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

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

[Agenda item 5]

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CONTENTS

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
I. RELATIONSHIP WITH THE REGIME OF STATE RESPONSIBILITY	1-21	104
A. Introduction	1-6	104
B. Connotations of the general approach	7-10	105
C. Strict liability: some problems	11-14	106
D. Primary rules	15-21	107
II. THE INTERSECTION OF HARM AND WRONG	22-40	108
A. The <i>Trail Smelter</i> arbitration	22-28	108
B. Freedom of action and obedience to rules	29-40	110
III. RIGHTS AND INTERESTS	41-67	112
A. The need to balance interests	41-52	112
B. Elements in striking a balance of interests	53-60	115
C. Reflections of the double system in State practice	61-67	117
IV. THE NATURE AND SCOPE OF THE TOPIC	68-93	119
A. The duty of care	68-72	119
B. Unforeseen accidents	73-77	121
C. Nature of the topic	78-92	122
D. Scope of the topic	93	123
<i>Article 1. Scope of these articles</i>	93	123

CHAPTER I

Relationship with the regime of State responsibility

A. Introduction

1. Most topics on the agenda of the International Law Commission have a title that clearly establishes their outermost boundaries and essential content, so that an examination of State practice and doctrine may be conducted within predetermined limits. It has, however, been generally recognized that the treatment of the present topic—like that of State responsibility more than a decade earlier—should begin with an unusually careful and deliberate provisional estimate of scope and content. In the Sixth Committee of the General Assembly, as in the Commission itself, the Special Rapporteur has been encouraged to take time for a patient exploration of basic principle—though without losing sight of the priority which the topic has been assigned.

2. These instructions accord well with the actual circumstances of the Commission's work programme in this, the last year of the quinquennial term. At the present juncture, the Commission can spare only a few meetings for consideration of a topic so far from completion; but in those few meetings it must aim to round out the preliminary phase of enquiry, so that, with the General Assembly's agreement, the new Commission may inherit a coherent, though tentative, approach to the topic. Accordingly, this second report is an extension of the preliminary report submitted in 1980¹ and the caveats entered in paragraph 1 of that report are renewed. It is intended, as was foreshadowed in paragraph 62 of the preliminary report, that the whole of the present report should lead towards an initial assessment of the scope and content of the topic.

3. The elements displayed in the preliminary report have first to be reviewed and reassembled, taking account of the observations made in the Commission and in the Sixth Committee of the General Assembly. In neither body was there much support for an option canvassed by the Special Rapporteur in the last paragraphs of the preliminary report²—that is, a drastic reduction in the breadth and abstractness of the topic, so that it might be centred concretely in the area of the use and management of the physical environment. It was, indeed, acknowledged that the latter area was already very large, embracing the field of industrial and technological hazard, as well as other ecological or environmental issues. It was, moreover, recognized that the topic had attracted wide interest because of developments in the management and use of the physical environment, and that State practice in that area provided the staple materials upon which the Special Rapporteur should mainly rely.

4. Even so, it was thought by nearly all that the topic was aptly named,³ asserting a principle which should not be restricted, on any *a priori* ground, to a particular subject area.⁴ Some who took this view nevertheless doubted that the principle could at the present time be elaborated in a manner acceptable to States.⁵ Some considered, on the other hand, that the principle was self-limiting, being perpetually overtaken by the formation of rules of wrongfulness,⁶ or being squeezed into small, anomalous areas upon the fringes of wrongfulness.⁷ Whatever the view taken, it was common ground that there was much work yet to be done to establish the line of distinction between the present topic and obligations arising from wrongfulness.

5. Without underestimating the doctrinal difficulties, the majority of those who expressed an opinion believed that the topic was adequately founded in a fast-developing State practice.⁸ There was also wide agreement about the policy aims which the law should reflect; as one

³ See, however, comments as to "liability" (*ibid.*, p. 250, paras 10–12) and as to "acts not prohibited" (*ibid.*, p. 251, para. 14), and the comments of the representative of Israel in the Sixth Committee of the General Assembly during its thirty-fifth session (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 50th meeting, para. 18).

⁴ See para. 139 of the Commission's report on its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), p. 160), and the comments made in relation to that paragraph at the time of its adoption by the Commission (*Yearbook ... 1980*, vol. I, p. 302, 1601st meeting, paras. 44–46).

⁵ See *Yearbook ... 1980*, vol. II (Part Two), p. 160, para. 140; see also, for example, the comments of Mr. Reuter (*Yearbook ... 1980*, vol. I, p. 254, 1632nd meeting, para. 30), as well as comments in the Sixth Committee of the General Assembly at its thirty-fifth session of the representatives of Italy (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 49th meeting, para. 39) and of the United Kingdom (*ibid.*, 51st meeting, para. 14).

⁶ See *Yearbook ... 1980*, vol. II (Part Two), p. 161, para. 143; see also, for example, the comments of Mr. Díaz González (*Yearbook ... 1980*, vol. I, p. 255, 1632nd meeting, paras. 37 *et seq.*).

⁷ For indications of particular areas that may be thought to have special relevance, see the preliminary report, especially paras. 4–7 and para. 30 (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2, pp. 248–249 and 256); and, for comment on the relevance of the topic in specific areas, see, for example, the observations in the Sixth Committee of the General Assembly during its thirty-fifth session of the representatives of the Netherlands (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 44th meeting, paras. 35–38), of Brazil (*ibid.*, 47th meeting, paras. 32–34), of Sweden (*ibid.*, 49th meeting, paras. 4–7), of Argentina (*ibid.*, 50th meeting, paras. 30–34), and of India (*ibid.*, paras. 50–52).

⁸ See, for example, the observations, in the Sixth Committee of the General Assembly during its thirty-fifth session, of the representatives of Canada (*ibid.*, 48th meeting, paras. 9–11), of Sri Lanka (*ibid.*, 49th meeting, para. 11), of Czechoslovakia (*ibid.*, 54th meeting, para. 23) of Zaire (*ibid.*, paras. 68–71); of Spain (*ibid.*, 55th meeting, para. 22), of Algeria (*ibid.*, paras. 32–33), of Trinidad and Tobago (*ibid.*, 56th meeting, para. 29) and of Tunisia (*ibid.*, 58th meeting, para. 32).

¹ See *Yearbook ... 1980*, vol. II (Part One), pp. 247 *et seq.*, document A/CN.4/334 and Add.1 and 2.

² *Ibid.*, p. 265, paras. 62–65.

Commission member put it, when speaking as his country's representative in the Sixth Committee:

The Commission should attempt to minimize the possibility of injurious consequences and, in providing adequate redress for such consequences, should avoid as much as possible those measures which would prohibit or hamper the creative activities, including economic activities, of each State.⁹

6. The flexibility and breadth of these policy aims, which seek an optimal balance between competing rights or interests, and which range from the prime duty of preventing harm to the substituted duty of repairing harm when it occurs, are in bold contrast with the rigidity, and the exclusive focus upon compensation, which tend to be regarded as the hallmarks of a regime of strict liability. In the remainder of the present chapter, it is proposed to consider the part played by the seminal topic of State responsibility in providing a profile for the present topic. It will then be possible, in subsequent chapters, to see how well this profile matches the salient features of State practice and of doctrine.

B. Connotations of the general approach

7. It is necessary, in the first place, to draw out the significance of the decision, taken deliberately and without notable dissent, to approach the present topic at a high level of generality. This decision brings to mind factors which prompted the Commission, more than ten years ago, to turn from the subject of State responsibility for the treatment of aliens to the universal aspects of State responsibility.¹⁰ The latter approach cannot lead to any quick production of rules to cover all practical situations, and the usefulness of the approach is therefore sometimes doubted;¹¹ but, in the world at large, the demand for compendious rule-books is less pressing than the need to vindicate the integrity and even-handedness of legal policy and principle. The Commission's work in the field of State responsibility is, apart from all other uses, an invitation to a renewal and extension of international confidence in law as a common possession. The treatment of the present topic cannot succeed unless it performs, in a small way, a similar service for a new, but growing, area of law.

8. Moreover, in the quest for fairness, the imperfect analogy between the case of aliens who suffer harm within

the jurisdiction of a foreign State and the case of the victims of transnational harm compels attention. Victims of the latter class have an even stronger claim to international legal protection, because they have not chosen to expose themselves to whatever dangers may be generated within the jurisdiction of another State. If their cases have been less noticed in the past, that is because the perils that beset them are, for the most part, new. In respect of the treatment of aliens, the obligation to exhaust local remedies allows the receiving State repeated opportunities to avoid wrongfulness.¹² There can, in general, be no corresponding dispensation for the State in which transnational harm is generated; yet, whether or not this harm entails wrongfulness, there may be great advantage in giving the State concerned an inducement to make amends without a prior determination or acknowledgment of wrongdoing.

9. It is important to recognize—and it has often not been recognized—that the regime of responsibility for wrongful acts and the regime with which the present topic deals are not mutually exclusive. As the Commission last year observed at its thirty-second session, when adopting on first reading the final draft article in part 1 of the articles dealing with State responsibility (art. 35):

preclusion of the wrongfulness of the act of a State ... should be understood as not affecting the possibility that the State committing the act may, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question.¹³

Equally, obligations arising independently of wrongfulness will not be obliterated by the occurrence of wrongfulness.¹⁴ Agreement upon the existence and content of such obligations may sometimes afford complete satisfaction to States which would not so readily have agreed that a loss or injury in question had arisen from a wrongful act.

10. It must follow that the regime described in the title of the present topic is not, as has often been thought, an anomalous collection of limiting cases for which the regime of State responsibility for wrongfulness fails to provide. It is, of course, true that the latter regime does provide, at least in principle, for all except an assortment of fringe areas; and it is mainly in those fringe areas that obligations arising out of acts not prohibited obtrude themselves upon our notice. It is also true that the regime with which we are now dealing cannot and should not be in any sense a competitor with the regime of State responsibility for wrongful acts; for that regime is the very centre of the system of international law. On the contrary, it seems possible that the regime now under consideration

⁹ Statement by Mr. Tsuruoka, representative of Japan at the Sixth Committee of the General Assembly during its thirty-fifth session (*ibid.*, 48th meeting, para. 45). For a similar emphasis on prevention, see, for example, the observations of the representatives of the Federal Republic of Germany (*ibid.*, 45th meeting, para. 18), of Ethiopia (*ibid.*, 51st meeting, para. 53), of Jamaica (*ibid.*, 54th meeting, para. 3), of Austria (*ibid.*, 57th meeting, para. 55) and of Indonesia (*ibid.*, 58th meeting, para. 27). The representative of Brazil, while agreeing that questions of prevention were of prime importance, doubted that they could be encompassed within this topic (*ibid.*, 47th meeting, para. 36).

See also the preliminary report, especially paras. 26–31 (*Yearbook ... 1980*, vol. II (Part One), pp. 254–256, document A/CN.4/334 and Add.1 and 2).

¹⁰ For the history of this matter, see, in particular, *Yearbook ... 1969*, vol. II, pp. 229 *et seq.*, document A/7610/Rev.1, chap. IV.

¹¹ See, for example, the summarized remarks of R.B. Lillich, "The current status of the law of State responsibility for injuries to aliens", in American Society of International Law, *Proceedings of the 73rd Annual Meeting, Washington, D.C. April 26–28, 1979*, pp. 246–247.

¹² See the preliminary report, and especially para. 29 (*Yearbook ... 1980*, vol. II (Part One), pp. 255–256, document A/CN.4/334 and Add.1 and 2), and the observations of Mr. Verosta in relation to that paragraph (*Yearbook ... 1980*, vol. I, p. 251, 1632nd meeting, para. 7). Cf. also article 22 of the draft articles on State responsibility, part 1, and the Commission's commentary thereto (*Yearbook ... 1977*, vol. II (Part Two), pp. 30 *et seq.*).

¹³ *Yearbook ... 1980*, vol. II (Part Two), p. 61, para. (1) of the commentary to article 35.

¹⁴ See the preliminary report, para. 14 (*Yearbook ... 1980*, vol. II (Part One), p. 251, document A/CN.4/334 and Add.1 and 2).

may have an auxiliary and supportive role in those situations in which rules as to wrongfulness are either in course of formation, or embody such complex tests that their application in disputed cases is not easily determined.

