the Intergovernmental Working Group of Experts on Natural Resources shared by two or more States on the work of its second and third sessions, held in September 1976 and January 1977 (UNEP/IG.3/3 and UNEP/IG.7/3). See also footnotes 8 and 9 above.

⁸³ See "Informal Composite Negotiating Text/Revision 2" (A/CONF.62/WP.10/Rev.2 and Corr. 2 and 3).

⁸⁴ See, especially, the first report of Mr. Schwebel, Special Rapporteur (*Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320). See also the materials relating to the United Nations Water Conference (March 1977) cited in Mr. Schwebel's second report (p. 159 above, document A/CN.4/332 and Add.1, paras. 149 *et seq.*).

⁸⁵ ECE/HLM.1/2, annex I.

⁸⁶ In this context, it should be noted that the Final Act of the Conference on Security and Co-operation in Europe (August 1975) (*Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies 1975) foreshadowed the High-level Meeting held in the framework of the ECE on the Protection of the Environment (November 1979) (ECE/HLM.1/2 and Add.1), at which the Convention on Long-range Transboundary Air Pollution was adopted.

⁸⁷ See para. 16 above. See also Dupuy, *op cit.*, especially title II, chap. 1, pp. 259 *et seq.*

⁸⁸ "Informal Composite Negotiating Text/Revision 2" (A/CONF.62/WP.10/Rev.2 and Corr.2 and 3), art. 150, subpara. (g).

⁸⁹ *Ibid.*, art. 151, para. 4.

provide compensation for the innocent victim;⁹⁰ but other equities may outweigh that consideration.⁹¹

47. The equitable principle can be seen to operate—as it were under laboratory conditions—in circumstances in which the wrongfulness of the action is precluded;⁹² but even in that limiting case, equity operates as a function of the primary rule of obligation, which insists that liability be assessed with reference to the injurious consequences suffered by the innocent victim as well as with reference to the quality of the act.⁹³ At the other end of the spectrum, the redress of injurious consequences that arise out of activities which adjacent national communities have expressly or tacitly agreed to tolerate, may well be left in the first instance to the operation of municipal law, even though in a particular case the injurious consequences have occurred transnationally.⁹⁴ Moreover, States have always the option of extending such arrangements reciprocally to classes of case that otherwise might immediately engage international liability. This policy has, for example, been pursued by the OECD in relation to transfrontier pollution.⁹⁵

48. It is not necessary, for the purposes of the present preliminary report, to consider in any greater detail the boundless choices that States have at their disposal in constructing regimes to regulate their mutual obligations in relation to shared interests, or to activities that have, or may have, adverse transboundary effects; but reference to two kinds of model may help to

elucidate general principle. First, in the very important fields of the peaceful uses of nuclear energy and of the sea carriage of oil, internationally agreed safety and supervisory measures have been supplemented by conventional regimes regulating liability for damage.⁹⁶ In both cases, liability arises from the fact that the damage has been sustained, and is “channelled” to the “operator” of the installation or ship; the recourse of the victim, whether a Government or a private person, is to the appropriate municipal court, and any jurisdictional immunities that might otherwise have been available are waived. There are measures to ensure that liabilities incurred will be met, but the maximum liability in respect of a single incident is limited. In the case of the conventions dealing with nuclear damage, the contracting Governments are guarantors for payment of compensation within the limits of liability fixed; in the case of the conventions dealing with oil spillages, there is no corresponding degree of direct governmental involvement, but an international compensation fund has been established by some Governments to cushion losses that may be incurred both by shipowners and by the victims of accidents.⁹⁷

49. Secondly, in the Helsinki Rules on the uses of the Waters of International Rivers,⁹⁸ which deal with the reciprocal rights and obligations of States that share an international drainage basin, the International Law Association provided an early and important model for a regime of shared resources. From the standpoint of the present report, it is of particular interest that the principle of equitable utilization, stated as a rule in article IV, is linked with the duty to minimize pollution, stated in article X, and that both of these broad rules are linked with the long and non-exhaustive enumeration of relevant factors in article V.⁹⁹ The

⁹⁰ *Ibid.*, art. 59:

“In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”

⁹¹ Cf. North Sea Continental Shelf. Judgment: *I.C.J. Reports 1969*, p. 50:

“In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.”

⁹² See para. 29 above.

⁹³ Cf. North Sea Continental Shelf. Judgment: *I.C.J. Reports 1969*, p. 48:

“Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.”

⁹⁴ See para. 37 and footnote 64 above.