C. Strict liability: some problems

11. If a sweeping metaphor may be permitted in regard to matters which must later be examined more closely, doctrine is a wave that breaks and scatters around the rocky outcrop of "strict" or "absolute" or "no-fault liability" or "liability for risk".¹⁵ For some it represents a new and autonomous principle, more or less unrelated to the received rules of State responsibility, and more or less

¹⁵ Although the following references are by no means complete, they offer a range of viewpoints bearing on the doctrinal issue described in paras. 11 and 12:

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, pp. 267-273;

P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et nucléaire* (Paris, Pedone, 1976);

L. F. E. Goldie, "Liability for damage and the progressive development of international law", *International and Comparative Law Quarterly* (London), vol. 14 (October 1965), p. 1189;

———, "International principles of responsibility for pollution", *Columbia Journal of Transnational Law* (New York), vol. 9, No. 2 (Autumn 1970), p. 283;

———, "A general view of international environmental law: A survey of capabilities, trends and limits", *Académie de droit international de La Haye, 1973 Colloquium: The Protection of the Environment and International Law* (Leyden, Sijthoff, 1975), p. 26;

G. Handl, "Territorial sovereignty and the problem of transnational pollution", *American Journal of International Law* (Washington, D.C.), vol. 69, No. 1 (January 1975), p. 50;

———, "Balancing of interests and international liability for the pollution of international watercourses: Customary principles of law revisited", *The Canadian Yearbook of International Law, 1976* (Vancouver), p. 156;

———, "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, No. 1 (1978), p. 1;

———, "State liability for accidental transnational environmental damage by private persons", *American Journal of International Law* (Washington, D.C.), vol. 74, No. 3 (July 1980), p. 525;

M. J. L. Hardy, "Nuclear liability: The general principles of law and further proposals", *The British Year Book of International Law, 1960* (London), vol. 36, p. 223;

———, "International protection against nuclear risks", *International and Comparative Law Quarterly* (London), vol. 10 (October 1961), p. 739;

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

J. M. Kelson, "State responsibility and the abnormally dangerous activity", *Harvard International Law Journal* (Cambridge, Mass.), vol. 13, No. 2 (Spring 1972), p. 197;

D. Lévy, "La responsabilité pour omission et la responsabilité pour risque en droit international public", *Revue générale de droit international public* (Paris), 65th year, vol. XXXII (October-December 1961), p. 744;

P. Reuter, "Principes de droit international public", *Recueil des cours . . . , 1961-II* (Leyden, Sijthoff, 1962), vol. 103, pp. 590-595;

J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (Toronto, University of Toronto Press, 1969), pp. 163-167.

in competition with those rules. Notwithstanding efforts to derive the principle from customary law, it tends to be justified by reference to the exceptional factual situations which have called it into being and to the developments in municipal law by which it has been inspired. Despite emphasis upon such open-ended concepts as "ultra-hazard" and "non-natural user", no very satisfactory way has been found to demonstrate that this onerous principle is self-limiting.

12. The cause of strict liability, therefore, generates and fuels its own opposition, which characteristically insists that strict liability regimes are always the product of convention, and that customary law obligations relevant to the avoidance and prevention of harm are always founded in responsibility for wrongfulness. There are two major consequential difficulties, which can be briefly stated, but must later be more thoroughly considered. First, the relationship between wrongfulness and the occurrence of harm is subtle, and does not lend itself to a universal formulation. Second, where there is wrongfulness, the precipitating factor is the occurrence of harm; and therefore the principle does not readily explain an obligation of prevention.

13. Apart altogether from their intrinsic difficulties, neither of the opposing positions outlined in the two preceding paragraphs is open to the Special Rapporteur. There has been general agreement within the Commission—and this view has been widely supported in the Sixth Committee of the General Assembly¹⁶—that the present topic is concerned with the elaboration of primary rules of obligation. These rules, therefore, cannot be in derogation of the universal system of secondary rules which comprise the subject-matter of the topic of State responsibility. Similarly, obligations arising from responsibility for wrongful acts cannot be allowed to become the focus of our attention, except in so far as this can help to fix the content and boundaries of the present topic, which is by definition concerned with obligations arising from acts not prohibited by international law.

14. On the other hand, by maintaining the objectives of the present topic, it should be possible to relieve the extreme discomfort associated with each of the opposing doctrinal positions already noted. If strict liability ceases to have the apparent character of an ungovernable encroachment upon the orthodox doctrine of State responsibility, it will be freed to take an appropriate place among measures that may be required when a beneficial activity entails substantial transnational dangers which are not entirely preventable. Again, there may be less artificiality in recognizing primary obligations of prevention, when substantial harm is in prospect, than in postulating that the shadow of wrongfulness reaches back to condemn a lack of prevention even before harm ensues.

¹⁶ See, however, *contra*, the observations of the representative of Israel (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 50th meeting, para. 19*) and of Zaire (*ibid.*, 54th meeting, para. 69).

D. Primary rules

15. Before considering further the dynamic principle that underlies the present topic, it seems necessary to review briefly the structural consequences of locating the topic in the field of primary rules, and the analytic advantages of doing so. The first advantage is to obtain a release from the nagging apprehension that the thrust of the topic is heterodox—that it challenges the integrity of international law by postulating a system of obligation which disobeys the universal rules of State responsibility. It is those rules which have been called “secondary”, in the sense that they become operative only when the breach of a “primary” rule of obligation occurs.¹⁷ Therefore to place the new topic in the field of primary rules is to offer an iron-clad guarantee that the ordinary and orthodox application of the principles and rules of State responsibility is not imperilled.

16. There is a corresponding reduction in doctrinal involvements. For example, there is no longer a need or a temptation to invade the inner sanctum of the law of State responsibility by considering upon the same plane theories of “fault” and of “risk”, or by attaching pivotal importance to one or another reading of the nuanced term “objective responsibility”.¹⁸ Equally, there are no longer

¹⁷ See the preliminary report, paras. 19–25 (*Yearbook . . . 1980*, vol. II (Part One), pp. 253–254, document A/CN.4/334 and Add.1 and 2).

¹⁸ For initial guidance as to the usages of, and perceived comparisons or contrasts between, such concepts as “responsibility (or liability) for fault”, “objective responsibility (or liability)”, and “responsibility (or liability) for risk”—and, in so far as they directly concern international law, the concept of “abuse of rights” and “nuisance”—it is still helpful to consult E. Jiménez de Aréchaga, “International responsibility”, *Manual of Public International Law* (ed. M. Sørensen (London, Macmillan, repr. 1978), pp. 534–540); and Goldie, “Liability for damage and the progressive development of international law”, 14 (*loc. cit.*), p. 1189.

In general, “responsibility for fault” (or “subjective responsibility”) is contrasted with “objective responsibility” and both are aspects of responsibility for the breach of an international obligation (see Part I of the draft articles on State responsibility adopted by the Commission on first reading (*Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*)).

Alternatively, the term “fault” is used co-extensively with “responsibility for the breach of an international obligation”, and in that sense is contrasted with “no-fault” or “strict” or “absolute responsibility (or liability)” or “responsibility (or liability) for risk”.

In the latter context, the term “liability” is used in contrast with “responsibility”, to indicate that an obligation of the former kind arises without wrongfulness. Unfortunately, however, there is also an implication that the distinction is between different systems of secondary rules; and the initial preference of the Commission is to conclude that obligations which arise without wrongfulness are, by definition, a function of primary rules.

Finally, there is also a tendency in the literature (perhaps deriving from D. Lévy’s influential article, “La responsabilité pour omission et la responsabilité pour risque en droit international public” (*loc. cit.*) but more common in recent years) to minimize the distinction between obligations which arise out of wrongfulness and those which arise without wrongful conduct, by identifying “objective liability” with “no-fault liability”.

It is essential to distinguish clearly the two quite different senses in which the term “objective responsibility (or liability)” is used:

(a) In the first sense, it corresponds with the structure of the draft articles on State responsibility, part 1. There is an act or omission attributable to a State, and the consequence of that act or omission is not in conformity with an obligation of that State. By the conjunction of

doctrinal compulsions to make sharp distinctions between obligations of prevention and reparation, presuming that the former are usually well-founded in existing law, and that the latter must fight for their right of existence, unless they can be derived from breaches of obligations of prevention. States may, indeed, have strong policy preferences for dissociating these two kinds of obligation;¹⁹ but those preferences are more clearly seen and evaluated when freed from doctrinal overlay.

17. More generally, it is no longer necessary to map an intricate frontier between the domains of this topic and that of State responsibility. They are not competing sovereignties, and the aggrandisement of one is not at the expense of the other. Just as the Commission was careful to insist that its findings in the field of State responsibility have no direct bearing on the substance of the present topic,²⁰ so also the content of this topic will permit no inferences about the situation in the domain of responsibility for wrongful acts. Sometimes, but not always, conduct which gives rise to a duty of reparation under rules developed pursuant to this topic may also be characterized as a wrongful act.²¹ Sometimes, but not always, the measure of reparation for material loss or injury will be the same under either rubric.²² Sometimes, but by no means always, States will be more concerned to

these two circumstances, the “fault” of the State is considered to have been established.

(b) In the second sense, the element of attribution is absent, or is supplied in a manner not contemplated by the draft articles on State responsibility, part 1—for example, the mere fact that the act or omission took place within the territory or jurisdiction of a State is held to import the responsibility (or liability) of that State. In other words, the responsibility (or liability) of that State arises without “fault”—that is without the breach of an obligation of that State.

The Special Rapporteur did not in his preliminary report, and does not now, invoke a principle corresponding to paragraph (b) above; and it has not been suggested, either in the Commission or in the Sixth Committee of the General Assembly that such a principle should be invoked.

There is, however, no doubt at all that the principle of strict liability, well established in major systems of municipal law, is so much a part of the shared experience of States that it plays an indispensable role in the construction of a number of conventional regimes. In some cases, as Jenks foresaw in his 1965 lectures at the Hague Academy of International Law (see footnote 15 above), it provides the most appropriate—or even the only appropriate—means of discharging the obligations of States, in relation to activities occurring within their territories or jurisdictions, to afford protection to the legitimate rights and interests of other States. That general obligation of protection is explored in the present report.

¹⁹ See, for example, the cases referred to in the preliminary report, para. 5, and in the footnotes to that paragraph (*Yearbook . . . 1980*, vol. II (Part Two), pp. 248–249, document A/CN.4/334 and Add.1 and 2.)

²⁰ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, chap. II, paras. 37–39.

²¹ For example, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 provides, in art. XVIII, that:

“This Convention shall not be construed as affecting the rights, if any, of a Contracting Party under the general rules of public international law in respect of nuclear damage.” (United Nations, *Juridical Yearbook 1963* (Sales No. 65.V.3), p. 155.)

²² The range of factors which may affect the existence and extent of a duty of reparation under rules developed pursuant to this topic—for example, a general limitation of liability which takes into account the beneficial nature of the activity and its capacity to absorb increased

assert a right to prompt, adequate and effective reparation than to stipulate under which rubric the case falls or should be brought.²³

18. The looseness of the relationship postulated in the previous paragraph should help to ensure that State practice is not interpreted in accordance with a pre-conceived pattern. Looseness, however, does not imply a lack of closeness. A conventional regime made, in accordance with rules developed under this topic, to regulate a certain kind of danger, will contain obligations which, in relations between the parties, may fix or supersede the incidence of more general obligations, and so affect the point at which conduct becomes wrongful. Moreover, the obligations contained in conventional regimes may, in the ordinary way, pass into customary law, or may at least provide evidence of concordant practice that influences the standards and content of customary law. In short, the new topic is not a competitor in the field of secondary rules, but a catalyst in the field of primary rules. This may offer an essential clue to the definition of the scope of the new topic; but the development of the question of scope must await the outcome of a survey of State practice.

19. There is a final point to be made in this chapter. As attention is redirected from secondary to primary rules, the question of attribution assumes a different form. Rules of attribution, set out in chapter II of the draft articles on

(Footnote 22 continued.)

overheads—is potentially wider than the range of factors which may be expected to affect the measure of reparation for breach of an international obligation. However, in the case of the Convention on International Liability for Damage caused by Space Objects (approved by the General Assembly in its resolution 2777 (XXVI) of 29 November 1971, and signed on 29 March 1972: United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 111), there is an obligation to compensate fully for damage caused by a space object.

²³ Obviously, much may depend, for example, upon the victim State's assessment of the acting State's will and capacity to insure that the incident giving rise to the loss or injury will not recur.

State responsibility (part 1)²⁴ will of course have their normal operation if there is a breach of any rule that may be established in pursuance of the present topic; but this topic is itself confined to situations in which the rules of State responsibility for wrongful acts have not been engaged—or, at any rate, have not been invoked. We are therefore concerned solely with the quality of the primary rules of obligation, their extent and their intensity.

20. Once again, the decision as to the placement of the topic does not dispose of any point of substance. It remains the cardinal question whether, and on what terms, States recognize—and expect other States to recognize—even in circumstances which do not disclose the breach of any rule of international law, obligations in relation to harm occurring outside their territory or jurisdiction, and resulting from things done or omitted within that territory or jurisdiction. At a later point in the development of the topic, it must be decided whether the topic should deal only with obligations arising when harm occurs, or whether provision should also be made for corresponding obligations arising when there is a potentiality of harm.

21. Clearly, the generic rules, whatever their exact ambit and formulation, are—like the analogous specific rules in the Convention on International Liability for Damage caused by Space Objects²⁵ and in other treaty regimes—correctly expressed as primary rules of obligation. That being done, it will, from a structural standpoint, become easier to accord a proper place to factors by which obligations may be conditioned. Due acknowledgement of such factors is essential; for, as State practice shows, obligations arising out of acts not prohibited by international law usually occur within a total context which plays a part in determining the incidence and the magnitude of the obligation. That is a theme to be taken up in chapter III of this report.

²⁴ *Yearbook . . . 1980*, vol. II (Part Two), p. 31.

²⁵ See footnote 22 above.

CHAPTER II

The intersection of harm and wrong

A. The *Trail Smelter* arbitration

22. In this chapter the Special Rapporteur proposes to use the circumstances of the *Trail Smelter*²⁶ case as a connecting theme, drawing upon other elements in State practice only to the extent that it seems useful to illustrate or reinforce a particular point. It should be said at once that the reason for reverting to this *locus classicus* is not its present popularity among scholars; for the *Trail Smelter* awards appear to be undergoing the same kind of eclipse

that attends the work of some artists of good reputation in the period after their deaths. The reason for returning to the *Trail Smelter* case is rather that this arbitration between the United States of America and Canada is at once unique and prototypical, and that it raises nearly every important issue. For forty years it has stood almost alone.

23. The first great merit of the *Trail Smelter* case is that the dispute arose out of a commonplace set of facts. Industrial pollution from the privately owned smelter affected wooded and arable land across an international boundary, causing damage (that is, loss in value of crops and trees) that was economically significant, though small in proportion to the value of the product of the smelter

²⁶ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

industry.²⁷ The situation was unusual only in the circumstances that made possible the joint reference to arbitration. A combination of topography and prevailing weather intensified and localized the damaging effects of wind-borne pollution. Solutions at the level of municipal law were virtually ruled out, because the constitution of the American State of Washington did not allow the purchase of smoke easements by an alien;²⁸ and the Courts in the Canadian province of British Columbia were almost certainly without jurisdiction to offer effective relief for nuisances suffered in another country.²⁹

24. A further circumstance in favour of the reference to arbitration was that Canada and the United States enjoyed a close relationship which allowed some recourse to shared values, and which favoured an orderly settlement of outstanding issues. Even so, it was a long and tortuous negotiation that led to the conclusion of the Convention for settlement of difficulties arising from operation of smelter at Trail, B.C., which was signed on behalf of the two Governments on 15 April 1935, and entered into force in August of that year.³⁰ The antecedent inter-governmental correspondence was available to the tribunal, forming, in effect, a body of *travaux préparatoires* to which the tribunal had extensive recourse.³¹ The tribunal began its meetings in June 1937, and rendered a first award on 16 April 1938.³² With the agreement of the two Governments, the tribunal was given extended time in which to decide upon the need for, and character of, a future regime. The tribunal's second and last award, exhausting its terms of reference, was made on 11 March 1941.³³

25. It was not in dispute that, between 1926 and 1931, fumes from the smelter had caused damage in the State of Washington.³⁴ The Canadian authorities hoped, and the American authorities denied, that the nuisance had then ended, as a result of extensive modifications made to the smelter.³⁵ Following a recommendation of the Canadian/American International Joint Commission, the United States reluctantly agreed to accept a global sum of \$350,000 in full satisfaction of the damage that had

occurred up to the end of 1931.³⁶ In return, Canada agreed that other matters upon which the International Joint Commission had made recommendations should nevertheless be referred to arbitration.³⁷ Accordingly, the Tribunal was asked³⁸ to find whether there had been damage since 1931 and, if so, to assess compensation. If there had been damage, the tribunal was also asked—and this proved to be its major task—whether there was an obligation to refrain from causing further damage in the future, what measures or regime might be required to give effect to such an obligation, and whether provision should also be made for payment of compensation.

26. The tribunal, after careful enquiry, found as a fact that there had been further damage since 1931, and assessed that damage in its first award.³⁹ It went on to say that it could not answer the other questions reliably until scientific observations, conducted under a test regime which the tribunal then prescribed, had yielded new factual information.⁴⁰ A reason for this difference in treatment was that the tribunal's first task was non-principled: it was required by the parties merely to ascertain whether damage had been sustained and, if so, to quantify that damage. By contrast, the tribunal's remaining tasks called both for an elucidation of the general law, and for the application of that law to a factual situation which could be ascertained only by complex scientific enquiry.

27. It may at this stage be helpful to offer an interpretation of the logical sequence and manner in which the tribunal approached the issues for decision in its second and last award. It first decided that, if the transboundary harm which was still being caused by the Trail Smelter were shown to be wrongful in character, Canada, as the territorial sovereign, would have an

³⁶ *Ibid.*, especially pp. 892, 925–927, 939–950 and 966, and Convention for settlement of difficulties arising from operation of smelter at Trail, B.C., art. 1 (see para. 24 above).

³⁷ The key question was whether or not to accept the International Joint Commission's definition of "damage" (see *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), especially pp. 879, 887, 906, 907, 958–962 and 966–973), and the interpretation which the Tribunal gave in its second award: United Nations, *Report of Arbitral Awards*, vol. III (*op. cit.*), pp. 1960–1962).

³⁸ Article III of the Convention (see footnote 36 above) provides as follows:

"The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

"(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?"

"(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?"

"(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?"

"(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?"

³⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1920–1933.

⁴⁰ *Ibid.*, pp. 1934 *et seq.*; Read, *loc. cit.*, pp. 215–216.

²⁷ *Ibid.*, pp. 1913–1917 and pp. 1941–1944.

²⁸ Note No. 13 of 17 February 1934, from the Prime Minister and Secretary of State for External Affairs of Canada, R. B. Bennett, to the American Minister in Canada, W. D. Robbins (United States of America, Department of State, *Foreign Relations of the United States, 1934*, vol. I (Washington, D.C., U.S. Government Printing Office, 1951), p. 898).

²⁹ J. E. Read, "The Trail Smelter dispute", *The Canadian Yearbook of International Law, 1963* (Vancouver), vol. I, p. 222.

³⁰ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1907–1910.

³¹ The official correspondence between the two Governments is published in *Foreign Relations of the United States (op. cit.)*, 1933, vol. II, pp. 52–67; 1934, vol. I, pp. 845–967; 1935, vol. II, pp. 32–35.

³² United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1911 *et seq.*

³³ *Ibid.*, pp. 1938 *et seq.*

³⁴ *Ibid.*, p. 1917, and *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), especially pp. 874–880.

³⁵ *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), especially pp. 876, 881–883, 901, 925, 958–959.

obligation to ensure that such harm did not occur in future.⁴¹ Secondly, the question whether the transboundary harm was wrongful in character would—subject to any special factors—depend on a balance of interest test: in the present case the balance of interest was such that those responsible for the smelter should be required to take every reasonable step, compatible with the economic and actual survival of the industry, to provide a reasonably adequate degree of assurance that transboundary harm would cease.⁴²

28. Thirdly, the scientific tests carried out under the tribunal's direction had established that a regime which satisfied the balance of interest test, applied in the manner indicated in the previous paragraph, would indeed provide reasonably adequate guarantees that harm would cease; and there was therefore no reason to include provision for compensation in the regime that Canada was under obligation to promote and sustain.⁴³ Finally, if Canada were to fulfil its obligations in relation to that regime, and harm should nevertheless occur, that would not in itself entail wrongfulness, but would attract an obligation to ensure that compensation was provided.⁴⁴

B. Freedom of action and obedience to rules

29. In any developed municipal legal system—and in the universal law of human rights—it is a first principle that the liberty of the individual is limited by the obligation to respect the equal liberties of others. Within the international community, organization is less developed, and interdependence is still a watchword, rather than a principle that governs conduct. The collective memories of sovereign States know more about the struggle to live separately than the mutual sacrifices of living in society, though Governments make deliberate efforts to redress that balance. International law reflects the evolving standards of the community it serves; but the law is built upon respect for the territorial sovereignty of States. Therefore, if we wish to assess the authority of the *Trail Smelter* awards, it would be well to follow the tribunal's example, and to begin by studying the attitudes of the States parties.

30. For Canada it was a matter of unending surprise that the question had an international aspect at all. The Prime Minister, R. B. Bennett, echoing a view long held by his advisers, observed:

This is not a dispute between the two Governments, and it does not come within any of the ordinary well-known categories of international arbitration . . . I have pointed out that it would have been open to the Canadian Government to disclaim international responsibility . . .⁴⁵

It was this aspect of the matter, as much as any other, which earned the case its wayward reputation. In one

characterization, the matter turned, not on an absence of right, but on an "abuse of rights". From another standpoint, it looked to be a long step towards a new principle of responsibility, based not on the conduct of the State, but on the mere creation of a transnational danger within the territorial jurisdiction of the State.⁴⁶ Neither view found support in the awards of the tribunal, which disposed of the issue in these words:

Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct [of the smelter] should be in conformity with the obligation of the Dominion under international law as herein determined.⁴⁷

31. The initial standpoint of the United States is equally striking, because it reflected an absolute view of the international wrongfulness of transboundary harm. Wrote the Secretary of State, Cordell Hull,

The United States is entitled to insist that an isolated agency without its borders, which is admitted to be polluting the air within its territory, shall desist from so doing. The right so to insist can not be conditioned on the giving of aid in the form of advice by scientists as to ways and means of controlling the nuisance at its source.⁴⁸

Five or six years later, the *Trail Smelter* tribunal, with the approval of the two Governments and the assistance of the scientists whom the Governments had placed at the tribunal's disposal, was directing its major effort to "ways and means of controlling the nuisance at its source"; and the balance of its findings depended as much upon the outcome of that enquiry as upon any other consideration.⁴⁹

32. Except for the chaotic state of the law of international watercourses,⁵⁰ governments had until this time been able to believe that State sovereignty embraced an almost complete freedom to take or allow within national borders any action which was not directed against other States, and yet to be almost completely insulated from the unwanted side-effects of equally unfettered activities within the borders of other States. Even the language of the law, with its rigorous concept of "invasion of

⁴⁶ See footnote 18 above.

⁴⁷ United Nations, *Reports of International Arbitral Awards*, vol. III, (*op. cit.*), pp. 1965–1966.

⁴⁸ Despatch No. 194 of 27 January 1934 to the American Minister in Canada, W. D. Robbins, *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), p. 888.

⁴⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1934–1936 and pp. 1966–1974.

⁵⁰ M. M. Whiteman, ed., *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1964), vol. 3, p. 1046, where the following two opinions are juxtaposed:

"Among writers on international law, H. Lauterpacht took the view that:

" . . . a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part." [L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. 1.]

"Briggs, on the other hand, stated:

"No general principle of international law prevents a riparian State from excluding foreign ships from the navigation of such a river [not subjected to a special conventional regime] or from diverting or polluting its waters." [H. W. Briggs, *Law of Nations*, 2nd ed. (London, Stevens, 1953), p. 274.]

⁴¹ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1963 and 1965–1966.

⁴² *Ibid.*, pp. 1962–1965.

⁴³ *Ibid.*, pp. 1966–1974.

⁴⁴ *Ibid.*, pp. 1980–1981.

⁴⁵ Letter of 17 November 1934 to the United States Under Secretary of State, W. Phillips, *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), p. 961.

sovereignty", was hardly suited to an age in which national endeavours frequently spilled across international frontiers without being designed to do so. In the *Nuclear Tests* cases before the International Court of Justice, Judge Sir Humphrey Waldock asked the representatives of Australia and of New Zealand:

... do they draw a line and if so where between a deposit or dispersion of matter within another State which is unlawful and one which has to be tolerated as merely an incident of the industrialization or technological development of modern society.⁵¹

The representatives of both countries agreed that such a line must be drawn; but their further answers did not suggest that the exact position of the line could be plotted simply, or for all purposes.⁵²

33. In the exchanges that preceded their joint reference to arbitration, the Canadian and United States authorities gradually came to terms with the ineluctable circumstance that conflicting interests, neither of which was intrinsically unworthy, had to be adjusted. Without conceding the superiority of their respective positions, or their right to contend for total victory before the prospective arbitral tribunal, the spokesmen of the two Governments moved a little towards middle ground. Canada, imbued with the sense that the question was really one of civil liability, and that smoke easements could ordinarily be bought, was very ready to contemplate that residual damage should be a charge on the operation⁵³—an early manifestation of the now familiar principle that the polluter should pay.