⁹⁵ See for example *International Legal Materials*, vol. 14, p. 242; OECD Council Recommendation on principles concerning transfrontier pollution (OECD document C(74) 224); *ibid.*, vol. 15, p. 1218; OECD Council Recommendation on the equal right of access in relation to transfrontier pollution (OECD document C(76) 55 (Final)).

⁹⁶ The Conventions concerned are listed in footnote 47 above.

⁹⁷ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (for reference, see footnote 47).

⁹⁸ For the full text of the Helsinki Rules, with commentaries, see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 484.

⁹⁹

“Article IV

“Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.”

“Article V

“(1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.

“(2) Relevant factors which are to be considered include, but are not limited to:

“(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

“(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

“(c) the climate affecting the basin;

“(d) the past utilization of the waters of the basin, including in particular existing utilization;

(Continued on next page.)

commentary to article IV stresses the fundamental consideration that a regime of care for the shared environmental demands equal care for the individuality, as well as the differing needs, of the States and peoples concerned.¹⁰⁰

(Footnote 99 continued.)

“(e) the economic and social needs of each basin State;

“(f) the population dependent on the waters of the basin in each basin State;

“(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

“(h) the availability of other resources;

“(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

“(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

“(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State;

“(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.”

“Article X

“1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State

“(a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and

“(b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.

“2. The rule stated in paragraph 1 of this Article applies to water pollution originating:

“(a) within a territory of the State, or

“(b) outside the territory of the State, if it is caused by the State’s conduct.”

¹⁰⁰ ILA, *op. cit.*, p. 487:

“A use of a basin State must take into consideration the economic and social needs of its co-basin States for use of the waters, and *vice versa*. . . . To be worthy of protection a use must be ‘beneficial’; that is to say, it must be economically or socially valuable, as opposed, for example, to a diversion of waters by one State merely for the purpose of harassing another.

50. At the end of this chapter, one must return to the concept of “a legal interest”. The *Lake Lanoux* arbitral tribunal observed:

In fact, States are today perfectly conscious of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal goodwill, provide States with the best conditions for concluding agreements.¹⁰¹

Nevertheless, international law does not undermine the sovereignty of States by making their essential freedom of action within their own borders subject to a foreign veto,¹⁰² and, except in the last resort, it does not place its faith in prohibitory rules:

France is entitled to exercise her rights; she cannot ignore Spanish interests.

Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.

As a matter of form, the upstream State has procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must determine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State.¹⁰³

“A ‘beneficial use’ need not be *the* most productive use to which the water may be put, nor need it utilise the most efficient methods known in order to avoid waste and insure maximum utilisation. . . . the present rule is not designed to foster waste but to hold States to a duty of efficiency which is commensurate with their financial resources.”

¹⁰¹ United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), p. 308.

¹⁰² See *Lake Lanoux* arbitral award, *ibid.*, especially pp. 306–307.

¹⁰³ *Ibid.*, p. 316.

CHAPTER IV

The nature and scope of the topic

A. The nature of the topic

51. Among the materials gathered in the preceding chapters it should be possible to find the framework of this topic, which can be tested in a preliminary way by reference to the known behaviour of States and to their expressed needs and expectations. First, the very basis of the topic is inherent in its present title. The liability with which the topic deals does not arise out of wrongfulness; it therefore can arise only out of primary rules of obligation.¹⁰⁴ Any other conclusion would

¹⁰⁴ See paras. 19–25 above.

mean setting aside the principles of State responsibility as the Commission has understood and developed them—and the costs of such unfaithfulness would be astronomically high. It is, in part, a fear of incurring costs of this order that fuels resistance to new concepts of responsibility (or liability), expressed in such terms as “risk” or “no-fault”.¹⁰⁵

52. Secondly, the principle out of which the primary obligation is born has the same elemental character as the principle that treaty obligations must be respected.

¹⁰⁵ See paras. 15–17 above.

A universe of law postulates that the freedom of each of its subjects will be bounded by equal respect for the freedoms of other subjects. In the final analysis, it is by conformity with this norm, expressed in the maxim "*sic utere tuo ut alienum non laedas*", that the extent and intensity of a State's obligations must be measured. If the secondary rules—which in reality are entirely neutral—are regarded as performing this function, there may well appear to be a fatal gap between the extent of a State's rights and that of its correlative obligations.¹⁰⁶ New theories of responsibility are sometimes advanced with a view to closing that perceived gap. With similar intentions, some learned writers have regarded questions of attribution as belonging to the sphere of the particular primary rules they accompany, rather than to the generalized sphere of secondary rules.¹⁰⁷

53. In the more usual classification that the Commission has followed, it is still the primary rule that determines the intensity of an obligation. For example, the Special Rapporteur on State responsibility (part I), Mr. Ago, has noted that:

international obligations to prevent an event might, after all, have their origin in custom or in treaties, and their subject-matter as well as the degree of prevention required might vary considerably. It was not to be excluded that some of them might be absolute. On the other hand, it was clear that a lesser degree of prevention was required for the protection of foreign private persons than for those enjoying special protection.¹⁰⁸

Secondary rules must therefore be applied with reference to the content of the relevant primary rule, in order not to frustrate the intention of that primary rule.