34. Canada was not, however, willing to run a substantial risk that the outcome of the arbitration would entail the closure of the Trail Smelter. Lacking any applicable international precedents, which might tend to channel the line of reasoning of an arbitral panel yet unnamed, Canada found reassurance in the quasi-international jurisprudence of the Supreme Court of the United States in matters affecting the respective rights of the constituent States. With the acquiescence of the United States negotiators, it was therefore settled that the Convention establishing the arbitration would direct the tribunal to "apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice".⁵⁴

35. For good measure—and to mark the firm belief of both Governments that damage must not go unrequited—the tribunal was also directed to "give consideration to the desire of the high contracting parties to reach a solution

just to all parties concerned".⁵⁵ The tribunal found that neither of these directives had impaired its authority to drink from the pure, but not brimming, well of international customary law. The tribunal stressed that "the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law".⁵⁶ As to the question of a solution just to all parties, the tribunal had this to say:

As Professor Eagleton puts it (in *Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." . . . International decisions, in various matters, from the *Alabama* case⁵⁷ onward, are based on the same general principle . . .⁵⁸

36. In settling the terms of reference, the United States negotiators had perhaps gone a little further than they would have wished in assimilating their own country's sovereign discretions to those accorded their constituent States by a national Court of competent—though exceptional—jurisdiction.⁵⁹ They had, however, in no way compromised their essential stand that States are not required, against their wishes, to suffer substantial harm if compensation is tendered. They had not yielded to Canadian suggestions that the settlement in the *Trail Smelter* dispute would govern other boundary situations, where the tables might be turned: harm had always to be assessed within a particular context, and the Trail situation was in many ways distinguishable.⁶⁰ Yet they could not fail to see that the Canadian argument contained a kernel of truth. If there were an obligation to avoid all transboundary harm—at least at any level that the law might find appreciable—the restriction upon a State's freedom of action could be little less than paralysing.

37. Once again, the tribunal was careful both to give expression to the applicable legal rules and to project exactly the shared expectations of the States parties. The second and last award contained a ringing declaration, which is later paralleled in the judgement of the International Court of Justice in the *Corfu Channel* case⁶¹ and

⁵⁵ Art. IV of the arbitral Convention.

⁵⁶ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1963.

⁵⁷ J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. I, chap. XIV ("The Geneva Arbitration"), pp. 495–682.

⁵⁸ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1963.

⁵⁹ They would at any rate have preferred to omit the reference to "practice", to the retention of which the Canadians attached importance—presumably because it was thought to favour solutions that accommodated both interests (see *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), especially p. 912, 916, 926 and 944). Moreover, the United States had pressed for terms of reference requiring the tribunal to fix levels of pollution that would automatically attract corresponding levels of compensation (*ibid.*, p. 913).

⁶⁰ *Ibid.*, especially pp. 923–924, 931–934 and 939–940.

⁶¹ *I.C.J. Reports 1949* p. 22. Cf. preliminary report, chap. III, especially para. 36 (*Yearbook . . . 1980*, vol. II (Part One), pp. 257–258, document A/CN.4/334 and Add.1 and 2).

⁵¹ *I.C.J. Pleadings, Nuclear Tests* (1973), vol. I, p. 524, vol. II, p. 291.

⁵² *Ibid.*, vol. I, pp. 525–527, and vol. II., pp. 429–431.

⁵³ Though, in general, Canada believed that the large sums already spent on smoke abatement and the lump sum of \$350,000 recommended by the International Joint Commission in respect of damage incurred before 1931 would be found to satisfy all Canadian obligations (*Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), pp. 874–967).

⁵⁴ Art. IV of the arbitral Convention (see footnote 50 above), and *Foreign Relations of the United States, 1934*, vol. I. (*op. cit.*), especially pp. 906, 912 and 942; see also Read, *loc. cit.*, pp. 226–227.

in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁶² according to which:

... under the principles of international law, as well as of the law of the United States, no State has the right to use or to 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.⁶³

If this dictum stood alone, it might lead towards recognition that States are absolutely liable for harm which arises within their territory or jurisdiction, and which produces harmful consequences outside that territory or jurisdiction.

38. In fact, however, the rule stated is not applied absolutely:

So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals.⁶⁴

The tribunal had already established that, if there were no overriding factors, United States law and practice would not require all harm to be avoided:

... when the [Supreme Court of the United States] actually framed an injunction, in the case of the Ducktown company (237 U.S. 474, 477) ... they did not go beyond a decree "adequate to diminish materially the present probability of damage to its (Georgia's) citizens".⁶⁵

39. The regime the tribunal prescribes is that which:

will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature...⁶⁶

⁶² 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. Cf. preliminary report, para. 42 (*Yearbook* ... 1980, vol. II (Part One), p. 259, document A/CN.4/334 and Add.1 and 2).

⁶³ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1965.

⁶⁴ *Ibid.*, p. 1966.

⁶⁵ *Ibid.*, p. 1965.

⁶⁶ *Ibid.*, p. 1980.

Nevertheless,

if any damage ... shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage...⁶⁷

In other words, the exact measure of Canada's customary law obligation not to allow activities in its territory to harm other States is fixed, in the first instance, at the level of the regime prescribed; but if harm occurs without any breach of that obligation, it will still require Canada to provide an indemnity.

40. These findings furnish the themes of chapter III. Because the policy of the law is to minimize and repair transboundary harm, and yet to preserve the widest latitude for the freedom of action of sovereign States, the criteria of "harm" and of "wrong" are interlocked but not fused. Not all harm is wrongful but the law is never indifferent to the occurrence or potentiality of harm when it threatens the rights of other States. The measure of a State's obligations to ensure that other States' rights are not infringed by the harmful effects of things done or omitted within its territory or jurisdiction is still the duty of care, but that duty extends to making good any harm that is fairly attributable to the lawful conduct of a lawful activity. Prevention and reparation are part of a single scale, in which the priority accorded to prevention is tempered by the need to maintain safeguards at levels which a beneficial activity can sustain. States may, of course, modify their customary law obligations by agreement; but, if a State fails conscientiously to strive for such an agreement when it is needed, that State may be in breach, not only of a specific rule of obligation embodying a balance of interest test, but also of the concomitant general rule of obligation which, in Eagleton's words adopted by the tribunal, it "owes at all times ... to protect other States against injurious acts by individuals from within its jurisdiction".⁶⁸

⁶⁷ *Ibid.*

⁶⁸ See para. 35 and footnote 58 above.

CHAPTER III

Rights and interests

A. The need to balance interests

41. In commenting upon the *Trail Smelter* awards, Goldie noted that the tribunal's reliance upon the case law of the United States of America Supreme Court gave a central place to the common law doctrine of nuisance, which he judged to be too idiosyncratic to be part of the doctrine of general international law.⁶⁹ The comment is no doubt well-founded, but there are several points that may be made. First, the branch of international law with which

⁶⁹ Goldie, "Liability for damage ..." (*loc cit.*) (footnote 15 above), p. 1189 and pp. 1226-1229.

we are dealing builds upon shared values and favours diverse solutions, because it is the policy of the law to allow the utmost freedom compatible with a reasonable regard for the protection of the freedoms of other States. Solutions reached in one context are not automatically transferable to other contexts.⁷⁰

⁷⁰ Cf. Principle 23 of the Stockholm Declaration (see footnote 62 above):

"Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be

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42. Secondly, the concept of nuisance performs a signal service because—unlike the concept of negligence—it does not dwell exclusively upon the causes of a loss or injury. In common law doctrine, nuisance always implies a balancing test—a weighing of the degree of deprivation or inconvenience suffered against the value of the activity which has caused the suffering and the reasonableness of the way in which that activity has been conducted. Equipped with this concept, the States parties in the *Trail Smelter* case were subliminally prepared for an adjustment of interests that neither had contemplated; for the United States looked only to the results of pollution, and Canada felt secure in the innocence of its causes.

43. Any tendency to insist that all transboundary harm is wrongful, or automatically compensable in accordance with optimal standards, causes justified alarm and impedes human progress.⁷¹ The ECE 1979 Convention on Long-range Transboundary Air Pollution⁷² is aimed initially at the reduction of sulphur dioxide, the same pollutant released by the Trail smelter; but the parties have felt compelled to stipulate that the goals they are now pledged to achieve are not necessarily the measure of their present liability for existing transboundary pollution.⁷³ In the same way, developing countries, though needing protection from industrial and technological processes that threaten to poison the biosphere, must also guard themselves against the imposition of standards that are incompatible with their own levels of economic and industrial development.⁷⁴

(Footnote 70 continued.)

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."

⁷¹ See, for example, the remarks of the Canadian Prime Minister:

"... A rule which would make the Company a guarantor that under no conditions would pockets of gas be carried across the border, under penalty of a shut-down of the plant, would be impossible. It would involve a far more rigid regime than has been imposed upon any smelter in either of the two Countries. It would be particularly unjust in the present instance, in which the Company has already expended more than ten millions of dollars upon projects designed to bring about a substantial and practical elimination of injury to United States interests. No Court in either country would impose such a harsh and oppressive rule. I have no doubt that your Government will agree that the practical elimination of damage is a satisfactory solution to the problem, and that no rule should be adopted which would involve the destruction of the industry. A principle should not be established in this case which would potentially involve a shutting down of existing industries of various types in industrial communities and sterilizing future development within a broad zone in the Dominion of Canada and the United States of America, stretching from coast to coast along the international boundary-line." (Note No. 13 of 17 February 1934, from the Prime Minister and Secretary of State for External Affairs of Canada, R. B. Bennett, to the American Minister in Canada, W. D. Robbins. *Foreign Relations of the United States, 1934*, vol. I (*op. cit.*), p. 906.)

⁷² See ECE/HLM.1/2, annex I.

⁷³ Cf. preliminary report, para. 5 (*Yearbook ... 1980*, vol. II (Part One), pp. 248–249, document A/CN.4/334 and Add.1 and 2).

⁷⁴ Cf. Principle 23 of the Stockholm Declaration (quoted in footnote 70 above). The same factors are evident in the activities of States toward UNEP's draft Principles of conduct in the field of the

44. On the other hand, an exclusive emphasis upon the causes of harm has equal disadvantages. In legal theory, as in any other area of principled debate, extreme positions tend to evoke their own antitheses. So Pierre-Marie Dupuy, in the course of an important study of State responsibility for industrial and technological damage,⁷⁵ reaches the conclusion that State responsibility for transboundary harm is limited to obligations of conduct, and does not extend to obligations of result.⁷⁶ There follows the argument *a contrario*: if it were not so, there would be no category of "lawful acts" with which the present topic could deal, because every act that caused harm would automatically give rise to State responsibility.

45. The limitation of State responsibility to obligations of conduct leads Dupuy inexorably to the conclusion that customary law offers no protection at all for harmful consequences that are unavoidable, even though of catastrophic proportions.⁷⁷ Accordingly, the gap in customary law cannot be filled except by concluding

environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States (UNEP/GC.6/17). See also the preliminary report, para. 5 and footnote 8 (*Yearbook ... 1980*, vol. II (Part One), pp. 248–249, document A/CN.4/334 and Add.1 and 2).

⁷⁵ P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle (op. cit.)* (footnote 15 above)

⁷⁶ As to obligations of conduct and result, see, in particular, arts. 20 and 21 of the draft articles on State responsibility (part I), adopted by the Commission on first reading (*Yearbook ... 1980*, vol. II (Part Two), p. 32).

⁷⁷ "As noted in the first part of this study, there is in general no doubt about the lawful nature of the activities dealt with in the international conventions considered earlier [i.e. those relating to liability for damage caused by space objects, for damage caused by the peaceful uses of atomic energy and for oil pollution].

"According to the principle of the sovereign jurisdiction of States, it is recognized that States may freely undertake the launching of space objects from their territories or arrange to replace conventional energy sources, such as petroleum and coal, by nuclear power stations erected in areas within their jurisdiction.

"The various limits usually placed on the legal exercise of their powers in these respects have the effect not of protecting third parties against any infringements of their subjective rights resulting from the conduct of these activities, but rather of making it an obligation for the States engaging in them to take the greatest care to *prevent* any possible damage.

"Because the principles of international law place no obligation of result on States in the exercise of their territorial jurisdiction, the conduct of "ultra-hazardous" activities in or from their national territories may be compatible with observance of the "principle of the non-harmful use of territory", exemplified by what is known as the law 'of good neighbourliness'.

"It must be repeated that acceptance of the view of those who wrongly consider (particularly in their commentaries on the *Trail Smelter Arbitration*) that this principle establishes a genuine obligation of result (or of guarantee), not an obligation of means, would mean that the category of 'lawful activities' itself would disappear as a result of an absolute presumption of responsibility—a possibility that is of course incompatible with the principle and practice of sovereignty.

"Exactly what determines the lawful nature of the activities in question (atomic and space activities, for the time being) is that despite the catastrophic damage they may cause, their conduct does not in itself constitute a breach of any obligation of international law, not even of the obligation of the non-harmful use of territory. For that to be true, however, one condition must be met: the conduct of these activities must actually be accompanied by a degree of *preventive care*

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conventional regimes, or by the emergence of new and more precise primary rules of obligation.⁷⁸ Only very exceptionally—as perhaps in the case of the peaceful uses of atomic energy—may conventional obligations have the support of a rule derived from general principles of law, exemplified in the comparative uniformity of municipal legal systems, as well as in the conventional regime or regimes.⁷⁹

46. This selective reference to some of Dupuy's conclusions does not sufficiently acknowledge the great value of his careful analysis of particular conventional regimes,⁸⁰ or his perception that the levels of the duty of care should rise in proportion to levels of potential danger. He describes persuasively the gains in precision and objectivity when obligations are quantified and made susceptible of scientific measurement.⁸¹ He is always conscious that prevention is better than cure, so that a regime which articulates required standards of behaviour may be worth more than one that sets a tariff for loss or injury. It follows that regimes of strict liability—whether they bind Governments or operate, by agreement of Governments, at the level of municipal law—are only one, and not always the best, method of discharging obligations towards those who may be adversely affected by an activity that is predominantly beneficial.⁸²

(Footnote 77 continued.)

commensurate with the risks the activities create. Although such care is powerless to eliminate all potential catastrophic dangers, it must nevertheless limit them as much as possible. This shows how close a link there is between the *harm* and the *activity* that are concerned in this type of responsibility.

"It is precisely because the harm is inevitable that it cannot engage the responsibility of the State except on the basis of the risk . . .". (Dupuy, *op. cit.*, pp. 225–226).

⁷⁸ "The main consequence of the limitation of objective international responsibility is that, being doomed to function in a derogatory manner, usually as a result of a treaty provision, it lets international responsibility for wrongful acts play the primary role.

"Whereas this responsibility under the ordinary law was hitherto based on very general rules of conduct, such as the "principle of the non-harmful use of territory", it now tends to rest on a number of much more specific obligations, even in the context of customary international law alone." (*Ibid.*, p. 259)

But see, more generally, the conclusions set out in part II, Title I, chap. II (*ibid.*, p. 256) and part II, Title II, chap. I (*ibid.*, pp. 259–274).

⁷⁹ *Ibid.*, pp. 136–138.

⁸⁰ *Ibid.*, pp. 44–156, part I, Title I.

⁸¹ *Ibid.*, pp. 259–274, part II, Title II, chap. I.

⁸² "... States are, fortunately, leaning more towards increased prevention than towards a broader guarantee. Both institutions—liability for a breach of the law and responsibility for lawful acts—must remain true to their original purposes and spheres of operation if they are not to lose their specificity and *raison d'être*.

"A possible argument against this requirement of legal clarity is that it might, in the final analysis, work against victims by depriving them of guaranteed reparation in cases where the State which caused the damage had nevertheless observed the law.

"To forestall such criticism, it is necessary to consider the possibility of new solutions which will make the continuance of international liability for a breach of the law, in its own field of application, compatible with the guarantee of better protection for victims. The approach to this must be to adapt the procedures for the implementation of international responsibility under the ordinary law: as will be seen below, the development of evidential techniques and an expansion of the duty of care required of States are the two main elements of such a process." (*Ibid.*, p. 233.)

47. What must surprise some readers is the seeming disconnection between the goals that Dupuy considers desirable and his estimate of the present capacity of customary international law to encompass those goals. Can it really be true that States—unlike the United States in the case of the *Trail Smelter*—are content to regard the existing law as requiring them to endure the harmful consequences of activities conducted with due care within the territory or jurisdiction of other States? Can the duty of care ever be described as an obligation of conduct? Surely it is the least exacting measure of a duty to achieve a given result—even if that result must sometimes be stated rather generally? Can one ever speak of consequences that are "unavoidable", where the real question is that of liberty to pursue competing objectives? The regimes that Dupuy sees as desirable—whether they go to prevention or to reparation—are all constructed by determining a balance of interest; yet he does not identify a general duty to balance interests.⁸³

48. In the result, therefore, Dupuy's regime is hardly less autonomous than the strict liability principle to which it is opposed. The evil he postulates is the rule of strict responsibility that any activity causing significant transboundary harm is wrongful. The solution he offers is that no activity causing transboundary harm is for that reason wrongful, provided that the activity is conducted with due care. To mitigate the obvious harshness of the latter rule, the relevance of the strict liability principle is admitted—but within limits that cannot be sharply defined—to deal with cases in which the harm is intolerable and the question of due care impenetrable.

49. In less extreme situations, Dupuy's concept that care should be proportionate to potential danger does provide the shadow of a balancing test; but the dice are still loaded in favour of the State within whose territory or jurisdiction the activity takes place. If, in the *Trail Smelter* situation, investigation had shown no way to mitigate the residual pollution problem of which the United States complained, under the rules Dupuy identifies, the United States would have been left to bear the loss. And if, in the actual circumstances of the *Trail Smelter* case, the United States had been gravely injured by an accidental departure from the agreed regime, once again under these rules the loss would lie with the United States, unless the accident was one which due care on the part of the Canadian Government could have avoided.

50. If Dupuy takes his stand upon the old orthodoxy and tries to carry its universal gospel into new areas, another contemporary writer, Günther Handl, sets out upon this work of unification from the opposite end. For him, no less than for Dupuy, the established standards of responsibility for wrongfulness are paramount, and do not yield easily or generally to an innovative standard of strict liability. But for Handl, the test of wrongfulness does not depend upon a simple conjunction between the occurrence of harm and a lack of due care on the part of the State within whose territory or jurisdiction that harm was caused. Rather, the first question is whether, in all the

⁸³ See para. 45 above and footnotes 77–79.

circumstances of the case, the occurrence of the harm establishes the objective element of wrongfulness, and that question turns upon a balance of interests, calculated with reference to all relevant factors.⁸⁴

51. If, upon a balance of interests, the objective element of wrongfulness is established, and the State within whose territory or jurisdiction the harm arose had knowledge of the harm and time to act, the wrongfulness of the conduct giving rise to the harm is attributable to that State.⁸⁵ Thus, there is no difficulty in bringing within the rules of State responsibility for breach of an international obligation cases of chronic and notorious harm, entailing wrongfulness. The case which is difficult is that of sudden, accidental harm—harm caused, perhaps, by the human error of ship's navigator or an employee of a privately owned steel plant—harm which cannot reasonably, on any objective or subjective basis, be attributed to the State. In such cases Handl finds in State practice⁸⁶ the same tendency that the Commission had discerned in circumstances which preclude wrongfulness. That is to say, a situation not in conformity with an international obligation escapes the taint of wrongfulness because the test of attribution has not been satisfied; but the victim State is felt to be as much entitled to redress as it would have been, had attribution been established.⁸⁷

52. In their different ways, therefore, Dupuy and Handl—two writers whose respect for the classic rules of State responsibility is not in question—reach the frontiers of the capacities of those rules, and are driven to contemplate the need for complementary systems of obligation.⁸⁸ The world of legal scholarship then divides. Some are tempted to consign the essential problem to the realm of politics, by holding that a complementary system—however necessary it may be—remains forever hypothetical until it has been captured in an international agreement: others believe that there is an onus upon

lawyers to describe, and assign to its proper place in general doctrine, a complementary system of obligation that is absolutely necessary in modern inter-State relationships, and already fitfully evidenced in non-conventional State practice.⁸⁹

B. Elements in striking a balance of interests

53. It would be, to say the least, a daunting problem to try to resolve the divergence of views and policies described in the previous paragraph, without drawing upon the massive record of continuing international effort to reach universal, regional and bilateral agreements, understandings and guide-lines, that do play some part in regulating obligations relating to transboundary harm. Moreover, one can expect only limited help from judicial and arbitral decisions, for reasons made clear by the International Court of Justice in its judgements, delivered 25 July 1974, in the *Fisheries Jurisdiction* cases:

The most appropriate method for the solution of the dispute is clearly that of negotiation. . . . It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case.⁹⁰

54. It is, however, a feature of the modern world—of which there is ample evidence in the jurisprudence of the Court—that the resolution of disputes between States may turn as much upon the adjustment of competing interests as upon the ascertainment and application of prohibitory rules.⁹¹ General rules relating to transboundary harm are apt to contain both elements; and in this may lie a root cause of uncertainty and disagreement. No one doubts the essential message of the *Trail Smelter*⁹² and *Corfu Channel*⁹³ cases and the Stockholm Declaration,⁹⁴ that transboundary harm, even if unintended, can be wrongful and therefore prohibited; but the problem of reconciling the rights of two or more sovereignties remains.⁹⁵

⁸⁴ See, for example, Handl, "Balancing of Interests . . ." (*loc. cit.*) (footnote 15 above), p. 156.

⁸⁵ This, of course, is the principle enunciated by the I.C.J. in its Judgment of 9 April 1949 in the *Corfu Channel* case (Merits):

"Such obligations [i.e., to notify the existence of a minefield in territorial waters and to warn approaching ships] are based . . . on certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." (*I.C.J. Reports 1949*, p. 22.)

⁸⁶ "State liability for accidental transnational environmental damage by private persons" (*loc. cit.*) (footnote 15 above), pp. 540–553.

⁸⁷ See art. 35 (Reservation as to compensation for damage) in the draft articles on State responsibility (part 1) and the Commission's commentary thereto (*Yearbook . . . 1980*, vol. II (Part Two), pp. 61–63).

⁸⁸ Both writers differ from the Special Rapporteur by attaching some importance to the criterion of "ultra-hazardous" as a justification for what they regard as a departure from the normal rules of State responsibility. As to this, see the preliminary report, para. 18 (*Yearbook . . . 1980*, vol. II (Part One), p. 252, document A/CN.4/334 and Add.1 and 2); but see also P. Cahier, "Le problème de la responsabilité pour risque en droit international", in *International Relations in a Changing World*, Institut Universitaire de Hautes Etudes Internationales (Geneva) (Leyden, Sijthoff, 1977), p. 411.

⁸⁹ This division of opinion was foreseen by Jenks, in relation to his own characterization of the subject:

"The concept of a general liability for ultra-hazardous activities, will, unless and until it is formulated by a generally accepted international convention, clearly be unacceptable to those for whom international law is still a limited body of specific rules deriving their authority from the explicit consent of States. Pending any such convention, the concept presupposes the view that international law is not a limited body of specific rules, but a body of living principle and developing precedent growing with the needs of international society." (*Loc. cit.* (footnote 15 above), p. 177).

⁹⁰ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, pp. 31–32, paras. 73–75 (excerpts); and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, *ibid.*, p. 201, paras. 65–67 (excerpts).

⁹¹ See for example, *Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 116; and the *North Sea Continental Shelf* cases, Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

⁹² See footnote 26 above.

⁹³ *I.C.J. Reports 1949*, p. 4.

⁹⁴ See footnote 62 above.

⁹⁵ See, in this connection, Reuter's observations:

" . . . the circumstances in which extremely serious damage may be caused as a result of modern-day technological developments pose problems which are only just beginning to come within the purview

(Continued on next page.)

55. There are at least very strong indications that, subject to the specific content of any particular obligation, and subject to the question of thresholds, the interests of the States whose sovereign rights are in question would be

(Footnote 95 continued.)

of national legal systems, but which public international law will be unable to ignore much longer. A lawful act of a State may cause incalculable damage; . . . we would thus have to lay down new rules. . . . It is doubtful whether we can stretch the limits of responsibility for wrongful acts indefinitely without attacking its very foundations

“Do not the rules of territorial sovereignty lay down the principle of the prohibition of any physical activity that affects the territory of a State from a source located in the territory of another State (physical interference)? If such a rule exists, it makes any harmful act having its physical origin in the territory of another State a breach of international law; reference might be made in this respect to famous precedents such as the *Trail Smelter Arbitration*. However, this rule certainly does not exist in as general a form as has just been stated Although there can be no responsibility for acts of nature, as soon as man is involved, either through an act or an omission, the problem of responsibility arises.

“Let us take the case of a dam that bursts. If we formulate a rule that States must ensure that all constructional work done in their territory is totally accident-proof, we shall definitely remain within the realm of traditional responsibility: the complainant State will have to furnish proof of negligence on the part of the State complained against, which will, where appropriate, be able to invoke one of the traditional grounds for exoneration, such as *force majeure* (if, for example, the dam burst because of an earthquake).