54. Thirdly, the developments which have led in the twentieth century to the establishment of a world organization, and to countless other forms of organized intergovernmental co-operation, have also given rise to innumerable situations of actual or potential conflict between States each of which is pursuing a legitimate right or interest.¹⁰⁹ The gap mentioned in the preceding paragraph then becomes of great practical significance. The pressures upon what might be called the "privacy" of States lead to legislative and judicial reaffirmations of their inalienable sovereignty, but also to more and more frequent warnings that the right to live in freedom depends upon respect for the rights and freedoms of others. In the *Corfu Channel* case judgement and in the Declaration of the United Nations Conference on the Human Environment—to take only two leading examples, drawn respectively from judicial and from legislative sources—these emphases are balanced.¹¹⁰

55. Fourthly, as States become more aware of, and more articulate about, the need to preserve this precarious balance between liberty and licence, the

standard of the care that they owe to each other may rise. For example, although the Convention on Long-range Transboundary Air Pollution carries a self-conscious footnote stating that it contains no rule as to liability, the terms of the Convention and the concordant statements made by delegation leaders to the High-level Meeting at which the Convention was adopted are, in their general effect, a mutual pledge to observe higher standards of vigilance.¹¹¹ Under such evolutionary pressures, whether or not derived from treaty instruments, the *Corfu Channel* case criterion of actual knowledge of a source of danger may sometimes be replaced, as the test of responsibility for wrongfulness, by an assessment as to whether a lack of knowledge is compatible with the required standard of due diligence. More than that, the standard may be purged of any subjective element by the emergence of a rule that a given level of pollution or other injury constitutes a presumption—or even conclusive proof—of wrongfulness.¹¹²

56. Nevertheless, States, balancing their need for habitual observance of stricter standards with reluctance to admit that an accidental deviation from those standards will automatically entail wrongfulness, may choose to create a buffer zone. Thus, in the Convention on International Liability for Damage caused by Space Objects (1971) States agreed, not that the accidental landing of a space object in the territory of another State would be wrongful, but that it would give rise to an obligation to pay compensation for any injurious consequences incurred.¹¹³ This approach to a problem may offer several advantages. In the first place, it satisfies the obligation—stressed, for example, in the *Lake Lanoux* arbitral award—that States engaging in an activity which may cause injurious consequences transnationally, will take reasonable account of the interests and wishes of other States likely to be affected.¹¹⁴ Secondly, it removes the taint of unlawfulness from an activity which, if properly regulated, is judged to be beneficial, despite a residual capacity to cause incidental harm. Thirdly, it should make easier a just, efficient and amicable settlement of any liability that may arise.

57. The starting-point for the construction of such a regime must be the equality of rights and obligations implied in Principle 21 of the Declaration of the United Nations Conference on the Human Environment¹¹⁵ and in every other formulation of the maxim "*sic utere tuo ut alienum non laedas*". Nor is there in principle any reason why the standard of obligation should not be an absolute standard; for that is the only standard commensurate with the completeness of a State's sovereignty, and the exclusiveness of its

¹⁰⁶ See paras. 26–28 above.

¹⁰⁷ See para. 24 above.

¹⁰⁸ *Yearbook . . . 1978*, vol. I, p. 10, 1477th meeting, para. 5.

¹⁰⁹ See paras. 32–38 above.

¹¹⁰ See paras. 36 and 42 above.

¹¹¹ See paras. 5 and 7 above.

¹¹² See Dupuy, *op. cit.*, pp. 259–274.

¹¹³ See para. 21 and footnote 34 above.

¹¹⁴ See para. 50 and footnote 101 above.

¹¹⁵ See footnote 17 above.

jurisdiction, over its territory, and over its ships, aircraft, and the activities of its nationals when beyond the territorial jurisdiction of any State. Moreover, as we have already seen, such a high standard of obligation is not inconsistent with the principles of State responsibility, or with the modern tendency to formulate detailed primary rules in ways that leave no room for a margin of appreciation. It is also consistent with the Commission's conclusion that the circumstances which preclude wrongfulness do not necessarily prevent a liability from arising from the same act or omission.¹¹⁶ The substantial deterrents to the formulation of existing rules of obligation and to the acceptance of new rules are not doctrinal: they arise from the complexity of the subject-matter.