“We could, however, formulate a slightly different rule, as follows: a State is not entitled to perform acts in its territory that might be abnormally dangerous for other States, in particular neighbouring States. In such a case, it is not the materialization of the danger, namely, a disastrous accident, that entails responsibility, but simply the performance of the act, such as the construction of the dam. Strictly speaking, such a rule, assuming it exists, makes it possible for the matter to remain within the framework of traditional responsibility; it presupposes the existence of rather sensitive standards and guidelines for the definition of an abnormal danger. Although it cannot be asserted that such a rule exists, it might be possible to find some traces of it in regard to good neighbourliness or in areas such as space experiments and nuclear tests.

“Simply making a slight change in the hypothetical rule we have just formulated removes the subject from the province of traditional responsibility. We have only to consider that certain risks, which are normal enough for no prohibition to be placed on the enterprises that create them, entail an obligation to make reparation for damage if the risk materializes. In such a case, responsibility exists without any breach of a rule of international law. The act is lawful, but it entails an obligation of reparation. Responsibility is bound up with mere causality. No one can say at present that such a rule exists in international law; but since mankind has never shrunk from highly dangerous undertakings, the rule might be adopted at least in part. In any event, claims have already been made on the basis of mere causality; in cases of nuclear accidents, for example, compensation has been paid, but always *ex gratia*, thus precluding any conclusions about legal obligations.

“It has been pointed out that this practice could be fitted into the general framework of international responsibility by means of a presumption: the State would be required to make reparation because it would be presumed to have acted without taking all the necessary precautions. Such a solution would be possible, provided however the presumption was not absolute; otherwise, the explanation would simply be a verbal one and tantamount to saying that, in a given technology, people are aware of the risks involved and of ways of avoiding them effectively. The inference is that in a time of trial and error in the face of new technologies, it is difficult to establish responsibility, if responsibility is needed, on a basis other than causality.” (*Op. cit.* (see footnote 15 above), pp. 591–594.)

weighed;⁹⁶ and the incidence of the prohibitory rule in the particular case would be the result of that weighing. In the *Nuclear Tests* case, the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, had this to say:

. . . we cannot fail to observe that, in alleging violations of its territorial sovereignty and of rights derived from the principle of the freedom of the high seas, the Applicant also rests its case on long-established—indeed elemental—rights, the character of which as *lex lata* is beyond question. In regard to these rights the task which the [International] Court [of Justice] is called upon to perform is that of determining their scope and limits vis-à-vis the rights of other States.⁹⁷

56. Although the rules of obligation that determine the wrongfulness of transboundary harm lie outside the province of the present topic, we must understand their nature; for on this the *raison d'être* of the present topic depends. If all transboundary harm were wrongful—or if its wrongfulness always depended upon the breach of a rule which left no margin for appreciation, or which entailed no comparison between the value of the activity and the extent of its harmful transboundary consequences—rules yielded by the present topic might still be needed; but their scope would be comparatively small. They could, for example, cover situations in which there are circumstances precluding wrongfulness,⁹⁸ and some categories of accidental harm. If, however, the wrongfulness of transboundary harm commonly depends upon a balance of interests, the development of the present topic is essential to the efficacy of the rules that determine wrongfulness.

57. This point is so important that it justifies expansion. The hypothesis is that activities capable of causing substantial transboundary harm would be unduly hampered if they were circumscribed by rigid rules of the kind that regulate deliberate invasions of sovereignty, and that such activities would be oppressive, if they were under no effective legal constraint. As States are not obliged to

⁹⁶ “Though the position may soon change, general international law (or customary law) contains no rules or standards related to the protection of the environment as such. Three sets of rules have major relevance nonetheless. First, the rules relating to state responsibility have a logic and vitality not to be despised or taken for granted. Secondly, the territorial sovereignty of States has a double impact. It provides a basis for individualist use and enjoyment of resources without setting any high standards of environmental protection. However, it also provides a basis for imposition of State responsibility on a sovereign State causing, maintaining, or failing to control a source of nuisance to other States. Thirdly, the concept of the freedom of the seas (and its clear equivalent in the case of outer space and celestial bodies) contains elements of reasonable user and non-exhaustive enjoyment which approach standards for environmental protection, although they are primarily based upon the concept of successful sharing rather than conservation in itself.” (I. Brownlie, “A survey of international customary rules of environmental protection”, *Natural Resources Journal* (Albuquerque, N.M., vol. 13, No. 1 (January 1973), p. 179.) See also J. Andrassy, “Les relations internationales de voisinage”, *Recueil des cours . . . 1951—II* (Paris, Sirey, 1952), vol. 79, especially pp. 105–112, and Handl, “Territorial sovereignty . . .” (*loc. cit.*) (see footnote 15 above).

⁹⁷ *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 367, para. 113. See also the identical passage in *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, *ibid.*, p. 519, para. 48.

⁹⁸ See footnote 87 above.

submit their differences to third party settlement, and as questions involving balances of interest entail large elements of policy choice, the practical application of rules containing a balance of interest test will ordinarily involve more than the fixing of the point of wrongfulness; for that is a system under which the winner would take all. Under such a system each State would be encouraged to rely upon its untested belief that the aggravation it was causing fell on the right side of the median line.

58. The rules as to wrongfulness therefore occupy a central place within a larger, equitable framework of obligations arising out of acts not prohibited by international law. The effect of the double regime is to leave a good deal of latitude for the accommodation of competing interests, and yet to insist that no State is required by customary international law to submit to unlimited deleterious intrusions upon its territory, or in areas that are the common heritage of mankind, even if compensation is offered. "Smoke easements" have their place in international, as in national, affairs; and, where there is chronic pollution and a rising environmental standard, groups of States may have to share the cost of eradicating a localized evil which affects group interests. States are, however, entitled to insist that some kinds and degrees of transboundary harm are intolerable, and must stop.

59. In summary, it is not within the province of the present topic to determine, in any given context, either the point of intersection of harm and wrong, or the proportions in which duties of prevention and promises of indemnification may contribute to the fixing of the point of wrongfulness. Nevertheless, the point of intersection of harm and wrong is always fixed on a scale that extends into the province of the present topic; and therefore it cannot be fixed without reference to the content of the present topic. Not all transboundary harm is wrongful; but substantial transboundary harm is never legally negligible. Conversely, it is the policy of the law to allow each sovereign State as much freedom, in matters arising within its territory or jurisdiction, as is compatible with the freedoms of other States; but no activity which generates or threatens substantial transboundary harm may be pursued in disregard of obligations that arise, *ipso facto*, in customary international law.

60. On the scale of harm, what lies on the far side of the point of wrongfulness is prohibited; and disobedience of that prohibition engages the rules of State responsibility. On the near side of the point of wrongfulness, activities which generate, or threaten to generate, substantial transboundary harm are carried on subject to the interests of other States. Those interests may be quantified, as in the case of the rights of compensation established by the Convention on International Liability for Space Objects⁹⁹ or they may be at large: they may have as much substance as a right arising in consequence of wrongful action; or, depending on the equities, they may amount to no more than a right to be informed and consulted and to have submissions considered in good faith.

C. Reflections of the double system in State practice

61. One famous passage of the *Lake Lanoux* arbitral award of 16 November 1957 is so succinct that it has a faintly sibylline ring:

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.¹⁰⁰

"Spain", says the tribunal disapprovingly, "tends to put rights and simple interests on the same plane".¹⁰¹ However, "Account must be taken of all interests, of whatsoever nature . . . even if they do not correspond to a right."¹⁰² And if they do correspond to a right? Then, of course, they are no longer merely "interests", but "rights". One aspect of the duty which each State may owe to others is to protect them and their nationals from serious transboundary harm, arising within its territory or jurisdiction.¹⁰³ If such harm is wrongful, it breaches the right of the other State concerned, and engages the responsibility of the State within whose territory or jurisdiction the harm was generated.

62. But, even if such harm is not wrongful, it constitutes an interest that must be taken into consideration; and that, said the tribunal, is not a purely formal requirement. The State on which the obligation falls must give such interests every satisfaction compatible with the pursuit of its own interests, and . . . show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.¹⁰⁴

And, as the tribunal observed in another context,

All negotiations tend to take on a global character; they bear at once upon rights—some recognized and some contested—and upon interests; it is normal that, when considering adverse interests, a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration.¹⁰⁵

63. In chapter II of the present report the sequence and manner was noted in which the *Trail Smelter* tribunal approached the issues that remained for decision in its second and last award (see paras. 27 and 28 above). It is often supposed that this precedent is vitiated by the prior agreement of the parties to treat the occurrence of harm as wrongful, but there is no justification for this view. The United States of America certainly regarded the damage which had occurred as wrongful.¹⁰⁶ Equally certainly,

⁹⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 316, para. 23.

¹⁰⁰ *Ibid.*, p. 315, para. 23.

¹⁰¹ *Ibid.*, para. 22. The Tribunal added:

"Only such a solution complies with the terms of Article 16 [of the Additional Act of 26 May 1866 concerning the use of the waters of Lake Lanoux], with the spirit of the Pyrenees Treaties, and with the tendencies which are manifested in instances of hydro-electric development in current international practice." (*Ibid.*)

¹⁰² In the *Lake Lanoux* case, the arbitral tribunal did not have to consider whether there was indeed "a principle which prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice the downstream State" because it had earlier found that the French hydro-electric scheme would not alter the waters of the River Carol. (*Ibid.*, p. 308, para. 13.)

¹⁰³ *Ibid.*, p. 314, para. 22.

¹⁰⁴ *Ibid.*, p. 311, para. 18.

¹⁰⁵ " . . . It is believed to be proper for the Government of the United States to look to the Canadian Government to cause such action to be

(Continued on next page.)

⁹⁹ See footnote 22 above.

Canada believed—though incorrectly—that the matter complained of by the United States did not constitute a dispute between the two Governments.¹⁰⁷ The Canadian Government went to considerable lengths to ensure both that the question of international wrongfulness was not prejudged and that the tribunal had full discretion to adjust the interests of all concerned without a prior finding of wrongfulness.¹⁰⁸

64. It should now be pointed out that the *Trail Smelter* tribunal had at its disposal, and used, not only the legal techniques which determine the existence and breach of a primary rule of obligation, but also the complementary techniques that assign responsibilities (or liabilities) in relation to conduct not prohibited by international law. For, quite exceptionally, this tribunal was asked to do for the interested parties something that they would ordinarily

(Footnote 106 continued.)

taken as will prevent the pollution of the air in the State of Washington by smelter fumes . . .

“Canadian interests have for a number of years been trespassing on the territory of the United States and on personal and property rights in the State of Washington. The Canadian interests seem to desire to continue so to trespass. “. . . The discharge of sulphur dioxide from the smelter at Trail . . . in such quantities and at such rates as to cause pollution of the air in the State of Washington has been at all times and is now wrongful. It ought of right to cease.” (Extracts from Note No. 194 of 27 January 1934, from the Secretary of State of the United States, Cordell Hull, to the American Minister in Canada, W.D. Robbins, *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*, pp. 875 and 896.) See also para. 31 above.

¹⁰⁷ “. . . When similar problems arise in the case of other smelters in Canada and the United States, a permanent and satisfactory solution is normally to be found in the acquisition, by purchase or otherwise, of smoke easements. . . .

“When the matter was brought to the attention of the Canadian Government, . . . The simplest course would have been to point out that the alleged facts complained of were civil and not international wrongs. The complainants, if they were unable to obtain satisfactory settlements by agreement, could always seek redress in the manner appropriate to a civil dispute between individuals in one country claiming to be injured by a corporate enterprise operating in another country.” (Extracts from Note 13, paras. 4, 6 and 7, of 17 February 1934, from the Prime Minister and Secretary of State for External Affairs of Canada, R.B. Bennett, to the American Minister in Canada, W.D. Robbins, *ibid.*, p. 899.) See also para. 30 above.

¹⁰⁸ The questions put to the tribunal were framed in terms, not of Canadian obligation, but of the *Trail Smelter's* obligations (see footnote 38 above, art. III of the arbitral convention; see also Read, *loc. cit.*, pp. 223–227, and paras. 34 and 35 above).

Canada asked for, and obtained a categorical assurance from the United States that nothing had been prejudged (see Note No. 194 of 27 January 1934, from the Secretary of State of the United States, Cordell Hull, to the American Minister in Canada, W.D. Robbins, *Foreign Relations of the United States*, 1934, vol. I (*op. cit.*), pp. 874–885; and Note No. 259 of 14 March 1934 between the same parties, *ibid.*, pp. 915–918). The exchange of correspondence between the two Governments on this point was part of the *travaux préparatoires* of which the tribunal had cognizance (see para. 23 above).

The tribunal itself, in its first award, noted that its findings as to damage incurred after 1931 and the amount of the indemnity payable in respect of that damage did not depend upon a prior determination of wrongfulness: “the Tribunal finds it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States”, because the arbitral convention was a sufficient authority for payment of losses found to have been incurred (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1932).

do for themselves—that is, to construct a regime which, while paying full regard to the primary rule which determines the wrongfulness of harm, also fixes the conditions which the parties will regard as compliance with that rule. The negotiation between the parties, and the reasoning by which the tribunal arrived at its decisions, have been traversed above in chapter II, and could reasonably be regarded as a working model of basic themes in this report.

65. Occasionally, in bilateral State practice, one may discover the same preference that Canada exhibited in the *Trail Smelter* case to seek a settlement that does not turn upon the acknowledged breach of an international obligation. For example, in the well-known case of damage caused to Japanese fishermen by United States atmospheric nuclear tests in the Pacific, in 1954, compensation was asked and paid on the basis of harm done.¹⁰⁹ Doubtless it was in the minds of Japanese and United States negotiators that a lack of care in the conduct of the tests might have been alleged. Doubtless also Japan's desire for satisfaction stopped short of raising a legal obstacle to the continuance of testing. Even so, such a case fits well enough into the framework outlined in the present chapter. There were no factors which might have been held to reduce Japan's entitlement to full compensation for material damage sustained, even if the incident were placed outside the zone of wrongfulness in the scale of harm.

66. Very occasionally in treaty practice—as in the well-known article 22 of the 1958 Convention of the High Seas, dealing with the right of visit¹¹⁰—an activity is expressly conditioned by the liability to pay compensation for any loss or damage sustained by an innocent suspect; this is a liability without fault. In general, such a provision serves much the same purpose as the equally strict

¹⁰⁹ The “*Fukuryu Maru*” incident. See M.M. Whiteman, ed., *Digest of International Law*, vol. 8, (Washington, D.C., U.S. Government Printing Office, 1967), pp. 764–768.

¹¹⁰ “Article 22

“1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is a reasonable ground for suspecting:

“(a) That the ship is engaged in piracy; or

“(b) That the ship is engaged in the slave trade; or

“(c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

“2. In the cases provided for in subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

“3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.” (United Nations, *Treaty Series*, vol. 450, pp. 92 and 94.)

I. Brownlie cites article 22 as an example of a rule which provides for compensation for the consequences of acts which are not unlawful in the sense of being prohibited, in *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), p. 443. See also article 110 of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr. 3 and 8).

obligations contained in the Convention on International Liability for Damage caused by Space Objects, 1971, and in the second and last award of the *Trail Smelter* tribunal (see paras. 37–39 above). If one begins from the position of principle that the State should not be the guarantor of good behaviour within its territory and jurisdiction, these liabilities¹¹¹ are burdens assumed voluntarily—or, in view, perhaps, of the “abnormal” dangers that the activities in question entail. If, however, one begins from the standpoint that the world cannot afford a gap between the authority and the responsibility that international law reposes in States, these liabilities are prudent measures to move the point of intersection between harm and wrong, so that the State accepting the commitment gains additional freedom to act lawfully, but does not charge the cost to other States.

67. It would be pointless to attempt to marshal the general evidence of State practice upon so large a question: it is more appropriate that the Commission should develop and clarify the issues, so that Governments will in due course have the opportunity to make deliberate choices. The Special Rapporteur does, however, see a reflection of the will of Governments in the

¹¹¹ In this paragraph no distinction has been made between cases of State activity and private activity. Despite the doctrinal importance of the question, it is rarely, if ever, that an actual dispute has turned upon the distinction.

Principles of the Stockholm Declaration¹¹² and in other legislative references to the need for the orderly development of international law in the areas with which the present topic must deal. The equipoise of the two halves of Stockholm Principle 21 evokes a balancing of interests that cannot be attained in terms of the simple dichotomy between right and wrong. The repeated references, in the text of the draft Convention on the law of the sea and in other international instruments, to the “further development of international law relating to responsibility and liability”¹¹³ is a further indication that solutions are not expected within a two-dimensional frame.

¹¹²

“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 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.” (See footnote 62 above.)

¹¹³ A/CONF.62/L.78 and Corr.3 and 8, art.235; also arts. 139 and 263. See also, for example, art.17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) (*International Legal Materials* (Washington, D.C.), vol. XIII, No. 3 (May 1974), p. 546).

CHAPTER IV

The nature and scope of the topic

A. The duty of care

68. This report proceeds on the view that the entrance to the present topic is guarded by two large questions, rather than one. The first—which has been given pride of place and was posed again in the last paragraphs of the preceding chapter—is whether or not activities capable of causing substantial transboundary harm are, in general, regulated by a balance of interest test, rather than by an overriding emphasis either upon the way they arose or upon their actual or potential harmful effects. The second question is more vexed, and may be intrinsically less important, but it has dominated doctrinal discussion: that is, should the responsibility or liability of the State, in relation to transboundary harm generated within its territory or jurisdiction, extend to accidental consequences which the State could not have foreseen? The two questions are better treated separately.

69. The first of these two questions has been sufficiently traversed, but needs to be related to the duty of care or due diligence. There is no lack of authority for the proposition that substantive obligations are supported by

a further obligation to ensure their effectiveness. The *Lake Lanoux* tribunal commented:

In fact, States are today perfectly aware of the importance 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 . . .¹¹⁴

The duties to provide information, to afford consultation, and to consider in good faith representations made by another interested party are too well-established to need elaboration.

70. It is, however, instructive to consider the patterns of obligation found in treaty regimes that deal with dangerous, though beneficial, activities; for here we are in the heartland of the present topic—the area in which activities that cause actual or potential harm are saved from

¹¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), p. 308, para. 13.

wrongfulness and permitted to continue, on conditions that safeguard the interests of other States. One general conclusion is that conventions dealing with liability seldom stand in isolation: much more usually they are a link in a chain of obligations, which in turn form part of a larger international effort designed to prevent or minimize loss or damage arising from the particular activity.¹¹⁵ Obligations of reparation, therefore, are not allowed to take the place of obligations of prevention.

¹¹⁵ (a) The International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (IMCO publication, Sales No. 77.16.E) and the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1 May 1977) (United Kingdom, *Final Act of the Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations*, Cmd. 6791 (London, H.M. Stationery Office, 1977), p. 7), must be seen in the wider context of the generalized duty of regulation to prevent pollution of the seas in Article 24 of the 1958 Convention on the High Seas (United Nations, *Treaty Series*, vol. 450, p. 96)—of the International Convention for the Prevention of Pollution of the Sea by Oil, (London, 12 May 1954) (*ibid.*, vol. 327, p. 3), subsequently amended several times to provide for ever-higher standards (amendments of 1962, 1969 and 1971: see IMCO publication, Sales No. 78.01.E), and the general and detailed provisions designed to combat marine pollution contained in a large number of universal and regional conventions, and the recommendations of international bodies. See, for example, the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (Bonn, 9 June 1969) (United Nations, *Treaty Series*, vol. 704, p. 4); the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969) (IMCO publication, Sales No. 77.15.E); the Agreement between Denmark, Finland, Norway and Sweden concerning Co-operation in Measures to Deal with Pollution of the Sea by Oil (Copenhagen, 16 September 1971) (United Nations, *Treaty Series*, vol. 822, p. 324); the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo, 15 February 1972) (*International Legal Materials* (Washington, D.C.), vol. XI, No. 2 (March 1972), p. 262); the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 29 December 1972) (IMCO publication, Sales No. 76.14.E); the International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) (IMCO publication, Sales No. 74.01.E); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) (see footnote 113 above); the convention for the Prevention of Pollution from Land-based Sources (Paris, 4 June 1974) (*Official Journal of the European Communities* (Luxembourg), vol. 18, No. L 194 (25 July 1975), p. 6); and the draft recommendations of the UNEP Working Party on Experts on Environmental Law on safety measures to prevent pollution from off-shore mining and drilling carried out within the limits of national jurisdiction (UNEP/GC.9/5/Add.5, annex III). Part XII of the draft convention on the law of the sea is devoted to "Protection and preservation of the marine environment" and contains a very elaborate set of provisions on preventive measures and also on responsibility and liability (A/CONF.62/L.78 and Corr.3 and 8).

(b) Similarly, the Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) (IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 22); the Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962) (*ibid.*, p. 34); the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) (*ibid.*, p. 7); the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 17 December 1971) (*ibid.*, p. 55), were concluded against the background of regulatory measures designed to ensure that, in taking advantage of nuclear energy for peaceful purposes, mankind's exposure to the accompanying dangers is kept to a minimum. See, for example, the International Atomic Energy Safety Standards to protect health, ensure nuclear safety and minimize danger to life and to the environment, in

71. It is also a constant feature of these clusters of conventions that governments retain ultimate supervisory functions, even when they pass on to private operators the duty to provide compensation and to guarantee its payment.¹¹⁶ Moreover, it can be stated, almost as an invariable rule, that the conventional regimes do not distinguish the cases in which the conduct of activities is in private hands from those in which it is carried on by agencies of the State.¹¹⁷ The strictness of the standard of care tends to increase with the degree of danger inherent in the enterprise; and this standard is, of course, related primarily to obligations of prevention.

IAEA, *Experience and Trends in Nuclear Law*, Legal Series No. 8 (Vienna, 1972), pp. 3 *et seq.*; the safeguards on all fissionable material required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 (United Nations, *Treaty Series*, vol. 729, p. 169); the Convention on the Physical Protection of Nuclear Material of 3 March 1980 (NPT/CONF.II/6/Add.1); the International Convention for Safety of Life at Sea (London, 1 November 1974), especially chapter VIII on Nuclear Ships (IMCO publication, Sales No. 75.01.E); ILO Convention 115, concerning the Protection of Workers against Ionising Radiations (Geneva, 22 June 1960); and numerous other multilateral and bilateral agreements and other initiatives concerning nuclear safety.

(c) The Convention on International Liability for Damage caused by Space Objects, signed on 29 March 1972 (see footnote 22 above), is expressly based on the consideration that "notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects". The Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, of 27 January 1967, requires, in article III, that States Parties "carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law", and in article IV, that "The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes" (United Nations, *Treaty Series*, vol. 610, p. 208). These provisions and those of the Space Objects Convention have been filled out by the other substantive obligations of the Treaty and by other agreements on space activities, including the Convention on the Registration of Objects Launched into Outer Space (General Assembly resolution 3235 (XXIX) of 12 November 1974, annex) and the Agreement Governing Activities on the Moon and the other Celestial Bodies which, in article 7, requires States Parties to take measures to prevent the disruption of the existing balance of its environment, and also to take measures "to avoid harmfully affecting the environment of the earth through the introduction of extra-terrestrial matter or otherwise" (General Assembly resolution 34/68 of 5 December 1979, annex).

¹¹⁶ See, for example, the provisions of the following conventions concerning civil liability for nuclear damage: the Paris Convention of 29 July 1960 (see footnote 115 (b) above), arts. 3, 7, 10, 12 and 13; the Brussels Convention of 25 May 1962 (*ibid.*), arts. III, XI, XV and XVI; the Vienna Convention of 21 May 1963 (*ibid.*), arts. IV, V, VII, XII and XV; the Convention supplementary to the Paris Convention of 29 July 1960 (Brussels, 31 January 1963) (IAEA, *International Conventions ... (op. cit.)*, p. 43, arts. 3, 5 and 13; and of the conventions on civil liability for oil pollution damage: the Brussels Convention of 29 November 1969 (see footnote 115(a) above), arts. VII and X; the London Convention of 1 May 1977, arts. 8 and 13. See also Dupuy, *op. cit.*, pp. 151-153.

¹¹⁷ Under article II of the Convention on International Liability for Damage caused by Space Objects (see footnote 22 above), the "launching State" is absolutely liable. The term "launching State" means:

- "(i) A State which launches or procures the launching of a space object;
- "(ii) A State from whose territory or facility a space object is launched" (art. I, para. (c)).

(Continued on next page.)

72. In short, once an activity which generates or threatens transboundary harm has been made the subject of a regime to which other States affected have agreed, there is little left for rules developed pursuant to the present topic to regulate—except, perhaps, the question of liability for unforeseen accidents, discussed in the next section. However, until such a regime has been established, the same obligation which governs the duties to provide information and to consider representations remains in play. The duty of care, operating as a function of this obligation, requires the State within whose territory or jurisdiction the danger arises to work in good faith for a just solution, taking due account of all the interests involved.