58. Yet it is this very complexity that provides the main incentive to construct regimes regulating conduct and liabilities in respect of acts not prohibited, rather than to multiply prohibitions.¹¹⁷ Normally the interests of the parties to such a negotiation will not be polarized. Most States that are exposed to the dangers of oil spillages at sea are also dependent—as consumers, producers or shippers, or all three—on the sea carriage of oil, and a limitation of liability in respect of a single incident may seem a reasonable price to pay for the certainty of compensation within that limit, and for moderating the financial burden upon the industry.¹¹⁸ Most States that have encountered a transnational problem of short-range industrial air pollution are themselves contributors to the pollution from which they and their neighbours suffer, and their interest is in extending the area in which uniform remedial measures are taken.¹¹⁹ Where there is a plan of action that lends itself to uniform implementation through the agency of national courts, the escape from the less structured procedures of Government-to-Government negotiation in respect of each individual incident should be welcomed equally by the various interests; and the resulting regime may in some measure contribute to realizing the monist ideal of units between international and municipal law.¹²⁰

59. Where interests are uneven, the duty of care, directed and supplemented by the concept of equity, must have regard to the validity of existing human situations, as well as to the need for conservation of resources. If the acts or omissions of one State cause damage in the territory of another State in circumstances which preclude wrongfulness, there may well be a residual obligation upon the first State to make good the loss sustained by the second State,¹²¹ but,

¹¹⁶ See para. 30 above.

¹¹⁷ See paras. 42 *et seq.* above.

¹¹⁸ Cf. International Convention on Civil Liability for Oil Pollution Damage, (Brussels, 1969) and International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (for references, see footnote 47 above).

¹¹⁹ See the OECD Recommendations cited in footnote 95.

¹²⁰ See for example each of the regimes cited in the two preceding footnotes.

¹²¹ See para. 29 and para. 47 above.

depending upon the actual circumstances and the elements of common disaster, it may be more equitable that the loss should be shared or should lie where it falls. If advances in science and technology expose the deleterious consequences of established industrial practices and offer better alternatives, it may be entirely equitable that States with a common interest should subsidize those of their own number upon whom the burden of re-equipment falls most heavily. Similarly, it may be just that a downstream State should contribute to the cost of an upstream development that reduces a risk of flooding; and, where there is an international interest in preserving a resource or amenity located within the boundaries of one or more States, equity may demand that the burden, as well as the benefit, be shared.

60. In short, the elaboration of the rules relating to liability for injurious consequences in respect of acts not prohibited by international law revolves around the variable concept of "harm".¹²² Where a State suffers substantial injury, or reasonably believes that it is exposed to a substantial danger arising beyond its own borders, from the acts or omissions of other States, there is a new legal relationship which obliges the States concerned to attempt in good faith to arrive at an agreed conclusion as to the reality of the injury or danger and the measures of redress or abatement that are appropriate to the situation. A State within whose jurisdiction such an injury or danger is caused is not justified in refusing its co-operation upon the ground that the cause of the danger was not, or is not, within its knowledge or control. If such an injury or danger is not caused by a breach of a specific international obligation, a State suffering such an injury or danger is not justified in demanding any limitation of the freedom of action of another State in relation to matters arising within that State's jurisdiction, except the minimum needed to ensure the redress and abatement of the injury or danger, taking into account any beneficial, though competing, interests.

61. Although this preliminary report is a forecast, not a proof, of the matters with which it deals, it is submitted that the description contained in the preceding paragraph is in general conformity with elements of existing State practice and with solemn expressions of international intent, ranging from the aims and purposes of the United Nations Charter and the enunciation of the principle of good neighbourliness in the Bandung Declaration of the first Asian-African Conference on the Promotion of World Peace and Co-operation¹²³ to the Declaration of the United

¹²² See, especially, para. 38 above.

¹²³ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2. The Declaration on the Promotion of World Peace and Co-operation contains the following statement:

"Free from mistrust and fear, and with confidence and goodwill towards each other, nations should practise tolerance and live together in peace with one another as good neighbours and develop friendly co-operation on the basis of the following principles: . . ." (*ibid.*, p. 6).

Nations Conference on the Human Environment¹²⁴ and the Charter of Economic Rights and Duties of States.¹²⁵ This description may also be regarded as marking the transition of the duty of reasonable care or due diligence from the relatively limited context of the adjustment of differences between States to the more sophisticated requirements of interdependent community interests. It has not been thought necessary in this report to draw upon analogies from domestic law, because they tend to be either of such generality that they have already entered international law through the doorway of equity or in the guise of general principle, or else of such specificity that their influence will be felt at the level of the construction of a particular regime. Nevertheless, it should be acknowledged that the theme of interdependence necessarily applies at the international level emanations from the experience and sense of values gained by States in the process of governing their own affairs.