B. Unforeseen accidents

73. Can the duty of care, placed in the wide perspectives of the preceding paragraph, account also for a customary law obligation to make good losses sustained through unforeseen accidents? It is as well, first, to consider the other hypothesis. If one takes the view that a State's responsibility or liability for transboundary harm is limited to ensuring that legitimate activities are conducted as safely as possible, there is an acknowledged gap that has to be filled in an exceptional way (see paras. 48 and 51 above). As the proliferation of treaty regimes has shown, strict liability does have a part to play; but its admission

(Footnote 117 continued.)

The Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (see footnote 115(c) above) provides that:

“Article VI

“States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State party to the Treaty. . . .”

The Paris Convention of 29 July 1960 and the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage (see footnote 115(b) above) each define, in article 1, the term “operator” of a nuclear installation as the person designated by the Contracting Party as the operator of that installation; such an operator may either have a private character or be an agency of the State. The Brussels Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships (*ibid.*) applies to nuclear incidents involving a nuclear ship flying the flag of a Contracting State (art. XIII); the Contracting States are required to waive any immunity which they may otherwise have, but nothing in the Convention shall make warships or other State-owned or State-operated ships on non-commercial service liable to arrest, attachment or seizure, or confer jurisdiction in respect of warships on the courts of any foreign State (art. X, para. 3). There is a similar provision as to waiver of immunity in the Brussels Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage (see footnote 115(a)) the provisions of the Convention do not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service (art. XI). Similarly, the London Convention of 1 May 1977 on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (*ibid.*) requires State party operators of installations to waive all defences based on their status as a sovereign State (art. 13). The conventions and other instruments designed to prevent nuclear damage and damage from oil pollution have broadly corresponding fields of application.

on sufferance is sometimes justified only because the situation is one in which a failure of care is very difficult to prove.

74. It is submitted that this explanation does not fit the facts. In the case, for example, of damage caused by space objects, the least likely eventuality is a failure of care in launching or control; and, if it did occur, media interest might well ensure that the failure became known. The real reason for strict liability in this case is the opposite one: human skills and knowledge are not yet equal to the task of eliminating all dangers. The *Trail Smelter* award provides a counterpoint. The regime constructed by the tribunal is a fully adequate safeguard; but due diligence on the part of Canada cannot avoid the possibility of the human error of a smelter employee (see paras. 38 and 64 above). In each case, the real question is whether the innocent victim should be left to bear a loss which was known to be “on the cards”.

75. The same parallels can be drawn in the cases in which circumstances preclude wrongfulness.¹¹⁸ In some such cases, there is still an element of choice. If in emergency, an air force pilot crash-lands in a neighbouring country to minimize damage, distress may be pleaded to preclude wrongfulness, but there seems a tendency in State practice to believe that compensation should be paid. If the same air force pilot is misled by faulty navigational equipment to cross an international frontier in ignorance of his true position, there is no element of choice. Fortuitous event may be pleaded to preclude wrongfulness; but again there is perhaps a perceptible tendency in State practice to feel that costs incurred should be repaid. Here the analogy with damage caused by space objects is very close. If it is necessary to deploy military aircraft in poor weather and visibility near an international frontier, the possibility of a stray aircraft is at least as great as the possibility in other circumstances of a stray space object.

76. In terms of the analysis offered in the present report, the law of State responsibility relating to circumstances precluding wrongfulness does for the parties something which in other circumstances they must do for themselves: it pushes away the point of intersection of harm and wrong. The stray military aircraft is saved from engaging wrongfulness by operation of law; and presumably the stray space object would be similarly exonerated. Yet the States concerned in space exploration have thought it right not to rely upon a preclusion of wrongfulness, if an accident should occur. They have instead assumed that the activity should be appraised in terms of its predictable capacity to cause an occasional, unforeseeable accident. One that basis a duty of care is owed, either to provide an insurance scheme, or to act as the insurer.

77. This is not a field in which a consistent State practice can be expected to develop in advance of efforts to develop the law. A government which believes, *de lege ferenda*, that there should in all such cases be full reparation, may yet refuse to act upon such a belief in advance of others—especially if it feels itself to have been

¹¹⁸ See para. 51 above and footnote 87.

the victim of similar situations in the past. And yet, the small indications that caused the Commission to include article 35 in the draft articles on State responsibility, part 1, are corroborated by vestiges of State practice in other cases of unforeseen accident. These stirrings, in the areas furthest removed from the plain case of State responsibility for wrongful acts, are evidence that, in the context of the present topic, "reasonable care" can have the enlarged meaning assigned to it in this chapter. The interests that this topic protects, and the rights that this topic upholds, are equitable interests, and therefore subject to all equities.

C. Nature of the topic

78. At the end of this survey, one must again recall the present state of legal needs and of legal development. Apart from questions affecting the flow of water, there was until the twentieth century little need to strike a balance between a State's freedom within its own borders and its obligation of non-interference within the borders of other States. Similarly, it was not until the present century that pressures upon the oceans and upon other common resources created an imperative need to regulate, in the interests of each State, the resources common to all States. Although that need is most apparent in relation to the growth of science and technology, and its impact upon the physical environment, similar issues may arise in relation to every aspect of human affairs in the present age of interdependence.

79. It is often regretted by lawyers that the community of States still lacks the solidarity to respond to the logic of its crowded and disordered situation. To the extent that the charge is true, the problem is beyond the reach of lawyers, acting alone; for international lawyers are not moralists, and they know no higher law than the collective will of sovereign States. It is, however, the immediate responsibility of lawyers to ensure that their own science assists, and does not obfuscate, the cause of progress. When, for example, the lay representatives of governments feel unable to adopt guidelines that they have commissioned, and find acceptable on economic and social grounds, because they have been conditioned to regard international law as an irrational force which may entrap their governments, it is time for lawyers to set their own house in order.

80. At the root of the present topic there lurks some such danger—a pull between contemporary economic, social and scientific values, on the one hand, and traditional legal values, on the other. On the surface, there has never been such fast progress: treaty regimes multiply and conferences abound. Below the surface, there are uncomfortably wide margins of disagreement about the bases of negotiation. Do we take our stand upon the right of sovereign States not to be exposed to harmful intrusions? Or do we insist upon the right to do, within the territory or jurisdiction of a sovereign State, anything that is not actually forbidden, provided that we cause other States and their nationals no greater injury than was necessary? Or do we develop the means to adjust competing claims in areas that could once be adequately regulated by applying the simple rule of right and wrong?

81. The outline contained in the present report assumes that the balance of interest test has come to stay, and that ways must be found to make it work, within the traditional structure of mandatory rules. States and their nationals need elbow-room in which to exercise their freedom, but they must not by their actions diminish the elbow-room of other States. No one challenges the authority of the great, undifferentiated principle that it is wrongful to cause harm to other States. Nearly everyone agrees that it is not possible to give an absolute value to so broad a principle. It has to be broken down into networks of little rules to accommodate the requirements of specific activities, and to reconcile those activities with the interests of others. And, except to the extent that that final breakdown has been achieved, the building materials are rules, not of prohibition, but of conditional authorization.

82. The topic has, then, a predominantly procedural character. It is at the service of any principle or rule of law so broadly conceived that its application requires margins of appreciation entailing a balancing of interests. The topic is founded in the substantive obligation to develop the law by making existing law work. This is the same obligation that founds the duty to negotiate, which plays so large a part in modern jurisprudence. The development of the topic will not supplant any existing rule of law, or supply any new one; but it will provide a catalyst, so that rules may be crystallized and be made more effective.

83. For this dependence upon other rules, there are two clear reasons. First, by no means all relationships between States are governed by balance of interest tests. Even in the field of the environment, this is true: for example, State practice suggests that a mere balance of economic advantage, and a willingness to furnish compensating benefits, could not justify unilateral action that flooded, or drained water from, the territory of a neighbouring State. Similarly, rules that do embody a balance of interest test may not always give an equal weighting to the different interests involved.

84. Secondly, a mere conflict of interest cannot engage these rules. Where competition is legitimate—as, for example, in high seas fishing—it is not a ground of complaint that other countries' fishermen have harvested most of the crop. But when there is perceived to be a need to regulate competition, and a rule of some generality emerges, the matters dealt with in this topic should assist in articulating and applying that rule.

85. If all transboundary harm were wrongful, there would be no need for this topic. Every activity that caused or threatened such harm would be prohibited, except with the consent of the States whose interest was affected. Conversely, if it were possible to speak of "lawful activities"—in the sense of activities that are permitted, whatever their transboundary consequences—there would still be no need for this topic. The topic is the product of interdependence among States and peoples. They have to regulate their affairs with minimum resort to prohibition, but also without lawlessness. They need rules that persuade compliance because observance will correspond with interest.

86. From the separation of "harm" and "wrong", this topic derives its basic mechanism. Once it has been

decided that not all harm is wrongful, the single test of "right" and "wrong" can no longer do substantial justice—and, without the prospect of substantial justice, there is insufficient motivation to evolve rules or to observe them. From the proposition that not all harm is wrongful, follows the corollary that substantial harm is never legally negligible.

87. Within the parameters of harm and non-wrongfulness exists the world in which acts not prohibited by international law yet give rise to responsibility or liability. It is not a shadowy world, existing in dark corners, for which the regime of State responsibility does not provide. It is the substantial, everyday world, in which people go about their affairs with a general sense of what the law requires of them, but with no feeling that the law is a mysterious and arbitrary presence, waiting to enmesh them in its toils.

88. It is, above all, the world of international negotiation, in which an evaluation of every interest goes towards the formulation of a treaty rule. In this report, almost no account has been taken of the treaty regimes, the recommendations, understandings and guidelines, universal and regional, that regulate particular dangers—except in the one, limited context of obligations of prevention and reparation. The reason for this abstention is to avoid a risk of circularity: it is hard to establish, by reference to the pragmatic process of treaty-making, that it is also a response to broader rules that exist in customary law independently of treaties. In fact, a great deal of State practice that has been passed as "non-principled" is principled in relation to the double criteria of harm and wrong.

89. Within the primary obligation to make other obligations effective there is ample room for all the equitable interests and factors by which liabilities arising out of acts not prohibited by international law are affected. By agreeing within what limits, and under what conditions, an activity capable of causing transboundary harm may be conducted, States attach their own assessments of the relevant equities. In all but a few cases, States will prefer to settle their affairs by this method. Even when—exceptionally—they choose to stand upon a definition of their rights, a tribunal may find that the rights on which they rely entails policy choices, best pursued in negotiation.

90. The admission of equitable factors sharply distinguishes the obligations that arise under this topic from those engendered by State responsibility; but both kinds of obligation may be conditioned by a duty of care. In fact, obligations arising under the present topic, because of their equitable content, cannot fail to be so conditioned. It is therefore theoretically important to recall that wrongfulness arises through the branch of a duty of care, whereas in the present topic the duty of care is a function of the primary obligation. The duty of care, within the setting of the present topic, is very well illustrated by the

conventional obligation to compensate for damage caused by space objects and by the discernible international stirrings of opinion that damage likely to arise from a pattern of activity should be compensable, even if, in the particular case, State responsibility is precluded or is not established.

91. The present topic is also a direct response to the call, in Principle 22 of the Stockholm Declaration¹¹⁹ and elsewhere, to develop the law of liability and compensation for the victims of transboundary harm. At the same time, it is important, as a matter of legal policy, that duties of reparation should not be separated from, or substituted for, duties of prevention. Treaty regimes provide ample evidence that compensation is a less adequate form of prevention—prevention after the event. It is a justified way of filling gaps when full prevention is not possible—either in absolute terms or in terms of the economic viability of a beneficial activity; but it should not be allowed to become a tariff for causing avoidable harm.

92. Finally, at the end of the journey, the monster of strict liability should be domesticated. In an conventional regime, strict liability is a commutation of an obligation of prevention, and usually—as with the Trail Smelter company—it represents a cost that the enterprise would gladly underwrite in perpetuity, rather than embark upon major schemes of prevention. In customary law, when wrongfulness is precluded or responsibility is not engaged, the acceptance in principle of a rule that does not penalize the innocent victim is a matter about which governments could form a view when this topic is a few years advanced. In any case, such a liability would be subject to equities; so the victim—as Mr. Schwobel remarked in the debate at the thirty-second session of the Commission¹²⁰—must really be an innocent victim.

D. Scope of the topic

93. Accordingly, it is proposed that the Commission adopt provisionally the following draft article:

Article 1. Scope of these articles

These articles apply when:

(a) activities undertaken within the territory or jurisdiction of a State give rise, beyond the territory of that State, to actual or potential loss or injury to another State or its nationals; and

(b) independently of these articles, the State within whose territory or jurisdiction the activities are undertaken has, in relation to those activities, obligations which correspond to legally protected interests of that other State.

¹¹⁹ See footnote 62 above.

¹²⁰ *Yearbook . . . 1980*, vol. I, p. 253, 1632nd meeting, para. 16.