B. The scope of the topic

62. An extended treatment of the scope of the topic belongs more properly to the second report, so that the views of Commission members upon the present preliminary report may be taken into account before planning is any further advanced. There are, however, a few general issues to which the Commission's attention should be invited, even at the present stage. First, the title of the topic is abstract and of unlimited generality. The significance of that title, and of the terms it employs, has been reviewed in chapter I; and it was there noted that in practice the topic has always been discussed in the specific content of environmental hazard.¹²⁶ Throughout the present report, illustrations have been drawn from the field of the environment, but an attempt has also been made to show that the principle reflected in the title of the topic does not limit itself to the field of the environment.¹²⁷ In the view of

¹²⁴ See footnotes 17 and 24 above.

¹²⁵ Adopted in General Assembly resolution 3281 (XXIX). See in particular art. 30:

"The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment."

¹²⁶ See paras. 3 and 4 above.

¹²⁷ In 1960, in his general course, Sørensen examined at considerable length the limitations of State sovereignty (*loc. cit.*, p. 5). He traced, for example, the elements of responsibility for the treatment of aliens referred to in para. 29 of this report; accepted, more readily than some learned writers, that "Malgré ces incertitudes et difficultés il paraît justifié de conclure que l'exercice de la compétence territoriale de l'Etat est subordonné à un

the Special Rapporteur, the Commission is not here asked to espouse new principles, or to turn conventional exceptions into general rules; it is asked to develop existing principles of good lineage and great generality to meet an unprecedented need. In this task, it already has the advantage of recourse to considerable State practice.

63. Secondly, in the course of identifying the governing principles, prominence has been given—especially in chapter II of this report—to the relationship between responsibility for wrongful acts and liability in respect of acts not prohibited by international law. Any obligation may be broken; and therefore all obligations—including those which give rise to liability for injurious consequences in respect of acts not prohibited—are ultimately referable to the regime of responsibility for wrongfulness. A regime of liability in respect of acts not prohibited does not purport to fix the dividing line between lawfulness and unlawfulness: it fixes only the conditions under which custom or convention allows wrongfulness to be avoided. It is not, however, the case that regimes of liability in respect of acts not prohibited encroach upon areas in which States would otherwise be free of obligation. Much more typically, they enlarge the area of relative freedom, by reconciling and accommodating competing interests and activities without resort to prohibition.

64. Indirectly, therefore, regimes of liability in respect of acts not prohibited may play a large role in determining, if the occasion arises, an unmarked boundary line between lawfulness and unlawfulness. Some initial reference to these wider implications is part of the process of testing the validity of the present topic and its relationship with other topics. That having been done, it should not be necessary in future reports to make sustained comparisons between the regime of responsibility for wrongful acts and that of liability in respect of acts not prohibited. It satisfies the internal logic of the present topic that—as described in chapter III of this report—States have a duty to find the specific content of the criterion of "harm" whenever the occasion arises, and to govern themselves accordingly.

65. If the Commission and the General Assembly accept the view that this topic is essentially concerned with the elaboration of primary rules of obligation and that its main immediate reference is to developments

principe de bon voisinage international" (*ibid.* p. 198); but concluded that that principle was in some degree self-limiting:

"Le préjudice d'ordre économique causé à l'Etat voisin par un changement de politique commerciale d'un Etat, par le développement de ses ressources, par le perfectionnement de ses voies de communications, etc. appartient aux vicissitudes de la vie, contre lesquelles le droit international ne protège aucunement, à moins qu'il n'existe entre les parties des engagements contractuels prévoyant de telles éventualités." (*Ibid.*, p. 195.)

In the light of developments since 1960—and, especially, perhaps, the adoption by the General Assembly of the Charter of Economic Rights and Duties of States—the latter view would now require reappraisal.

within the field of the environment, it might also be agreed expressly to limit the topic, as was recommended by the Working Group set up by the Commission at its thirtieth session in 1978:

[The topic] concerns the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. [It] concerns also the injurious consequences that such use or management may entail within the territory of other States, or in

relation to the citizens and property of other States in areas beyond national jurisdiction.¹²⁸

It might then follow that the topic would be renamed, more modestly and concretely, to reflect the ambit of its actual concern.

¹²⁸ *Yearbook ... 1978*, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex, para. 13.